



REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMIAL CASE NO.111 OF 2014

BETWEEN

REPUBLIC PROSECUTOR

AND

**SIMON NCHORE ONYIEGO
ACCUSED**

JUDGMENT

1. **ANDREW CHACHA** (“the deceased”) was a 10 year old boy attending Class 4 at Nyamaharaga Primary School. His lifeless body was found in the shallows of a local river on 18th September 2013. On 21st November 2014, this court was informed that **SIMON NCHORE ONYIEGO** (“the deceased”) had murdered the deceased on or before 18th September 2013 at Nyamwinyi Village, Bukira West Location, Kuria West District within Migori County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. The prosecution case was that the accused lured the deceased, who was his brother in law, to assist him carry some luggage which he had purportedly brought from Nairobi. The deceased without sensing any danger accompanied the accused to pick the luggage. He did not return home and his body was later found in a river. The prosecution called 7 witnesses while the accused elected to give unsworn testimony.
3. Elizabeth Nyaboke Chacha (PW 1) testified that she was the accused’s wife and that they had two children. Although they used to live in Nairobi, she had come to Isebania where she was doing the business of roasting maize and residing with her mother. She recalled that the accused called her at about 3.00pm on 15th September 2013 and told her he was coming to Isebania from Nairobi. As her phone was losing charge, she told him to call a neighbour, Baba Stano, if he wanted to reach her. At about 7.00pm Baba Stano came to inform her that the accused was calling. At that time she was roasting maize along the street in Isebania. She spoke to the accused and they agreed to meet at the junction of Tembo Lodge so that she could assist him carry his luggage. PW 1 went to meet him and they proceeded towards Tembo Lodge to collect the luggage.
4. PW 1 started following the accused but instead of going to Tembo Lodge, he started going towards some bushes. She got scared as it was getting dark and she asked him where they were going. The accused told her that the luggage was ahead. PW 1 got too scared and decided to go back to the road. As she was running she tripped and fell. The accused held her, bit her thumb and took the phone she was holding. She ran until the road where she met Baba Stano and her brother, Julius Murta to whom she explained had happened. Baba Stano asked her to give him the accused’s number so that they could talk. She also gave him the accused’s father’s number. Baba

- Stano told her that the accused's father accepted to pay for the phone if indeed the accused had taken it. She left to close her business and go home.
5. When PW 1 reached home, she asked her mother, Priscilla Osebi (PW 4), where her younger brother, Andrew Chacha was. She told him that the accused had come to take him to go and assist him to carry some luggage from the bus stage. PW 1 was shocked because of what had happened to her earlier. She narrated to her mother what had happened to her earlier that evening. Her mother told her to wait and see if her brother came back home with the accused.
 6. On the next day at about 6.00am, the accused called PW 1 on phone and told her that the deceased was at a place called Highway Centre and that he was coming and that he was at Nyamwinyi village in Isebania for prayers. When she asked the accused to give her the phone to talk to the deceased he switched off the phone. She immediately called the accused's father and told him that the accused had taken the deceased and that they had not returned. The accused's father told her to go to the accused's aunt's place near the PAG School, Isebania. She went there and found his aunt called Mama Nthenyi but she said that she had not seen the accused or the deceased. As she was there, the accused called Mama Nthenyi and told her he was at the river at Nyamwinyi. PW 1 and Nthenyi proceed to the river but they did not find the accused or the deceased. On the way back, the accused called Mama Nthenyi again and told her to proceed to Isebania School where he was. They went the school but did not find him there.
 7. On 17th August 2013, PW 1 went to report to Nyamaharaga Police Post that the deceased was missing. The police officer told her they would look for him. She also continued to look for the deceased. On 17th August, 2013, the deceased called her on a strange number and told her to go to River Nyanwinyi as the deceased was swimming there. She did not go there but continued to search for him. On 18th August 2013, she went to Maberu. When she returned to Isebania at about midday, she was informed that her brother had been killed and his body found in the river.
 8. The deceased's mother, Priscilla Osebi (PW 4) testified that on 15th September 2013 at about 7.00pm she was home with the deceased when the accused came home. She was welcomed him but he refused to come into the house. He said he wanted the deceased to go with him to the bus stage to help him carry luggage he had come with from Nairobi. PW 4 allowed the deceased to go with him as he was his brother in law. She waited for them until PW 1 came home at about 8.30pm. They did not come back that night or the next morning. On the next morning they started making calls and looking for the deceased. PW 1 told her what had happened to her the previous evening. Although she was later on told that the deceased's body was found at the river, she did not go there.
 9. Charles Nyabiru Chacha (PW 2) found the deceased's body at River Nyamwinyi on 18th September 2013 as he was grazing cattle. His attention was attracted by some flies. When he went close, he saw a child dressed in a shirt and shorts, with the head slightly above the water. He immediately called Charles Lwanga Mwikwabe (PW 3). PW 3 testified that he went to inform the Commanding Officer, Isebania Police Station that a deceased child had been found at the river. The Commanding Officer made arrangements for them to proceed to the River Nyamwinyi. PW 2 informed other neighbours what he had found and they raised alarm causing people to come to the scene.
 10. PW 4's brother, Peterson Mosoti (PW 6), recalled that on 18th September 2014, he was going to school where he was teaching. He decided to pass by the home of PW 4 as he had been informed that she was not feeling well. PW4 told her that the accused had left with the deceased three days before and they had not returned. He knew the accused as Arash who was married to PW 1. He admitted that the relationship between the accused and PW 1 was not good. As they were talking that morning, he heard screams coming from the neighbourhood. He followed the noise with his motorbike and reached the river where he found a herdsman whom he did not know and who told him that there was a body in a thicket in the river. He proceeded to the river and saw a fly infested

body which he easily identified the body as that of his nephew, Andrew Chacha. He went to make a report at Isebania Police Station. The police later came and took the body to Pastor Machage Memorial Hospital. He attended the post-mortem where he identified the body.

11. Dr Vitalis K'ogutu (PW 5), a medical officer at Migori District Hospital, conducted the post-mortem on the body of the deceased on 23rd September 2013 at Pastor Machage Memorial Hospital. He observed the body of the deceased. The body had bruises and lacerations all over. On the scalp, chest, neck upper arms and forearms, lower limbs, abdomen and back. The right ear was chopped off. There were lacerations on the rectum and anal opening. There was a right haemothorax on the chest. There were bruises and inflammation on the liver, stomach and intestines. The right arm was fractured at the neck. The doctor concluded that the cause of death was asphyxia secondary to strangulation. PW 5 also examined the accused to ascertain his mental to stand trial. He concluded that the accused was mentally fit to stand trial.
12. PC David Kwemai Ndiema (PW 7) was the investigating officer. He recalled that on 18th September 2013, he received information that a body had been found at a river within Isebania. He proceeded to the scene at River Nyamwinyi with the Commanding Officer where they found the body of young male body estimated to be about 14 years old partly immersed in water. The initial report was that the body was of an unknown person but when they arrived they found PW 6 who identified the body. He observed the body and noted a scar on the head, the ear was chopped off and there were signs of strangulation on the neck. The body was in a thicket in the river with the lower part of the body submerged. At the scene PW 7 took the names of the witnesses, removed the body and took it to Pastor Machage Hospital. He organised for the post mortem to be done on 23rd September 2013 by PW 5. Following investigation he discovered that the deceased was last seen on 15th September with his brother-in-law, the accused who had gone to their and requested his mother-in-law (PW 5) to allow him to assist in collecting luggage he had brought from Nairobi.
13. On 31st May 2014, PW 7 received information that the accused had been seen in Gucha. He wrote a letter to the DCIO, Gucha to assist in arresting the accused. On 15th November 2014, the Deputy DCIO Gucha called to inform him that the accused had been arrested. He collected the accused from Gucha and brought him to Isebania on 16th November 2014 and caused him to be charged with murder.
14. The accused elected to give unsworn evidence when called upon to make his defence. He stated that on 18th September 2013, he came to Ogembo, Kisii at about 7.30pm as his wife giving birth and he wanted to be present. His wife told her to go and call his aunt to help her cut her placenta and wash the baby. After that upto the time he was arrested on 8th November 2014 at about 3.30pm, he was sick and was at home. His wife had gone to see her father who was unwell. The accused denied that he had ever visited the home of PW 4.
15. Counsel for the accused submitted that there was no direct evidence linking the accused to the charge. In his view, the circumstantial evidence was not watertight. He pointed to several loopholes for example the people who communicated with PW 1 like Baba Stano were not called to testify. That the time when the PW 1 went home and when PW 2 stated that the deceased was picked was inconsistent and that the testimony of PW 1 was undermined since she had separated from the accused. He also contended that the accused had a credible alibi defence.
16. In order to establish the offence of murder under the provisions of **section 203** and **204** of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients;
 - a. Proof of the fact and the cause of death of the deceased.
 - b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.
 - c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the *Penal Code*.

17. The fact and cause of death is not in dispute. The deceased body was found lying in the shallows of River Nyamwinyi. At the river, the deceased was identified by PW 6. The people who observed the deceased's body among them PW 2, PW 3 and PW 6 observed that the deceased had injuries on his head, his eyes and his ear was cut off. The injuries described by them were consistent with those observed by PW 5 who conducted the post-mortem. I therefore agree with the findings of PW 5 that the several injuries were inflicted on the deceased and that he died from asphyxia due to strangulation. The deceased also had several injuries which were indicative of having been assaulted.
18. The case against the accused is circumstantial in nature. It has been held that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt (see **Rex v Kipkering Arap Koske & Another [1949] 16 EACA** and **135 Mwita v Republic [2004] 2 KLR 60**, **Simon Musoke v Republic [1958] EA 715**).
19. No one saw the accused kill the deceased but there is evidence that the accused went to the home of PW 4 and asked to take the deceased to assist him. The accused was not a stranger to PW 4 and the deceased. He had been married to PW 1, the daughter of PW 4 and he was therefore a brother in law to the deceased. Thus there was no reason for the deceased to refuse to go with the accused as requested. In the circumstances, there can be no case of mistaken identity. I therefore find that the prosecution proved that the accused was the last person to be seen with the deceased.
20. Counsel for the accused made hay from the fact that PW 1 testified that she came home at 8.30pm while PW 4 stated that the deceased was picked by the accused at about 6.30pm. While the exact time stated by the witnesses is inconsistent, the evidence must be considered as a whole particularly taking into account the sequence of events as it is unlikely that in such circumstances the witnesses would have been recording the exact time. What is clear is that after she left the accused, PW 1 went to close her business, went home and did not find her brother. It follows that after parting with PW 1, the accused went to the deceased's home.
21. The fact that the accused was in the Isebania at the material time was confirmed by PW 1. The accused called PW 1 and tried to lure her to collect his luggage. She suspected that he was up to no good and quickly ran away causing the accused to proceed to her home and lure PW 4. PW 1 gave evidence of how she looked for the deceased and how the accused kept calling her and taking her on a wild goose chase.
22. The law is clear that the burden of proof always rests on the prosecution to prove the case against the accused beyond any reasonable doubt. No duty or burden is imposed on the accused to prove his innocence but there are instances when the law places a duty on the accused to explain certain facts particularly those peculiarly within his own knowledge. **Section 111(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)** which casts the burden of proof on the accused provides as follows:-

111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt

of the accused person in respect of that offence.

23. Since the accused is the one who went to take the deceased from his home when he was in apparent good health on the evening of 15th September 2013, it was up to him to give a reasonable explanation of what could have happened to the deceased when they left together. The accused's defence that he was not in Isebania on or about 18th September 2013 but in Nairobi before that then in Ogembo, Kisii tending to his wife and new born baby rings hollow. PW 1 and PW 4 saw him on that day and there is no reason to believe that the witnesses were lying. On my part, I heard the two witnesses testify and I am satisfied that they were telling the truth. I therefore reject the accused's defence.
24. The law as I understand does not require the prosecution to call any number of witnesses to prove a particular fact. The essence of the prosecution case is that the accused was the last person to be seen with the deceased as he is the one who came to the deceased's mother's home. The people who communicated with PW 1 would neither add nor subtract to that fact.
25. I therefore find and hold that it is the accused who killed the deceased by inflicting on him vicious injuries and ultimately strangling him. These injuries leave no doubt they were inflicted with, "*An intention to cause the death of or to do grievous harm to any person, whether the person is actually killed or not*" within the meaning of **section 206(a)** of the **Penal Code**. I find that the prosecution proved that the injury was inflicted with malice aforethought.
26. Counsel for the accused urged the court to dismiss the information on account of the fact that it was a duplex charge as it stated that the accused murdered the deceased, "*on or before 18th September 2013.*" The fact of the matter is that the deceased was found dead on 18th September 2013 and in light of the evidence, he could have been killed anytime between the time the accused came to take him from his mother's house on the night of 15th September 2013 and the date he was found. These were the facts presented and the accused was able to defend himself. I do not find any defect in the charge and if the same is defective, then the accused was not thereby prejudiced.
27. I therefore find the accused **SIMON NCHORE ONYIEGO** guilty of the murder of the **ANDREW CHACHA** and I therefore convict him.

DATED and DELIVERED at HOMA BAY this 16th day of November 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.