

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 33 OF 2010

REPUBLIC PROSECUTOR

V E R S U S

FREDRICK ODUOR MURUNGA 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 5.9.2010 at Mahondo village, Masaba sub-location in Shibembe location in Butere district within Western Province killed NICHOLAS RATOLO MURUNGA.*

Four witnesses testified for the prosecution. **PW1, CECILIA MARY OWINI** informed the court the deceased was her brother in-law. On the 5.9.2010 she went to visit the deceased's home at 2.30 p.m. and found the deceased's mother who informed her that the deceased was in his house and he was sick. PW1 found the deceased in his house complaining of stomachache and chest pains. PW1 took the deceased to a dispensary at Manyala and left him there. She went back to the hospital on the 7.9.2010 only to be informed that the deceased had died at 8.00 p.m. the previous night. It is her evidence that the deceased informed her that he had been assaulted by his younger brother. The deceased had an injury on his forehead.

PW2, SALIM MUDEIZI MOHAMMED, is a clinical officer who was based at the Manyala sub-district hospital. The deceased was taken to him on the 6.9.2010 at 5.00 p.m. by a female relative. He had injuries on the forehead and left side of the chin. He was complaining of severe chest and abdominal pain. The injuries were cut wounds. PW2 stitched the wounds and referred the deceased for x-ray but the relative disappeared. The deceased was taken to main ward but he passed on at about 7.20 p.m. PW2 notified the police and the body was later taken to St. Mary's hospital Mumias. According to PW2 the deceased informed him that it was his younger brother who had assaulted him but he did not give him the name of the brother.

CPL PETER MALONZO MUKINYA testified as **PW3**. He got information about the deceased's death on the 7.9.2010 at 10.00 a.m. while at Manyala police patrol base where he was stationed. The information was taken by PW2. He visited the hospital and saw the body with deep cut wounds. He investigated the case and went to the deceased's home. He found the deceased's mother who is aged and sickly. He got information that the accused is the deceased's brother and they had fought. The accused was at home and he arrested him. According to him there were only two brothers. It is his evidence that the mother informed him that the deceased arrived home drunk and seemed to have fought with someone. The accused was also drunk and they started fighting. **PW4, DR. FLORENCE WANANGWE**, produced the postmortem report on behalf of Dr. Manase. The postmortem was conducted on 9.9.2010. The body had a penetrating wound on the head and left chin. The doctor opined that the cause of death was head injury.

The accused was placed on his defence. He testified that the deceased was his brother and denied that he assaulted him. It is his evidence that he went to hospital on the 5.9.2010 and went back home. The deceased was an alcoholic and whenever drunk would shout. He heard the deceased shouting that evening but he remained in his house. The deceased had his own house. He didn't see him that night and he was not aware that the deceased had been taken to hospital. There are about seven brothers and he does not know where the deceased was assaulted. He was at home when the police visited the homestead and

asked for someone from the family to go and identify the body. He entered the vehicle and the deceased was taken to St. Mary's hospital but he was arrested. According to him the deceased was a good man if he was not drunk but would shout and be abusive when drunk. If one knew him he would not quarrel with him whenever he was drunk. He had no problem with his brother.

Mr. Nyikuli, counsel for the accused, submitted that there is no direct evidence linking the accused to the offence. The evidence is only based on suspicion which cannot be used as a basis for conviction. The accused has other brothers.

The prosecution case does establish that the deceased sustained stab wounds on the 5.9.2010. He was taken to the Manyala sub-district hospital by PW1 on the 6.9.2010 and passed on the same day at about 7.00 p.m. The only evidence touching on the accused is that of PW1 and PW2 to the effect that the deceased informed them that he had been assaulted by his younger brother. According to PW1 the deceased informed her that it was his younger brother who had hit him. It is her evidence that the accused is the only younger brother. The evidence of PW2 is that the deceased informed him that it was a younger brother who had assaulted him. No name was given. The accused testified that there are other brothers. According to the investigating officer the deceased reached home that night while drunk. The deceased seemed to have fought with someone when he arrived home. The investigating officer further testified that it seems the deceased fought again with the accused. From the evidence on record it is not clear where the deceased picked his injuries. Even if I am to find that the deceased fought with the accused, it is not clear whether the injuries had already been inflicted upon the deceased before the second fight. The accused did not run away and it is his evidence that he boarded the police vehicle and went with the police to identify his brother's body. PW3 found the accused at home and arrested him. Although the prosecution evidence is to the effect that the deceased had only one brother who is the accused, the accused testified that they are seven brothers although he did not give any names. Having found that the deceased was drunk and as per the evidence of the investigating officer the deceased fought somewhere before reaching home, I do find that the accused is entitled to the benefit of doubt. There is no direct evidence connecting the accused to the offence. No one saw the accused fighting with the deceased. No weapon was recovered from the accused's house. The accused's mother was at home but she was not called to testify.

In the end, I do find that the prosecution has not proved its case beyond reasonable doubt and the accused is hereby acquitted of the offence of murder as charged. The accused shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 4th day of December 2013

SAID J. CHITEMBWE

J U D G E