



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Criminal Case 45 of 2009**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**ZABLON ONYANCHA ARONI ..... ACCUSED**

**JUDGMENT**

1. The accused person herein Zablun Onyancha Aroni is before this court on an information of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that on the night of 4<sup>th</sup> and 5<sup>th</sup> June 2009 at Boisanga 1 sub location in Nyamira District of Nyanza Province, jointly with others not before court he murdered FLORENCE KEMUMA ORUCHO. He pleaded not guilty and the case went to trial during which the prosecution called 8 witnesses.
2. Briefly, the prosecution's case is that on the night of 4<sup>th</sup> and 5<sup>th</sup> June 2009, the deceased FLORENCE KEMUMA ORUCHO was in her house together with her daughter when they were woken up by some unusual movements outside the house. When they went to find out what was happening outside, the accused together with others descended upon the deceased and attacked her. The deceased was cut with a sharp object on the head sustaining a deep cut injury. After the attack, the accused and others fled. The accused was later arrested, while the others are still at large.
3. From the testimonies of the 8 witnesses, the evidence by the prosecution unfolds. PW1 Dorca Kerubo Orucho told the court that on the night of 4<sup>th</sup> June 2009 at around midnight she was asleep with the deceased in the kitchen. She heard some sound outside the house. They opened the door and they both went outside. The deceased went ahead and no sooner had she stepped out than Dorca heard screams from where the deceased was standing. She also started screaming as the deceased came back towards the house. She noticed the deceased had been hit. She saw blood running down from the head of the deceased. She further told the court that she saw the accused hit the deceased with a panga, and that she was able to see the accused with the aid of moonlight. PW1 also stated that the distance between her and the deceased was 10 metres and that the deceased was wearing a red and black striped T-shirt. She further told the court that the accused was her neighbour and a cousin as only a fence separates his home and her home.
4. PW2 was the deceased's husband one John Orucho Osoro. He told the court that on 4<sup>th</sup> June 2009 he was awakened by PW1 who told him that the deceased had been attacked. On going out of the house to check, he noticed that the deceased had a cut wound on the left side of the head running down to the forehead and she was not talking. He took the deceased to Nyamira Hospital.
5. On cross examination by court he confirmed that on the night when deceased was attacked there was bright moonlight, so bright that the night resembled the morning the witness testified. That that night was beautifully bright.

6. PW3 was Joshua Orucho Nyambogoria a neighbour to the deceased and to PW2. He confirmed to the court that on 5<sup>th</sup> June 2009 at about 2.00 a.m. he was awakened by PW2 and informed that the deceased had been attacked and that she had suffered a cut wound on the head. PW3 assisted PW2 in taking the deceased to hospital.
7. PW4 was Edward Ongwae Orucho, a son to the deceased. He told the court that on 4<sup>th</sup> June 2009 while returning from a funeral of a cousin, he heard shouts and on going to find out what was going on he met with PW2 who told him that the deceased had been killed by some people. He rushed home and confirmed that the deceased had been cut on the head and was bleeding profusely from the wound. They later took her to Nyamira General Hospital for treatment.
8. PW5 was Kennedy Nyaroo Mutureti, a brother to the deceased. He told the court that on 20<sup>th</sup> June 2009 he went to Nyamira District Hospital mortuary to identify the deceased's body for post mortem examination.
9. PW6 was NO.80926 PC Micah Kipkoech who in June 2009 was stationed at Nyamira police station crime branch section. On 10<sup>th</sup> June 2009, he received PW5 at the police station who reported that the deceased had been assaulted on 4<sup>th</sup> June 2009 at midnight. He accompanied PW5 to the hospital and found the deceased in a coma. He also confirmed that the deceased had a deep cut on the left side of the head running all the way down to the nose.
10. Upon investigation, PC Kipkoech confirmed that the deceased had been identified by PW1 as the attacker. He revealed to the court that the deceased died on 13<sup>th</sup> June 2009 while still in a coma so he was unable to talk to her. He however wrote PW1's statement in which PW1 confirmed that she identified the accused given the fact that he was a neighbour and cousin, and because there was bright moon light which enabled her to identify him by the clothes he was wearing, namely a T-shirt with red and black markings.
11. PC Kipkoech testified further that on 13<sup>th</sup> June 2009 the accused and one Festus Amolo Magoma were brought to the police station by the Assistant Chief. He interrogated the suspects and noticed the accused wearing the same T-shirt that PW1 had said he wore on the night the deceased was attacked. He undressed the accused of the said T-shirt which was produced as **P. Exhibit 1**.
12. PW7 was Robert Oyondi Muga the Assistant Chief of Boisanga Location. His testimony was that when he heard about the attack on the deceased, he convened a big baraza and in the baraza PW1 confirmed that she recognized the accused. He later got word about the accused's whereabouts. With the help of the area Assistant Chief they managed to arrest the accused and take him to Nyamira police station. He told the court that before taking the accused to Nyamira police station, they took him to Ekerenyo AP Camp as the accused had mentioned the name of one Amolo Magoma as his accomplice. They later found the said Amolo Magoma and arrested him. On cross examination by the court PW7 confirmed that they arrested accused about 20 kilometres away from his home.
13. PW8 was Dr. Lillian Kerubo Bosire. She appeared on behalf of doctor Okech who had performed a post mortem examination on the deceased. She explained to the court that the cause of death of the deceased was cardio-pulmonary arrest due to severe head injury from a cut on the head by a sharp object. She submitted doctor Okech's postmortem report as **P. Exhibit 2**.
14. At the close of the prosecution case, the accused was put on his defence. He gave unsworn evidence and stated that on 13<sup>th</sup> June 2011 he was at home selling alcohol but later went to fetch more alcohol from his suppliers and on his way back 2 motorcycles blocked his way. AP officers and the Chief arrested him. He was taken to Ekerenyo AP camp and detained until 11.00 a.m. He was then transferred from Ekerenyo to Nyamira police station and placed in cells where he remained for about 10 days. He said that during his incarceration, one of the police officers came and removed his clothes. He also stated that he stayed at Nyamira police station for 31 days before being brought to Kisii where the charge of murder was read to him.

15. In his final submission, counsel for the accused Mr. Okenye contended that the prosecution had failed to prove its case beyond any reasonable doubt against the accused. Counsel anchored his contention on the fact that the attack took place at around midnight, on a dark night and therefore that PW1 could not say she saw accused with help of moonlight. He stated further that there was no evidence on the intensity of the moon.

16. Secondly counsel submitted that the fact that though both PW2 and PW4 inquired from PW1 as to who the deceased's attackers were, PW1 said she did not know them.

17. Thirdly that the evidence that the T-shirt removed from the accused at the police station was the same T-shirt accused worn on the night the deceased was attacked was removed from accused in the absence of PW1 who was not in the police station to identify it.

18. Fourthly, counsel submitted that identification by a single witness at night where the intensity of the light was in doubt could not be relied upon as PW1 could not easily identify the attacker and the issue of mistaken identity could not be ruled out. He urged the court to acquit the accused of the offence of murder.

19. This court has now carefully analyzed the evidence and the submissions. The only issue that arises for determination in this case is whether the deceased was murdered and if so whether the accused herein is the murderer.

20. As regards the first issue, the offence of murder is committed where a person causes the death of another with malice aforethought by an unlawful act or omission. Malice aforethought is the mens rea in a murder. The definition of mens rea in murder is found under **section 206** of the **Penal Code** which reads:-

**“206 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.”**

21. There is evidence on record to show that the deceased was attacked on 4<sup>th</sup> June 2009 at midnight and died on 13<sup>th</sup> June 2009 in a hospital bed. PW8 told the court that the cause of death was cardiac pulmonary arrest due to severe head injury from a cut on the head by a sharp object. Such a death was not from natural causes. Therefore the first question has been answered positively that the deceased was indeed murdered. What is in issue however is whether at time of the commission of the offence, PW1 was able to identify the accused as the attacker?

22. PW1 during her evidence in chief stated:-

**“I had seen Onyancha hit my mother. He was wearing a red and black striped T-shirt. I was able to see Onyancha because there was moonlight. She was not far from me. The distance was like 10 metres ---- There was moonlight. Florence was hit with a panga. Onyancha had a panga.”**

During cross-examination by the court PW1 stated:-

**“I could see Onyancha because of the moonlight. The moonlight was bright. I saw the moon. No I did not see the moon.”**

On cross examination by counsel for the accused PW1 stated:

**“I said I identified one of the strangers by the clothes he was wearing.”**

23. PW1 testified that she had known the accused as a neighbour and a cousin but on the night of the attack she was only able to identify him by the clothes he was wearing with the aid of moonlight which in cross examination by the court she contradicted herself by saying that there was no moonlight. This court notes the fact that PW1 was the only eye witness to the alleged attack of the deceased by the accused.

24. In **criminal Appeal No.409 of 2006 – Stephen Njenga Wamimu –vs- Republic** it was held:-

**“Although the complainant said in his evidence that there was moonlight, he didn’t specify how bright that moon light was. If it was a new moon, its light would probably not have been as bright as that of a full moon. In the absence of any evidence as to the quality of the moonlight, one cannot be certain that the attacker was properly identified beyond a shadow of doubt, especially considering that PW1 was on the ground during part of the attack which lasted only three minutes.**

25. In **Matongo –vs- Republic [1956] KLR 198**, the Court of Appeal addressed the issue of identification evidence at night by a single witness and rendered itself thus.

**“It must be emphasized that what is being tested is primarily the impression received by a single witness of the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve... It is at least essential to ascertain the nature of the light available. What sort of light its size and its position relative to the suspect are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into ....”**

26. And in **Criminal Appeal No.436 of 2007 – John Njeru Kithak & another –vs- Republic**, the Court of Appeal addressed the issue of identification and recognition and stated as follows:-

**“As we have stated, only two matters of law are raised and are for consideration before us. On identification, the law is now well settled and that is that a trial court has the duty to consider with utmost care, evidence of identification or recognition before it bases conviction on it. In particular if the conditions under which such identification is purported to have been made were not favourable and if the identification is by a single witness. Although recognition raises less problems than identification of strangers nonetheless, even in cases of recognition, there is need to exercise caution before a conviction is entered. It is thus established that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In Kiarie –v- Republic [1984] KLR 739, this court made it clear that before conviction can be entered against a suspect on account of visual identification, such evidence must be watertight as it is possible for even an honest witness to make a mistake. Also in R.-v- Turn Bull [1976] 3 All EA 549 it was stated as follows:**

**“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”**

27. The law is thus clear that there is need to exercise utmost care before the accused can be convicted on the evidence of PW1 who is the only identifying witness. In her evidence PW1 did not describe the conditions prevailing at the time of the attack in order to persuade me the conditions prevailing were free from mistake or error. She did not describe the intensity of the moonlight whether it was a full moon, crescent or otherwise to persuade me that the circumstances prevailing at the time of the attack could not result in mistaken identity or was free from error. In the circumstances, the evidence of identification or

recognition attributed by PW1 was not conclusively and positively rendered in a clear and watertight manner. And this case being a case of identification or recognition there was need for PW1 to demonstrate to the court that during the day she had probably seen the accused wearing the red and black stripped T-shirt which made it easy for her to identify him on the night of the attack given the fact that they were neighbours and cousins.

28. Without PW1's evidence on the moonlight intensity on the night of the attack or on her previous encounter during day time with the accused thus supporting evidence on the clothes he wore, it is possible that PW1 saw someone she knows yet being mistaken making the chances of error or mistake very high. I have considered the evidence of PW2, John Orucho Osoro who seemed to suggest that the moonlight was as bright as daytime but in view of the fact that PW1 saw and at the same time did not see the moon casts doubt as to whether PW2 was speaking the truth.

29. In my view therefore, I think the evidence tendered by PW1 cannot be a basis to convict the accused for such a serious offence of murder which carries mandatory death sentence. Even though PW6 found the accused with the same colour of T-shirt he was described to have been wearing by PW1 on the night of the attack that alone does not provide reason enough to convict the accused of the charge of murder. How many people does PW1 know who have red T-shirts with black stripped marks?

30. The upshot of what I have narrated herein above is that there is no sufficient evidence upon which to convict the accused. I accordingly acquit Zablun Onyancha Aroni under **section 322 (1)** of the **CPC** of the charge of murder. Unless he is otherwise lawfully held, he is to be released from prison custody forthwith.

**Dated and delivered at Kisii this 31<sup>st</sup> 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 the Accused

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**