



REPUBLIC OF KENYA

High Court of Kisii

Criminal Case 38 of 2008

REPUBLIC PROSECUTOR

VERSUS

DICKLACK NCHERERE SAKWA ACCUSED

JUDGMENT

INTRODUCTION

1. The accused herein, DICKLACK NCHERERE SAKWA, was arraigned before this court on a charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on the night of 10th and 11th August, 2008, at Osupuko village in Transmara District within Rift Valley Province, he murdered MICHAEL LELINKA MURI. The accused denied the charge and the case proceeded to hearing during which the prosecution called eight (8) witnesses.
2. The brief facts of the case are that on the 10th day of August, 2008 at about 10.00 a.m., the deceased met his brother, Nicholas Muri (PW1), at their parent's home. They talked briefly and the deceased left for Nyacheki market. He was not seen until the following day when PW1 received a report that there was a body lying in a "shamba". PW1 confirmed that the body was that of his brother the deceased and that it had a cut on the neck. A mobile phone with a safaricom line was missing. The phone was alleged to have been sold by the accused on 16th August, 2008 to one Enock Onchere (PW3) who later realized that it belonged to the deceased. The accused was later arrested and charged with murder.

PROSECUTION CASE

3. PW1, Nicholas Muri stated that on 10th August 2008, the deceased went to Nyacheki market but did not return. On 11th August 2008 at about 6.00 a.m., PW1 was called from his farm by some people who informed him that they had seen the body of a person who had been murdered. PW1 rushed to the scene and found that the body was that of his brother, Michael Lelinka Muri. He observed that the deceased had a deep cut on the head and neck. The pockets of his "Kaunda" suit were empty and turned inside out.
4. PW1 further stated that the deceased used to have a Nokia phone 1110 and Nokia 1100, the former of which he identified in court as **Exhibit MF1-1**. The deceased had been given that phone by Mary Soroi (PW2) for charging.
5. PW1 made a report at Kilgoris police station whereupon he accompanied the police to the scene and took the body to Akemo Hospital Mortuary. They returned on 13th August 2008 for a post mortem examination during which PW1 identified the body of the deceased to the doctor.
6. On cross examination, PW1 testified that he told the police about the phone that was recovered

although the deceased's own phone was not recovered.

7. PW2 was Mary Soroi, the deceased's aunt. She testified that on the 9th day of August 2008, she gave her phone to the deceased for charging. The phone was blue in colour and had a scratched cover. She also gave him 1000/= to buy some fertilizer for her. In the evening of the following day, she went to the deceased's home to collect the phone but did not find the deceased. She was told by the deceased's children that the deceased had not arrived home.

8. On 11th August 2008 at about 7.00 a.m., PW2 sent her 5-year old son, Naitari to collect the phone from the deceased's home but the young boy brought back a report that he did not find the deceased. Later, PW2 heard screams from a nearby valley whereupon she ran towards the scene and saw the body of the deceased. The body had a cut at the back of the head. PW2 stayed at the scene until the police came and removed the body.

9. On cross examination, PW2 stated that she had scratched her phone with a stone on the back cover to mark it, and that she gave this detail to the police at Kilgoris police station. PW2 further testified that she was shown only one phone at the police station, which phone she identified to the police as the one she had given to the deceased on 9th August 2008 for purposes of having it charged.

10. PW3 Enock Onchere stated that while he was grazing their animals on 16th August 2008, the accused whom he had known before for about two years, came and told him (PW3) that he wanted to sell his mobile phone. The accused had two mobile phones – Nokia 1100 and Motorola C117.

11. As they were negotiating the price, two people whom PW3 knew as Hezron and Evans (the two not called as witnesses) showed up. They motivated PW3 to buy the Nokia phone saying it was a good one. PW3 knew the two before. The phone had a scratch and the back thereof was cracked. It had no sim card but the battery was charged.

12. PW3 paid 200/= for the Nokia 1100 phone and agreed to pay to the accused the balance of 1300/= later. PW3 stated that of the Kshs.200/= be paid to the accused, the accused retained 100/= and gave 50/= each to Hezron and Evans. PW3 identified the phone before court as **MF1-1**.

13. PW3 further testified that when he went back home, he put his sim card number 0717656809 into the phone and called his brother only once. On 18th August 2008, Hezron and Evans went to PW3's home. They demanded the phone PW3 had partially paid for from the accused and said they would refund him the 200/= he had paid. PW3 told them that he had taken the phone to be charged at Masimba market. The two told PW3 to go for the phone, which he did. They told PW3 that the phone belonged to the deceased, a revelation which frightened PW3 because he feared that his father would beat him for having purchased the phone. On cross examination, PW3 stated that he wanted to return the phone to the accused but the latter was unavailable.

14. PW3 also stated that he left the phone in their house and went to his cousin's home where he stayed for three weeks. When he came back home, he found that his mother had handed in the phone to their area Chief one Julius. Julius was however not called as a witness.

15. PW3 was asked to go and record a statement at Kilgoris police station, which he did. PW3 further stated that though he knew that the deceased had been murdered, he denied having taken part in the murder.

16. PW4 was Leteipa Sakwa from Osupuka. He testified that he knew the deceased as his uncle. He stated that on 10th August 2008 at about 8.30 p.m., he was at home when the accused came. The accused had only a radio and did not offer any explanation for his coming to the home of PW4 at that hour, which PW4 found strange. They took supper together and spent the night there. PW4 stated that it was not usual for the accused to sleep in PW4's home although their homes are about 100 m apart. When they were in the house, one Dancan Oramati (PW4's cousin) came and pushed the door forcefully. The accused was

worried when the door was pushed open. Fortunately Dancan had only a rungu.

17. PW4 woke up at about 6.00 a.m. on 11th August 2008 and left the accused asleep. He later saw him cultivating in the shamba and saw him again after about two days.

18. PW5 was Simeon Onyokia, the deceased's brother in-law. He testified that on 11th August 2008 at about 6.00 a.m., he went to the farm and at around 7.30 a.m., he heard cries from his home. He rushed back home only to find many people crying. He was told that his brother in-law had been killed whereupon he went to the deceased's home but was told that the body was lying in a valley. PW5 stated that the body had two cuts at the back of the head. The police later came and removed the body to the mortuary.

19. PW5 further testified that he was with the deceased on 10th August 2008 at about 8.00 a.m. when the latter had come with a lorry to carry PW5's maize. The deceased left at about 10.00 a.m. PW5 later called the deceased at around 7.00 p.m. to inform him about the maize. The deceased told him he was at Nyacheki and was coming home.

20. John K. Olerumbe, PW6, the Chief of Osupuko Location, testified that on 16th August 2008, while he was at the deceased's funeral, he was called by the deceased's cousin, one Pastor Paul Singo, who told him that a murder suspect had been named. Paul Singo pointed out the accused herein; and further told PW6 that the accused had not attended any of the meetings for the deceased's burial arrangements. PW6 said that he would report the matter to the police station. The suspect was arrested in the presence of PW6 on 18th August 2008 and taken to Kilgoris police station.

21. PW7 was NO.56421 PC Jonah Sawe who was, at the material time, the DCIO Transmara Divisional CID. He stated that on 11th August 2008 at about 9.30 a.m., he was in the office when he was called by the Deputy OCS Kilgoris to accompany the latter to a scene of murder at Osupuko. They travelled there and on arrival, they found a huge gathering surrounding the body of the deceased.

22. On close observation, PW7 said he noted that the body had a deep cut on the left side of the neck and the shirt was blood stained. The deceased wore cream trousers and socks, but had no shoes. The body was covered by some leaves. PW7 drew a sketch plan which he produced in court as an exhibit in this case. He testified that at that moment, they could not record any statements due to high tension in the area. They took the body to a mortuary and on 13th August 2008, the Deputy DCIO witnessed the postmortem.

23. PW7 also stated that on 31st August 2008, the Deputy DCIO received a report that a mobile phone which belonged to the deceased had been recovered by the Chief of Geteri sub location. PW7 went to the chief's office and recovered the phone which was a Nokia 1100 with a grey and blue housing. PW7 took possession of the same.

24. During the investigations, PW7 stated that he learnt that the phone had been sold by the accused to one Enock Onchere, a student. On 1st September 2008, Mary Soroi Shiruka, a relative of the deceased, recorded her statement and positively identified the phone before Deputy DCIO which she alleged she had given the deceased to go and charge for her.

25. On 12th September 2008, they (PW7 and his fellow officers) learnt that the accused had been sighted at his homestead. They proceeded there and with the help of the area chief, arrested the accused and took him to the station.

26. PW7 further stated that the said phone had no line but the owner identified it because it had a mark (crack) on its top. PW7 identified the phone before court and produced same as **P. Exhibit 1** in this case.

27. On cross examination, PW7 testified that they arrested the accused person from his house.

28. PW8 was Dr. Aggrey Ouko. He testified that he examined the body of the deceased and filled a postmortem form on 13th August 2008 at Akemo Nursing Home. The body was identified to him by one Nicholas Muri (PW1) and Paul Singo under the escort of PC Kariuki. Paul Singo was not called as a witness.

29. On external examination, PW8 found that the body had a deep fresh wound on the left parietal part of the head. There was also a deep cut on the back of the head (occipital cervical junction) measuring 16 cm long and 8 cm deep; and another deep wound at the 1st and 2nd cervical spine measuring 11cm long and 7 cm deep. The brain stem was chopped and severed. The cervical bones, C₁ and C₂, were also chopped, just below the head.

30. PW8 formed the opinion that the cause of death was neurogenic shock following severe injuries of the brain stem and cervical spine combined with severe haemorrhage (bleeding). The testimony of PW8 was confirmed by the post mortem report which he produced in court as **P. Exhibit 2**.

CASE TO ANSWER

31. At the close of the prosecution case, and after hearing submissions from both parties, this court was satisfied that the accused had a case to answer and proceeded to place him on his defence.

DEFENCE CASE

32. The accused gave a lengthy unsworn statement in which he testified that on 13th August 2008, he was in the “shamba” when he heard screams and ran towards the direction of the scene. On arrival, he found many people.

33. The accused controverted PW1’s testimony and said that those who told PW1 that he (accused) murdered the deceased were not called as witnesses. The accused concurred with PW3’s statement that they were together in the ‘shamba’ and added that they spent the whole day and night together. He however controverted the fact that he sold a phone to PW3 and added that he had no knowledge of the phone. The accused further stated that PW3 denied having been issued with a receipt. The accused wondered why Hezron and Evans Orero who are said to have witnessed the phone deal between the accused and PW3 were not called to testify before court.

34. The accused also stated that PW3’s allegation that he gave each (Evans and Hezron) 50/= each is false. He contended that it is PW3 who knows how the deceased died because it was him who was in possession of the deceased’s phone.

35. Concerning PW5’s testimony, the accused stated that PW5 did not say why he telephoned the deceased nor could he say whether he regularly called the deceased. The accused stated that PW3 did not show to the court any receipt for the phone to prove her ownership of the same; that when PW2 was asked for the receipt, she said she did not know whether there was any and that only her children could say so.

36. With regard to PW6’s testimony, the accused testified that the deceased’s cousin who was said to have pointed out the suspect of the murder to PW6 was not called as a witness to say how the deceased died. The accused said that PW8’s testimony that the deceased had injuries on the head was false because he took long to appear before court.

37. The accused further stated that he was arrested on 13th August 2008 after which he was kept in police custody for 3 months before being arraigned in court. This issue was the subject of a constitutional reference which was duly heard and dismissed.

38. The accused did not call any witnesses. Counsel for the accused submitted, both during the stage of no case to answer and during the final submissions that there is no evidence whatsoever, warranting a

finding of guilty against the accused. It was submitted that the circumstantial evidence placed before this court does not irresistibly point to the accused as the one who killed the deceased. He further submitted that the fact that PW2 demanded a phone from the deceased casts doubt as to who had the phone. Counsel added in reference to PW2's testimony that the two people, Hezron and Evans, who are said to have knowledge that the said phone belonged to the deceased, were neither arrested nor called as witnesses.

39. Counsel for accused submitted that the evidence on record is unreliable and prayed that the court dismisses the charge against the accused.

FINDINGS AND CONCLUSION

40. I have now carefully analyzed the evidence on record and the submissions by both parties. From the analysis, two issues arise for determination:-

- 1) *Whether the accused's constitutional rights to a fair and expeditious trial were violated, and if so, what is the remedy for same; and*
- 2) *Whether the prosecution has proved its case against the accused beyond any reasonable doubt.*

41. With regard to the first issue, the accused alleges that he was arraigned in court some 3 (three) months after his arrest. As I have stated elsewhere in this judgment, this question was determined by Hon. Mr. Justice Musunga vide his ruling dated 16th December 2009. I hasten to add that even if this court were to find that there was such violation, the same would not automatically give rise to an acquittal or discharge of the accused person, as this may be disproportionate, inappropriate and draconian as a remedy since public security is likely to be compromised. Any breach of such a right entitles the aggrieved person to monetary compensation only since the fact of arrest cannot be reversed. Such relief was given by the Court of Appeal in the case of **Kihoro –vs- Attorney General of Kenya [1993] 23 LRC 390.**

42. Concerning the second issue, it is clear that the prosecution's case against the accused revolves around circumstantial evidence and the doctrine of recent possession. There is no direct evidence linking the accused to the murder of the deceased whose body was found in the valley on the morning of 11th August 2008. Those who saw the accused last saw him on 10th August 2008 when he said he was going to Nyacheki Market. It is also clear from the evidence on record that the person who spoke to the deceased last was Simeon Onyokia, PW5 who told the court that he last spoke to the deceased at about 7.00 p.m. when the deceased told him that he (deceased) was on his way home from Nyacheki market. That was the last time anyone heard from the deceased. There is no indication from the evidence on record as to when the deceased may have met his death and by who. According to PW7, Number 56421, PC Jonah Sawe, it appeared that the deceased may have been killed elsewhere and his body dumped where it was eventually found on the morning of 11th August 2008. According to PW7 also, there were no signs of a struggle at the scene where the deceased's body was found.

43. The evidence that tends to connect the accused to the death of the deceased is the Nokia Mobile phone 1100 which was said to have been sold to PW3, Enock Onchere, a student, by the accused. According to PW2, Mary Seroyo, the said mobile phone belonged to her and she had given the same to the deceased on the 9th August 2008 for purposes of having the phone charged. According to PW3, Enock Onchere, he was in the field grazing his father's cattle on the 16th August 2008 when the accused approached him and offered two mobile phones for sale one being a Nokia 1100 and the other a Motorola C117. PW3 stated that he knew the accused well. As the two were negotiating the price, and to the surprise of PW3, two other gentlemen suddenly appeared on the scene, one named Hezron and the other named Evans. The two gentlemen who were well known to PW3 encouraged PW3 to buy the Nokia phone which they said was a good phone. The price agreed upon was Kshs.1500/=. PW3 paid Kshs.200/= to the accused and the two agreed that the balance of Kshs.1300/= would be paid later after PW3 had sold his chickens to raise the amount. According to PW3, the accused kept Kshs.100/= for himself and shared the other Kshs.100/= equally between Hezron and Evans. It is to be noted that neither Hezron nor Evans was called as a witness.

44. From the evidence on record, PW2 confirmed that the Nokia phone 1100 which was recovered from PW3 who said had bought the same from the accused, PW2 positively identified that phone to be hers. She said that because she was illiterate, she had made a mark at the back of the phone with a stone. PW2 said she had given the phone to the deceased so he could charge it for her. PW3 stated that when he bought the phone from the accused, it had no sim card, but when he got home and inserted his own sim card, the phone whose battery was charged worked.

45. According to the evidence on record, the deceased met his death sometime between 7.00 p.m. on 10th August 2008 and the morning of 11th August 2008 when his body was discovered in the valley with deep fresh cut wounds on the left parietal part of the head and another deep cut wound on the occipital cervical junction measuring 16 cm long and 8 cm deep. There was a third cut wound at the 1st and 2nd cervical spine measuring 11 cm long and 7 cm deep. There were other serious injuries affecting the brain stem and cervical bones C1 and C2 resulting in severing of the spine at the said bones. PW3 bought the Nokia phone from the accused on 16th August 2008, which was about 5-6 days after the deceased met his death.

46. In the case of **Andrea Obonyo & others –vs- Republic [1962] EA 542**, the Court of Appeal expressed itself thus on the doctrine of recent possession. “--- **it is settled in law, that evidence of recent possession, is circumstantial evidence, which, depending on the facts of the case, may support any charge, however penal.**”

47. I note however, that this court can only rely on the doctrine of recent possession as a basis for conviction in a criminal case when the possession is positively proved. It must be proved firstly that the property was found with the suspect. Secondly that the property was positively identified to be the property of the complainant, thirdly that the property was stolen from the complainant. The proof as to time will, in a large measure depend on how easy it is for the stolen property to move from one pair of hands to another. See generally **Obonyo case** (above) and **Erick Otieno Arum –vs- Republic, Criminal Appeal No.85 of 2005.**

48. In the instant case, the recovered phone was not found on the accused, although it was alleged by PW3 that it was the accused who sold the phone to him (PW3). Although there is evidence to show that the phone was positively identified by PW2 as the one she had given to the deceased for purposes of having it charged, and that the same was still in the possession of the deceased when the deceased met his death, this court is not satisfied that the phone was recovered from the accused. It is instructive to note that the prosecution needed to bring on board other evidence such as evidence by Hezron and Evans to corroborate the testimony by PW3 that the accused had the phone and sold it to PW3. It is also to be noted that after PW3 was informed that the phone belonged to the deceased, he kept it at home and went away for three weeks. In my humble view, PW3 was under a duty to hand over the phone to the authorities if he was certain the same had been offered to him for sale by the accused.

49. In the circumstances, I find that the evidence of recent possession sought to be relied upon by the prosecution is too weak for the purpose it was intended to serve. Accordingly, I find and hold that the prosecution has not proved the charge of murder against the accused beyond any reasonable doubt.

50. The accused is therefore acquitted of the said charge under **section 322 (1) of the Criminal Procedure Code**. Unless he is otherwise lawfully held, the accused shall be released from prison custody forthwith.

51. It is so ordered.

Dated and delivered at Kisii on this 31st day of January, 2013.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Shabola (present) for the State

Mr. S.M. Sagwe for C.A. Okenye for Accused

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.