



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL CASE NO. 59 OF 2014**  
**(FORMERLY OF KISII HCCR NO. 70 OF 2014)**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOO..... ACCUSED**

**JUDGMENT**

1. **JOO** (“the accused”) is facing a charge of murder contrary to **section 203** as read to **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. According to the information dated 16<sup>th</sup> June 2014, he murdered **BOO** (“the deceased”) on 13<sup>th</sup> June 2013 in Migori County.
2. The accused was the first born son of the deceased. On the morning of 14<sup>th</sup> June 2014, the deceased was found lying dead in his bedroom. The cause of death was established by a post mortem conducted by Dr Douglas Marita (PW 4) who conducted the post-mortem on the deceased’s body on 17<sup>th</sup> June 2014 at Rosewood Mortuary after the deceased’s body had been identified by JO (PW 1) and JO.
3. PW 4 observed a laceration on the right cheek, the first two upper and lower molars were broken and there was a deep cut wound at the back of the head. There were segmental rib fractures, No. 1, 2, 3, 5 and 6 of the left side and No. 2, 4, 6 on the right side. On internal observation of the respiratory system, the ribs were broken and there was 500ml of blood in the haemothorax on either side. As a result of the examination, PW 4 concluded that the cause of death was cardiopulmonary arrest due to haemothorax due to multiple rib fractures secondary to assault caused by a blunt object.
4. Having established that the deceased died and that he died as a result of having blunt injuries inflicted on his chest causing his ribs to fracture and lead to internal bleeding in the chest cavity, the issue for consideration who inflicted the fatal injuries. The evidence led by the prosecution was as follows.
5. On the morning of 14<sup>th</sup> June 2014, JOO (PW 1), a resident of Kameji, recalled that he was at home when the wife of his younger brother called him to inform him about the deceased’s death. He rushed to the deceased home which was about 800 metres away accompanied by his brothers, IOO and AO. When they arrived they found the deceased lying dead on his bed. The deceased was naked save for his underpants. They noted that he had a mark on his forehead, a sharp injury on

his chin and other injuries on his mouth.

6. The deceased's other children were in the compound crying. PW 1 asked the accused what happened and he informed him that he found his father dead at about 6.00am. He decided to call the Assistant Chief, Harrison Okongo Opiyo (PW 2), who in turn called the Chief of North Kamagambo, John Agoro (PW 3). As the members of the village began to gather, they threatened to kill the accused so PW 3 took him to PW 1's house for his safety. Police officers from Kamagambo Police Station arrived at about 11.00am and proceeded to retrieve the deceased's body.
7. PW 2, the Assistant Chief of Kameji Sub-Location, recalled that he received a call from PW 1 on 14<sup>th</sup> June 2014 at about 6.30 am informing him that the deceased had been killed in the house. He immediately called PW 3 and informed him of the incident. They went together to the deceased's homestead where they found the deceased in his house lying on the bed with injuries on the neck and head. PW 2 and PW 3 talked to the accused and his brothers and other family members. PW 2 interrogated the deceased's son, DO (PW 5) who told him that there was a dispute between the younger son, O and the deceased. The deceased asked him to look after the goats and a quarrel started between the accused, O and the deceased. PW 3 also testified that he spoke to the accused, PW 5 and the other young children. PW 5 told him that the accused told him not to reveal what happened and if he did so he would be killed. He said the accused killed his father as they had had a quarrel at home and the accused said he must kill him. As the crowd became agitated and wanted to kill the accused, he decided to take the accused and PW 5 to the home of PW 1. After he had locked them at PW 1's house, police officers came from Kamagambo Police Station.
8. The deceased's son, DO (PW 5), aged 12 years gave unsworn testimony. He stated that although he slept in the same house as his father, he slept in a separate room with his other brothers. He recalled that it was on a Sabbath day at about 6.00am when the accused woke him up and told him that he had killed their father at about 1.00am. PW 5 testified that the accused told him that he was tired with the deceased about the shamba and that he beat him with a metal rod. He stated that he saw the metal rod (Exhibit No. 2) under the accused's bed and he identified that same when it was produced in court.
9. PW 5 further testified that in the morning other people, including his uncles, came to their homestead and entered the house to view the deceased's body. According to PW 5, PW 2 came and organized a meeting and began asking all the children what happened. The accused stated that he did not know what happened. PW 5 told them that it is the accused who told him that he had killed the deceased. Thereafter the accused and his wife were taken to PW 1's home.
10. Corporal James Thuu (PW 6), a police officer stationed at Kamagambo Police Station was the investigating officer. On 14<sup>th</sup> June 2014 at around 6.00 am, he was with PC Daniel Choge (PW 8) when he received a call from PW 3 who reported the deceased's death. The two officers proceeded to the deceased's homestead and entered the deceased house. The deceased was lying on his bed which was full of blood. He observed the deceased's body which had injuries on the neck, head and cheek. He noted that the cuts may have been caused by a blunt object. He took photographs of the deceased's body. The officers then caused the deceased body to be removed and taken to Rosewood Mortuary at Rongo where a post mortem was done later.
11. After removing the body, they were informed by PW 3 that the accused had been taken to PW 1's house for his safety. They proceeded there, re-arrested him and took him to the police station. PW 2 and PW 3 interrogated family members among them PW 5 who told them that the accused had killed the deceased. On 17<sup>th</sup> June 2014, PW 6 and PW 8 escorted the accused to Rongo District Hospital for mental assessment. Dr Jared Ndege (PW 7) examined the accused and certified that he was mentally fit to stand trial. On 20<sup>th</sup> June 2014, PW 3, PW 6 and PW 8 went with the accused to the deceased's house where the accused showed them a piece of metal pipe (Exhibit No. 2) he had used to kill the deceased. It was beside a cupboard in the deceased's bedroom.

12. When put on his defence, the accused elected to make an unsworn statement. He denied killing the deceased. He recalled that on the morning of 13<sup>th</sup> June 2014, he woke up as usual and went to work as a welder. He greeted his father at 6.00am and worked until he returned home at 8.00pm. At 6.00 am on the next morning, his siblings came and knocked on his door and told him that their father had died. He went to his father's house and confirmed that his father had died. He immediately called his father's brothers who came and started beating him. They tied him and threatened to burn him. Thereafter they locked him up in PW 1's. He was later arrested by the police and taken to the police station. He further stated that on 20<sup>th</sup> June 2014, he was asked by police officers what he had in his house and he told them he had a jembe, panga and other things. He left the police station with officers upon being told that the items were going to be photographed. When they reached the deceased's homestead, they did not enter his house but instead went to his father's house where they found a pipe which was used to light fire.
13. Defence counsel submitted that there was no direct evidence linking the accused to the murder of the deceased. He contended that the prosecution evidence was all hearsay and contradictory. Counsel for the accused further submitted that testimony of PW 5 being that of a child needed to be corroborated. Further that the testimony of PW 5 and PW 8 that they were led by the accused to recover the murder weapon was inadmissible as no statement under charge and caution was administered before such incriminatory evidence was given to the investigating officer. Defence counsel argued that if indeed the accused killed the deceased, there is evidence that he was provoked into acting in the manner he did.
14. It is clear from the evidence adduced by the prosecution that this is a case where there is no direct evidence implicating the accused. The facts and circumstances that link the accused to the death of the deceased are principally that he informed his brother, PW 5, that he had killed the deceased with an iron rod. The testimony of PW 5 was unsworn evidence of a child hence **section 124 of the Evidence Act**, which applies in the situation provides;

*Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the Prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him .....*

15. The testimony of PW 5 being that of a child had to be corroborated in material particulars and such corroboration is to be found in the testimony of PW 6 and PW 8 pointing to recovery of the weapon that was used to kill the deceased. The central issue is whether the evidence of recovery of the weapon more particularly the evidence that it is the accused who led PW 6 and PW 8 to where the weapon was recovered is admissible. What the accused is alleged to have told PW 6 and PW 8 leading to the recovery of the weapon can be regarded as a confession as it amounts to words and conduct from which an inference may reasonably be drawn that the person making it committed an offence. This is provided for under **section 25 of the Evidence Act (Chapter 80 of the Laws of Kenya)** which states as follows;

*A confession comprises words, or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.*

16. The conditions under which a confession is admissible is provided under **section 25A(1) of the Evidence Act** which states as follows:

*25A(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police and a third party of the persons choice. (Emphasis mine)*

17. **Section 25A (1)** of the **Act** recognizes that a confession or admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person, **unless** it is made before a judge, a magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Chief Inspector and a third party of the accused person's choice. The circumstances in this case do fall within what is contemplated by **section 25A (1)** of the **Evidence Act** as PW 6 was the investigating officer in this matter and his rank is below that of Chief Inspector. Furthermore as a confession, it was not taken when a third party of accused's choice was present.

18. In addition **section 29** of the **Evidence Act** provides for situation where a confession may be made to police officers and that officer would have to be above the rank or equivalent to inspector. This would not apply to PW 6 who was at the material time a corporal and the investigating officer. Likewise PW 8 was a police constable. The net effect of the provisions I have cited is that the evidence leading to the recovery of the alleged weapon is inadmissible.

19. My reason on the issue of admissibility is fortified by the fact that the rule that previously rendered admissible facts discovered as a result of the confession was repealed by **Act No. 5 of 2003. Section 31** of the **Evidence Act** which was repealed provided as follows;

20. *Notwithstanding the provisions of section 26, 28 and 29, when any fact is deposed to as discovered in consequences of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.*

21. It is now clear that the testimony of PW 5 is the only evidence connecting the accused to the death of the deceased. That evidence is not corroborated by admissible evidence. In the circumstances I have no option but to find the accused **JOO** not guilty of the murder of **BOO**. I therefore acquit him and direct his released unless otherwise lawfully held.

**DATED and DELIVERED at MIGORI this 22<sup>nd</sup> day of October 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Gembe instructed by Gembe Capis Omolo and Company Advocates for the accused.

Ms Owenga, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.