



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 6 OF 2014
(FORMERLY KISII HCCRC NO. 30 OF 2010)

BETWEEN

REPUBLIC PROSECUTOR

AND

NICHOLAS OMONDI ONDIEK ACCUSED

JUDGMENT

1. **NICHOLAS OMONDI ONDIEK** (“the accused”) was charged with the offence of murder contrary to **section 203** as read with **section 204** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the offence were that on night of 19th /20th January 2010 at Oruba Estate, Nyabisawa Location within Migori District of the then Nyanza Province, he murdered **NICHOLAS OCHIENG CHUCHU** (“the deceased”).
2. The prosecution lined up 6 witnesses to prove its case against the accused. The case was initially heard by Sitati J., who was transferred and completed by me under **section 200** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***.
3. On the morning of 20th January 2010, the body of the deceased was found lying at a car wash at Onyinjo Estate near Onyinjo stream. PW 1, James Ochieng Nyabundo, a cousin of the deceased, recalled that he received a call early in the morning informing him that his cousin had been found dead. He proceeded to the scene and observed the deceased had a wound on the head and right leg. He later reported the matter to the Police. He was joined by PW 2, Dismus Onyango Chuchu, who had also received a call informing him that his cousin was dead. He saw the deceased’s body and observed a deep cut on the head and a fracture on the right leg. He testified that police officers came and took the body to Oruba Nursing Home.
4. On 27th January 2010, PW 2 was escorted to the Oruba Nursing Home by PW 3, PC Weston Muhanje for the post mortem examination conducted by PW 4, Dr David Ongoro Akuku after the body had been identified by amongst others PW 2. PW 4 recorded that the body had a cut wound at 4th inter-digital space right hand, a bruised wound on the right leg, a lacerated wound on the parietal-frontal region of the skull and a bone deep Y shaped wound but no fracture. The major observation arising from internal examination of the body was that the spleen was ruptured and there was a lot of blood on the abdomen, intracranial bleeding on the left frontal side and clotted blood in the skull.

5. PW 4 concluded that the cause of death was cardio-respiratory arrest from shock due to brain injury and loss of blood in abdomen due to a ruptured spleen and a fractured right tibia and fibula. PW 4 extracted some blood samples handed them to PW 3 who took them to the Government Chemist for analysis.
6. PW 6, PC Vincent Muswagi of Migori Police Station recalled that on 20th January 2010 about 8.55 am, PW 1 came to report the death of the deceased at the Police Station. He booked the report and went to the scene, in the company of other officers, at a car wash near Onyinjo River where they found the deceased's body lying in a pool of blood with deep cuts on the right side of the neck. Together with Chief Inspector Baraza, they interrogated members of the public who led them to a mud walled house said to belong to a woman called Mary Achieng. They observed blood stains right up to house. As the house was not locked, they entered and saw blood on the walls and clothes on the floor and on the bed.
7. PW 6 further testified that the members of the public told them that the accused was staying with Achieng who was, at the time, still at large. The members of the public broke down the door of the room facing that of Achieng where the accused was alleged to be staying. When they entered they found blood stained clothes and shoes. PW 6 recovered the following items for the room alleged to the accused's house; a pair of men's black shoes (Exhibit 2), a pair of jungle green stripe long trousers (Exhibit 1) and a creamish jacket with blood on the chest (Exhibit 3). He stated that nothing was recovered from Achieng's room.
8. PW 6 with other officers removed the deceased's body and escorted it Oruba Nursing Home Mortuary pending an autopsy. PW 6 gave an account of how the accused was arrested. He recounted that on 23rd February 2010 at about 11.00 am, a relative of the deceased, Cyramos Chuchu, come to the Police Station and reported that the accused was seen at the Migori Bus Stage. PW 6 went there with two officers and upon arrival; the accused saw them and started running away. He was arrested with the help of members of public, handcuffed and taken back to Migori Police Station. PW 6 stated that Achieng has not found been found to date.
9. PW 6 caused blood samples taken from the deceased, the shoes, trouser and jacket to be taken to the Government Chemist for analysis by PW 3. Stephen Matinde Joel Weibe, a Government Analyst from Nairobi testified as PW 5. He stated that on 11th February 2010, PW 3 submitted the following items for examination; A – Blood sample of deceased Nicholas Ochieng, B – Grey pair of trousers, C – Left foot black shoe. His task was to confirm if the items had any blood, group them and find the possible origin of the blood. He examined the items and made the following findings; Item A – blood Group B, Item B – heavily stained with human blood of Group B, Item C – was slightly stained with human blood of Group B.
10. From his findings PW 5 noted that the blood groups of items B and C matched blood sample of the deceased person in Item A. He therefore formed the opinion that the blood could have come from deceased after injury. He concluded his findings on 5th July 2010 and prepared my report which was signed on his behalf by Albert Kithuri Muriuki. The report was produced in evidence.
11. After the 6 witnesses testified, the accused was called upon to make his defence. He made an unsworn statement whose thrust was that he was not involved in the death of the deceased. He stated that he was a driver and that on the evening of 19th February 2010, he left his place of work for his home in Nyamanga Village. He had dinner with his father, who is now deceased, that evening. He stayed with his father until 10 pm when he went to his house to sleep. He stated that nothing happened that night and he went to work the next day as usual.
12. He continued working until 23rd February 2010, the date he was arrested. The accused stated that on that day at about 11 am while he was at the bus stage at Migori, he saw two police officers in civilian clothes. He knew them from Migori Police Station. One of them had a gun. They told him they wanted to talk to him and when he inquired the reason why, he was told he had to go the

Police Station. He was handcuffed and taken to the Police Station in a taxi. After staying custody for over a month, he was charged with murder. He stated that he knew nothing about the case against him.

13. The offence of murder is defined by **section 203** of the **Penal Code** as, “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” **Section 206** of the **Penal Code** states as follows;

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- a. *an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- b. *knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- c. *an intent to commit a felony;*
- d. *an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

14. The three ingredients of murder which the prosecution must establish beyond reasonable doubt under **section 203** as read with **section 206** of the **Penal Code** are:

- 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 which is the *actus reus* of the offence.
- c. Proof that the unlawful act or omission was committed with malice aforethought.

15. The prosecution proved that fact of death and the cause of death. The evidence is clear that the deceased met his death as a result of an assault. PW 1 and PW 2 identified the deceased’s body at Onyinjo Stream near the car wash. PW 2 also identified the body at the Nursing Home before the autopsy was conducted. The autopsy revealed that the deceased suffered head injuries and a bruised wound on the right leg. The observations of PW 4 were consistent with the testimony of PW 1, PW 2 and PW 6 who had seen the body of the deceased at the *locus in quo*. I therefore find and hold that Nicholas Ochieng Chuchu died as a result of an injury inflicted by a person on the head, abdomen and right leg which led to cardio-respiratory arrest from shock due to brain injury and loss of blood due to the ruptured spleen and fractured right leg.

16. The next question is who caused the injury that led to the death of the deceased. No one saw the accused commit the act that led to the death of deceased. The prosecution evidence tried to link the accused to the house which was next to that of Mary Achieng where bloodied clothes with the deceased’s blood were found. The Government Analyst’s report produced by PW 5 established the clothes contained the deceased blood.

17. As this case is founded of circumstantial evidence, it is important to recall the principle upon which the court acts on circumstantial evidence. In **Nzivo v Republic [2005] 1 KLR 699**, the Court of Appeal had this to say;

In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.

18. In order to succeed in its case, the prosecution had to prove that the house in which the bloodied clothes and shoes were found belonged to the accused. On this issue the prosecution did not call the landlord of the premises to testify. The landlord would have affirmatively proved the house was leased to and occupied by the accused. Conversely, the prosecution did not call evidence to show that the accused did not reside anywhere else other than the house where the bloodied items were found.
19. PW 6 testified that it is the members of the public who said that the house belonged to the accused. In my view such evidence was hearsay. The prosecution did not call any witness who knew the accused or who saw the accused live in that house. None of the neighbours in the compound where the accused is alleged to have resided were called to testify that he actually occupied the house. It is worth noting the one village elder, Charles Aroko Ouko, who pointed out the houses where the clothes were recovered was not called to give evidence.
20. I also note from the evidence it is not clear from the evidence of PW 6 where the clothes were recovered. PW6 initially stated that the clothes were recovered from Achieng's house, where there was a trail of blood, but later changed his testimony to state that they were recovered from the second house which was alleged to belong to the accused. Indeed the learned judge noted in the record that, "*the witness looks confused.*" This issue would have been resolved by independent evidence of a person who was present when the search and recovery was being done. Chief Inspector Barasa and Charles Aroko Ouko who were present would have shed light on this fact.
21. Finally, PW 6 did not recover anything like a document or item of clothing in the house which was identified as belonging to the accused. Nothing was found in that house connected to the accused. None of the witnesses identified the clothes and shoes which had the deceased's blood as belonging to the accused.
22. Believing the prosecution case is taking a leap of faith. There are too many loose ends to be tied and the facts presented by the prosecution do not lead to an inference of the accused's guilt. As a result I have no option but to find **NICHOLAS OMONDI ONDIEKI** not guilty of the murder of the **NICHOLAS OCHIENG CHUCHU**. He is therefore acquitted.
23. The accused is set free unless otherwise lawfully held in custody.

DATED and DELIVERED at MIGORI this 17th day of October 2014

D.S. MAJANJA

JUDGE

Mr Kaburi, Advocate for the accused.

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