

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 58 OF 2009

REPUBLIC PROSECUTOR

V E R S U S

PATRICK MALALA MUSUMBA ACCUSED

J U D G M E N T

The accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that the accused *on the 30.11.2009 at Suo village, Munami sub-location, Matungu district within Western Province murdered MALALA OTUKO ITABAKOLI. The accused denied the charge and the prosecution called six witnesses.*

DR. MESHACK KIPSANG ROTICH testified as **PW1**. He produced the post mortem report on the deceased that was conducted by Doctor Duncan Odera at St. Mary's hospital Mumias on the 1.12.2009. According to the report the body had several stab wounds and fracture of the mandible. The cause of death was anemia secondary to the stab wounds and chest injury.

BETTY NACHENO REJA was **PW2**. On the 30.11.2009 she was asleep in her house when the accused went to call her at about 10.00 p.m. She opened the door and the accused told her that the deceased was calling her. The accused is a son of her brother in-law. PW2 declined to go to the deceased's house and the accused got up and said he had disagreed with his father. Shortly PW2's son Joseph Otuko (PW3) went there and PW2 and PW3 went to the deceased's house. They opened the door and found the deceased's body lying in a pool of blood dead. They saw a spear and a kitchen knife which had blood stains. According to PW2 the accused had no home and used to live with the deceased. The accused's wife and children had left. The accused had no grudge with his father but the accused used to drink and on that night he was drunk.

PW3, JOSEPH OTUKA ONGAYA went to his mother's house (PW2) and the two went to the deceased's house on the 30.11.2009. According to PW3 the accused knocked on PW3's house first but PW3 refused to open. PW3 later heard the accused knocking at PW2's door. When they went to the deceased's house they found the deceased with stab wounds lying dead. They saw a spear and a kitchen knife. According to PW3 both the deceased and the accused used to drink together and whenever they reached home the accused would chase away his father. The deceased and the accused were drunk that day. **WASHINGTON MAGERO** was **PW4**. He identified the deceased's body on the 1.12.2009 for postmortem purposes.

CHRISTOPHER MAKOKHA was **PW5**. He is the assistant chief of Munami sub-location in Koyonzo location. On the 30.11.2009 at about midnight he was informed about the incident. He went to the scene and saw the deceased's body inside his house lying in a pool of blood. They recovered a spear and a kitchen knife. The accused was not at home. He informed the police who went to collect the body. Only the deceased and the accused used to live in that house. **PW6 CPL ALEX NDOMBI** investigated the matter. He got information about the murder on the 30.11.2009 at about 2.30 a.m. when he was on duty at the Mumias police station. He went to the scene with other police officers and took the body to the mortuary. They recovered a spear and knife that had blood stains. The accused was not at home and was arrested in December 2009 at Mayoni and was taken to Mumias police station.

The accused was placed on his defence. In his sworn testimony he testified that he used to work as a loader of cane. The deceased was his father and he heard about of his death on 8.12.2009. He was

going to buy milk on that day when he was arrested by his cousin and a councilor. He did not sleep at home on the 30.11.2009 and he had his own house while the deceased had his. His father had divorced his mother since 1977 and remarried. He left the deceased alone at home and the deceased had divided his land amongst his sons. He denied that he went to wake up PW2. He knows PW2 and PW3. He admits that he drinks but denies that he was at home that day. The last time he was with his father was on 14.11.2009 when they buried his brother. He left home on 2.12.2009 and his father died on 8.12.2009. He was at Matungu market doing his loading work.

From the prosecution evidence, no one saw the accused killing the deceased. The evidence is purely circumstantial. The main issue for determination is whether it is the accused who killed the deceased. The evidence of PW2 is that the accused went to her house at about 10.00 p.m. and informed her that the deceased was calling her. When PW2 declined to go as it was late, the accused informed PW2 that he had disagreed with the deceased. The evidence of PW3 is that he heard the accused calling him that night to open the door but he declined. PW3 heard the accused knocking on PW2's door.

The accused's testimony is that he went to Matungu on 2.12.2009. He was with his father on 14.11.2009 and also on 1.12.2009. He heard about his death on 8.12.2009. From the evidence of PW2, it is clear that PW2 saw the accused on 30.11.2009 at 10.00 p.m. PW2 knows the accused who is a relative. According to PW2 the accused was drunk.

The prosecution evidence does prove that the accused was at his Suo village house on the night the deceased was killed. PW3 testified to the effect that both the deceased and the accused were drunk that night. PW2 and PW3 are relatives of the accused and the deceased.

The prosecution evidence shows that the deceased was living with the deceased only. The accused's defence that he had his own house and family is not proved. According to PW5, the area assistant chief, it is only the accused and the deceased who used to live in the house where the deceased's body was found. PW2 informed the court that the accused went to inform her that he had disagreed with his father. Shortly, PW2 and PW3 went to the deceased's house and found him dead. I do find that the accused had the opportunity and time to assault the deceased. It is PW3's evidence that the accused used to assault his father and chase him away whenever the accused got drunk.

From the evidence on record, I am satisfied that it is the accused who killed the deceased. The circumstances of the case leave no doubt in my mind that it is the accused who killed the deceased. The defence evidence does not disprove the prosecution evidence that the accused was with the deceased on the material night of 30.11.2009.

From the evidence of PW2 and PW3, the accused was drunk that night. Section 138 of the Penal Code provides for the defence of intoxication in certain circumstances. The prosecution evidence does establish that both the deceased and the accused were drunk that night. According to PW2, the accused seemed to have disagreed with his father. The prosecution evidence shows that the accused had no malice aforethought to kill his father. The two lived together in the same house but would quarrel whenever drunk.

In the end, I do find that when the accused committed the offence he was drunk and did not intend to kill his father. There was no malice aforethought on the part of the accused. The accused is not found guilty of the offence of murder as charged but is found guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and shall be convicted accordingly.

Delivered, dated and signed at Kakamega this 14th day of November 2013

SAID J. CHITEMBWE

J U D G E