



REPUBLIC OF KENYA

High Court of Kisii

Criminal Case 32 of 2008

REPUBLIC PROSECUTOR

VERSUS

JOSECK OMWENGA SAMWEL ACCUSED

JUDGMENT

1. The accused Joseck Omwenga Samwel faces a charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that on the 7th August 2008 at Bassi Central Location in Gucha District within Nyanza Province he murdered CHARLES OTEYO OBARE.
2. Upon being arraigned in court the accused entered a plea of not guilty to the charge. The prosecution led by learned state counsel Mr. Gitonga called a total of 10 witnesses in support of their case. The accused was represented by Mr. Kaburi.
3. The brief facts of the case were narrated by PW1 Careen Evans Moraa who told the court that on 7th August 2008 at about 5 p.m. she heard a commotion outside her house. The commotion was from the home of her neighbour called Dolroba Kibet. She saw people running towards her and she gave way for them to pass but got hold of the deceased and asked him what had happened because she knew him very well. The deceased told her that the person he was chasing had snatched his mobile phone. PW1 then suggested that they go to her house. No sooner had they reached her house than the person who was being chased emerged from PW1's house with a jembe. Apparently the person who was being chased had entered PW1's house without any permission or knowledge of PW1. When the deceased approached the person who he was chasing and who was now carrying a jembe, the person cut the deceased with the jembe on the head and blood gushed out. PW1 screamed for help. She was shocked and dumbfounded. The deceased and PW1 were very close to the assailant. The deceased staggered and fell down unconscious after he was hit by the assailant. PW1 later on came back and tried to get the next of kin to the deceased to assist him to hospital. Later on she heard people wailing and upon enquiring she learnt that the deceased had passed on. She identified the assailant as the accused person who was being pursued. On cross examination, PW1 confirmed having properly identified the accused who was very close to her when the incident occurred.
4. PW2 LYDIA SURE KWAMBOKA told the court that on the 7th August 2008 she was standing outside her house when she saw two people running. One of them ran into their house and the one pursuing stopped outside their house and she asked him what the problem was. He told her that the person he was chasing had snatched his phone. She said she had known the pursuer before. The person being pursued shouted back that he did not have the phone. PW2 thereafter requested the person in their house to come out so that they could amicably sort out the matter. As he was coming out of the house the deceased hit him with a walking stick and he started running away to another homestead which was close

by. It was at that other home that the assailant hit the deceased who staggered and fell on the ground. She screamed for help and people responded. She identified the accused as the assailant. On cross examination she confirmed that the house where the incident occurred belonged to PW1 and that the incident occurred at around 5 p.m. when it was bright and she saw what happened very clearly.

5. PW3 was HELLEN GESICHU. She told the court that on the 7th August 2008 at about 6 p.m. as she was checking on her cows she heard someone screaming from a neighbour's house which was about 50 meters away from where she was. She checked and saw a person coming from behind her with a jembe. She got scared and ran away and hid behind her house. When she came out from her hiding place she found the deceased on the ground and the person who was screaming for assistance was sitting on a tree trunk.

6. She knew the assailant but did not know his home. He had been employed as jua kali by one Muranga. She identified the accused as the assailant.

7. PW4 EVELYNE GESARE OTEYO the wife to the deceased told the court that on 7th August 2008 she left her house heading to the road when she met an old man by the name PENGON SARE who asked her to tell her mother in law that her son had been killed. Soon after her mother in-law joined her and the two started running to where her husband (deceased) was. They found that he had been hit on the head and there was blood all over. They then carried him to RIOBARE got a vehicle and ferried him to KEUMBU. They found the father in-law who brought them to Kisii. The following day the deceased talked to her about the incident, and informed her that as he was returning from picking up his phones at RIBOARE MARKET he was accosted by 3 men one of whom snatched his phone and started running away. That the person ran into someone else's house and again came out and ran into a second house where he then assaulted him. PW4 said she left the deceased in hospital for treatment however on the 17th August 2008 she received a report that her husband had succumbed to the injuries.

8. PW5 one ALOISE MOKUA OBARE told the court that on the 7th August 2008 at 7 p.m. as he was coming from IGARE market on his way home, he met KENNEDY SEGORA who informed him that his brother (the deceased) had been assaulted and left for dead. He went to the scene and with the assistance of other people took the deceased to the hospital RIOBARA CLINIC from where they were referred to KISII LEVEL 5 HOSPITAL. He called his father for assistance. They met at Keumbu and took the deceased to Kisii Level 5 Hospital.

9. On 8th August 2010 the deceased was conscious and he narrated what had happened and how he was hit with a jembe by a person who had snatched his phone and who he was pursuing. The deceased later passed on.

10. PW6 DAVID OBARE OMOYO the father of the deceased also told the court how he was called by his son PW5 and how they took the deceased to Kisii Level 5 Hospital. He also stated that his son explained to him how the incident occurred.

11. PW7 JOSEPH ONSARE OMIMI also told the court that while resting in his house he heard screams from EVANS NYAKUNDI's house and on arrival thereat, he found the deceased lying on the ground. He then talked to PW2 who informed him what had transpired. He then informed the deceased's parents of what had transpired and on the next day he went to the hospital where the deceased was and the deceased repeated the sequence of events to him. The story was the same as told to PW4, and to Evelyne Gesare Okeyo, wife to the deceased.

12. PW8 WILFRED MOEGI SEGORA a primary school teacher told the court that on the 22nd August 2008 he went to Kisii Level 5 mortuary and identified the body of the deceased to the doctor for purposes of a post mortem.

13. PW9 No.92233 PC JOEL MACHANA of Nyangusu police station told the court that on the 18th August 2008 he received one DAVID OBARE OMWOYO who reported that on 7th August 2008 his son

Charles Oteyo Obare was assaulted by the accused. That together with PC SYLVANUS JUMA they visited the scene of crime interrogated the eye witnesses and collected a jembe from the scene allegedly used in the course of the offence. They later took statements from the witnesses. The accused was later arrested at Kisii by the OCS Ogembo police station. PW9 and her witnessed the post mortem examination at Kisii Level 5 Hospital mortuary which was conducted by Dr. Musau on 22nd August 2008. He produced the jembe and a cap as exhibits and identified the person he re-arrested as the accused. On cross examination PW9 confirmed that he had not taken any finger prints and that he did not recover the jembe from the accused's house nor did they recover any phone.

14. PW10 was DR. EZEKIEL OGANDO ZOGA. He was stepped down as he was not the one who performed the postmortem thus he was not competent to produce the postmortem report as he was not the person who prepared the report.

15. PW11 OBARE ROBERT MASANGA (though recorded as PW10) told the court that on the 7th August 2008 at about 6.30 p.m. he heard screams from his brother's wife and rushed to find out why she was screaming. On enquiring she told him that she had received information that her husband, who was his brother, had been attacked and injured. He visited the scene at the home of EVANS NYAKUNDI, found his brother lying on the ground next to a trench with his clothes torn and blood stained. Shortly after another of his brothers came but prior to that his brother the deceased recognized his voice (PW11's) and told him what had transpired. They took him to the clinic then to the Kisii Level 5 Hospital. He learned that his brother succumbed to the injuries on the 17th August 2008. PW11 stated that the deceased had sustained injuries on the head.

16. At the close of the prosecution's case, the accused was put on his defence. He chose to give an unsworn testimony. In his testimony the accused told the court that on the 20th August 2008 as he was doing his normal trips as a matatu driver he was arrested by police on the third trip and taken to Kisii police station. According to his testimony the reason for his arrest was that his vehicle was unroadworthy. Later he was taken to the OCS who interrogated him about a person who had died. He was placed in the cells for 14 days after which he was brought to court and the charges of murder read to him. He denied the same. He claimed that the evidence of PW1 and PW2 were all false as that he does not know both the prosecution witnesses and the deceased.

17. At the close of the defence case counsel for the defence Mr. Kaburi submitted that the prosecution had failed to prove its case beyond any reasonable doubt and that of the 10 prosecution witnesses none positively identified the accused as having been part of the incident which took place at 5 p.m. on the 7th August 2008. Counsel submitted that PW1 clearly testified that he identified the deceased and referred to the person deceased was chasing as another man.

18. It is counsel's further submissions that no identification parade was conducted for PW1 to identify the other man she saw on the fateful day. On cross examination PW1 confirmed she never attended any identification parade. It was alleged that 3 mobile phones were snatched from the deceased. PW4 wife of the deceased said that she couldn't remember the number of her deceased husband's mobile phone. Further, it was submitted that no investigation was done to establish who was eventually using those numbers so as to link them to the deceased's assailants.

19. It is also counsel's submission that the prosecution did not call a doctor to produce the post mortem report and as the matter stands no one knows who the deceased nor the cause of his death. In light of that evidence which he says falls below the standard required of proving the case beyond reasonable doubt, counsel urges the court to set accused at liberty.

20. The offence of murder is defined in **section 203** of the **Penal Code** as follows:-

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”

21. The definition establishes three crucial ingredients for the offence of murder:

1. *Proof of death of the deceased and the cause of death;*
2. *Proof that the accused caused the death of the deceased by an unlawful act or omission; and*
3. *Proof that the said unlawful act or omission was committed with malice aforethought.*

22. The fact of death of the deceased is not in any doubt. PW8 confirmed having identified the body when it was being taken for post mortem examination whereas PW9 was present during the post mortem. The cause of death of the deceased is however not known. No post mortem report was produced nor was the doctor who conducted the post mortem called to testify.

23. No death certificate and/or even a burial permit were tendered in evidence to establish the fact of and/or cause of the deceased's death. It is trite law that the standard of proof in any criminal case is beyond reasonable doubt. Thus it behoves the prosecution to prove beyond reasonable doubt and with evidence beyond per adventure that the deceased died and the cause of death thereof.

24. Beside lack of proof of such death and/or cause thereof, the prosecution is also required to place the accused at the scene of crime through watertight direct or circumstantial evidence. The cause of death must bear direct linkage to the activities of the accused. There must be a nexus between the actions of the accused and the death of the deceased. Such nexus can only be established by the doctor's opinion as to the cause of death in his/her post mortem report which would be linked to the injuries sustained by the deceased and the probable cause of such injuries. In the absence of such evidence how can the court be sure that the death of the deceased if at all had a direct relation to the actions of the accused. There is no room for speculation in criminal proceedings.

25. I am aware of the case of **Republic –vs- Cheya & another [1973] EA 500** in which the judge rendered himself on the above issue thus:-

“--- However, the absence of medical evidence to death and the cause of it is not fatal because as I said at that stage postmortem reports are evidence of two things, the fact of death and cause of death. Therefore it was open to the prosecution to produce and rely on other evidence to establish these facts...”

26. This is a decision of the High Court of Tanzania which must be treated with caution depending on the circumstances of each case. The prosecution in the present case did not even produce a burial permit or a death certificate and therefore there was no medical evidence at all to support the contention by the state that the accused can be said to have caused the deceased's death within the meaning of **section 203** of the **Penal Code** or that the specific injuries inflicted on the deceased in the course of the attack resulted in his death.

27. But again even if I was to accept the position that the deceased died as a result of the actions of another, I will still find it difficult to attribute the death of the deceased to the accused. The deceased did not die immediately after the attack by the assailant but he was in hospital for some 10 days or thereabout where it is said he was conscious and could narrate what happened. There is no evidence that the deceased narrated to anyone the details of what happened to him or particulars of his assailant(s). According to Obara Robert Masanga, the deceased only mentioned he had been attacked by 3 people but gave no names of the 3 people.

28. In the absence of such crucial evidence the first ingredient of the offence of murder has not been proved. This also means that even the second and third ingredients have not been proved because it is not shown and or proved that the head injury was the cause of death of the deceased. I am left with no other choice but to hold that the prosecution has failed to prove its case against the accused beyond any reasonable doubt. Accordingly, the accused stands acquitted under **section 306 (1)** of the **Criminal Procedure Code Cap 75** of the **Laws of Kenya**.

29. Unless he is otherwise lawfully held, the accused shall be released from prison custody forthwith.

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

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Shabola (present) for Republic

Mr. Kaburi (present) for Accused

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.