



REPUBLIC OF KENYA

High Court of Kisii

Criminal Case 5 of 2009

REPUBLIC PPROSECUTOR

VERSUS

MOSES KORA CHACHA ACCUSED

JUDGMENT

1. The accused herein, Moses Kora Chacha is before this court on an information of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars are that on the night of 26th and 27th December 2008 at Keboye sub location in Kisii South District within Nyanza Province, he murdered Charles Chacha Orangi. The accused pleaded not guilty and the case went to trial. The prosecution called five (5) witnesses.
2. The facts of the case are that on the 24th December 2008, the accused, who is a son to the deceased, demanded that the deceased subdivides the family land and give him his share. The deceased did not accede to the accused's request. The accused was embittered by the deceased's failure to subdivide the land as requested and he went around vowing to various people that he would kill the deceased.
3. On the night of 26th and 27th December 2008, the accused armed himself before confronting the deceased who was alone in the house. The accused assaulted the deceased, fatally wounding him. On the following day, the deceased was found lying dead with injuries around his neck. The post mortem revealed that the deceased died due to strangulation.
4. From the testimony of PW3, Philip Oyaró Otúcho (Oyaró) the accused used to work at Nyamache. On the 24th December, accused went to Oyaró's home and enquired about the deceased. The accused was carrying some clothes which he said were for the deceased. When Oyaró told the accused that he did not know where the deceased was, the accused went away but returned on the 26th December 2008 and again asked for the deceased. The accused then went away. Both on the 24th and 26th December, the accused told Oyaró that he wanted the deceased to give him a share of the family land so that he could build a house and get married. Oyaró also stated that the accused made it clear that if the deceased did not give him a share of the family land, there was going to be no peace in the home and that he (accused) would kill somebody. When Oyaró asked the accused to wait for the family to resolve the land issue, the accused told Oyaró that he could not wait any longer for a family solution. Oyaró and the accused are sons of brothers.
5. During cross examination, Oyaró told the court that when he met the deceased in the intervening

period, he informed him about the threats issued by the accused. Oyaro could however not say when, how and where the deceased was killed.

6. PW1 was Ronald Orangi Chacha (Ronald). He told the court that he is the elder son to the deceased and also elder brother to the accused. His evidence was that on the morning of 27th December 2008, he woke up in the morning as usual and went to the deceased's house to untether the cow and goats. He found the door to the deceased's house open. Though he did not see the deceased in the sitting room where the animals were, he untethered the cow and the goats and after that he proceeded to the farm to harvest maize. He returned home for lunch and continued with other home chores until the evening when the accused went to him and informed him that their father was lying dead in his (deceased's) house.

7. Ronald accompanied the accused who had a torch, to the deceased's house where they found the body lying on the bed. Ronald stated that he saw strangulation marks around the deceased's neck. He also observed blood oozing from the deceased's nose. Ronald who was accompanied by his wife Wilkister, PW2, later made a report of the incident to the area Chief, one Tirisa (not called as a witness).

8. Ronald stated further that before the deceased died, he (Ronald) was aware of the land issue between the accused and the deceased and that on the 24th December 2008, the accused had vowed to kill the deceased if the latter did not give him a share of the family land. Ronald stated further that on the 25th December 2008, the accused went to visit an aunt but returned home on 26th December 2008. On that day, the accused told Ronald that he would go away from home for the next five years, although the accused was back home on 27th December 2008.

9. After the deceased's body was found in the house on the evening of 27th December 2008, the police came to the scene. The accused allegedly told the police that he had used a stone to kill the deceased. Two stones were found under the deceased's bed. Post mortem examination was done on 30th December 2008.

10. During cross examination, Ronald stated that the accused was not at home on 25th December as he had gone to visit their aunt. He also stated that he did not report to any authority the accused's threats that he would either kill someone or that he would burn a house though he stated he informed his uncle Benson Ongwae.

11. Ronald stated further that on the evening of 26th December 2008, he did not go to his father's house as it was Ronald's wife who used to take the goats and the cow to the deceased's house in the evenings. From Ronald's further testimony, the deceased lived alone since his wife had gone to her people due to illness. Ronald also stated that on the fateful night, the deceased ate at his (Ronald's) house as usual, and that when the deceased failed to show up for breakfast and lunch, Ronald thought that his father had gone to drink busaa, as he normally did sometimes.

12. PW2, Wilkister Bonareri Orangi confirmed the story given by Ronald. She confirmed that on the evening of 26th December 2008, the deceased, who ate at Ronald's house, was alive and well.

13. Dr. Cheruiyot Kipng'eno Robert testified as PW4. He is the one who did post mortem examination on the body of the deceased on the 30th December 2008, some three days after the deceased died. Dr. Cheruiyot stated that the deceased had multiple bruises on anterior neck and a cut on the right sub mental (chin) region. There was haematoma on the right side of the scalp. Dr. Cheruiyot also stated that on internal examination of the deceased's body, he found long term cirrhosis of the liver. The doctor opined that the cause of death was cardiorespiratory arrest due to strangulation. The post mortem report was produced as **P. Exhibit I**.

14. PW5 was Number 75362 Police Constable Charles Namisi. He is the one who visited the scene of crime together with the Officer Commanding Station (OCS) Inspector Mateche. According to PW5, the deceased had visible injuries on the neck and blood was oozing from the mouth and nose. After taking statements from members of the public, PW5 removed the deceased's body to Ram Hospital mortuary to

await post mortem. It is PW5 who recommended that the accused be charged with murder.

15. During question time, PW5 stated that though he investigated the case, he did not take any specimens to the Government Chemist for analysis.

16. The accused gave an unsworn statement in which he denied being at the home of the deceased at the time of the alleged crime. He stated that both Ronald and himself were arrested in connection with their father's death though Ronald allegedly bribed his way out. Regarding the land issue the accused stated that it was Ronald who was against the deceased's desire to divide the land between the two sons: Ronald and the accused. According to the accused both Ronald and himself should have been charged with the offence of murder. The accused dismissed all the testimonies given in this case by a good number of the witnesses. The accused did not call any witnesses.

17. The defence put in final written submissions in which it was contended that the person who was most likely to have caused the death of the deceased was Ronald since the accused went to visit his aunt between 25th and 27th December 2008; or if not, then the deceased was killed by unknown persons. In brief, counsel for the accused submitted that the prosecution had failed to prove the case against the accused beyond any reasonable doubt. Counsel urged this court to find the accused not guilty of the offence of murder and to acquit him accordingly.

18. I have analysed the evidence before me. What is clear to me is that the prosecution's case against the accused turns on circumstantial evidence. All the 3 key witnesses, namely Oyaro, Ronald and Wilkister stated that on the 24th December 2008, the accused stated in their hearing at different times of the day that if the deceased failed to give the accused a piece of the family land, then he (accused) would kill somebody or he would set a house on fire. Secondly, both Ronald and Wilkister stated that on the evening of 27th December 2008, the accused went to their house and asked them why they were just sitting around when the deceased was lying dead in the house. The two witnesses also stated that the accused, who had a torch led the way to the deceased's house and into the bedroom where the trio saw the deceased's body lying on his bed with blood oozing from the nose and mouth. Ronald and Wilkister also stated that they saw marks of strangulation on the deceased's neck and later on after the accused said he had used a stone to kill the deceased, Ronald recovered two stones from under the deceased's bed.

19. Before determining whether or not the evidence before the court proves beyond any reasonable doubt that the accused committed the offence of murder, it is necessary to establish whether the prosecution has proved that the accused had the necessary malice aforethought for the commission of the offence. **Section 206 of the Penal Code, Cap 63 of the Laws of Kenya** defines establishment of malice aforethought in the following terms:-

“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.”

20. It is thus clear from the above provisions that if the prosecution has offered evidence proving any one or more of the above circumstances, and further if it is proved that it is the accused who actually killed the

deceased, then this court has no option but to find the accused guilty as charged.

21. The other preliminary issue to consider is whether the circumstantial evidence that is on record is sufficient to lead to a finding of guilt by this court. In the case of **Sawe –vs- Republic [2003] KLR 364**, the court held as follows:-

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstance weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

4. -----

5. -----

6. -----

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond any reasonable doubt.”

22. The above is the law on circumstantial evidence and I agree with it. See also the case of **R. –vs- Kipkering Arap Koske & another (1949) 16 EACA, 135**.

23. In the **Sawe case**, the appellant was wife to the deceased. The prosecution’s case was that the appellant, with malice aforethought, caused the death of the deceased. There was no eye-witness accounts of what may have happened between the appellant and the deceased. The prosecution therefore relied on circumstantial evidence connecting the appellant with the death of the deceased. The trial court found the appellant guilty as charged, stating that the prosecution had proved beyond reasonable doubt that it was the appellant who had caused the death of the deceased by sitting.

24. On appeal the Court of Appeal, stated that the circumstantial evidence must irresistibly point to the accused to the exclusion of all others within the meaning of **R. –vs- Kipkering Arap Koske & another** (supra) where the court had held, *inter alia*, that:-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

25. The question that must be answered by this court is whether the inculpatory facts of this case are incompatible with the innocence of the accused and incapable upon any other reasonable hypothesis than that of his guilt. I shall be returning to this issue presently.

26. Thirdly, the accused has raised the issue of alibi saying that on the day of the alleged offence he was not near the scene. He stated that on the 28th December 2008, he received information from an unnamed cousin of his that there were visitors at home and that he needed to go there, only to find out on arrival thereat that the deceased had died. In this regard, what the accused must do is not to establish that his alibi is reasonably true. “All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin, an alibi which is not particularly strong may very well raise doubts”. See **Uganda –vs- Sebyala & others [1969] EA 204**.

27. Now, applying the above principles to the instant case, I am satisfied that the prosecution has proved its case against the accused beyond any reasonable doubt. In the first place, there is evidence from Oyaro,

Ronald and Wilkister to the effect that on 24th December 2008, the accused vowed that unless the deceased met his (accused's) long-standing demand for subdivision of the family land, then someone would either die or some houses in the family homestead would be set ablaze. It does not matter who the person to die was, but it was evident that the person who was targeted by the accused was the deceased.

28. Secondly, I am satisfied that the chain of events running from 24th December 2008 to the evening of 27th December, 2008 were such that they were not consistent with the accused's innocence. The accused spoke loudly about his intentions and what would happen if the deceased did not share out the land. On both the 24th and 26th December when the accused went to Oyaró's house, he asked for the deceased. It is surprising to the court that a son should go to another home to ask about his father when he could have gone straight to the father and seen him if he wanted to see him. The only inference that the court has drawn from this conduct on the part of the accused is that his intentions towards the deceased were not good intentions. The accused had planned in his mind to eliminate the deceased in case the land was not subdivided. It is also instructive that on the evening of 27th December 2008, the accused went to see Ronald and Wilkister. He had a torch and it is him who lit the way to the deceased's house, right up to the bedroom and showed the two the body of the deceased. I am satisfied that though Ronald was initially arrested alongside the accused, the evidence irresistibly points to the accused as the person who was responsible for the deceased's death.

29. In light of the above, I find that the defence of alibi raised by the accused has not made a dent in the prosecution's evidence pointing to the accused via the circumstances on the ground that it was the accused and nobody else that killed the deceased, and that in doing so, he had the malice aforethought to commit the offence.

30. In the premises, I am satisfied that the accused is guilty as charged and I so find. I accordingly convict the accused of the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It is the accused who murdered Charles Chacha Orangi on the night of 26th and 27th December 2008.

31. It is so ordered.

Dated and delivered at Kisii this 31st day of July, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Kaburi (absent) for the Accused

Mr. Mutai (present) for the State

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.

Mr. Mutai: We pray that we take a date for address by parties before sentence.

RUTH NEKOYE SITATI

JUDGE.

Order:

- 1) Mention on 27th September 2012 for address by parties before sentence.
- 2) Accused RIC.

RUTH NEKOYE SITATI

JUDGE.
31/07/2012

4/10/2012

Before Ruth Nekoye Sitati, J.

Bibu – cc

Mr. Mutai (present) for State

Mr. Kaburi (present) for accused

Accused – present in court

Language: English into Ekegusii by Biu

Mr. Mutai: The accused may be treated as a first offender since I do

not have a record of his previous criminal antecedents.

RUTH NEKOYE SITATI

JUDGE.

Mr. Kaburi: The accused person is a first offender. He is remorseful.

We invite the court to also consider the time he has spent in custody. We pray that the court may call for a Probation Officer's report so that the accused may be given a more lenient sentence. I so pray. The crime was against his father.

RUTH NEKOYE SITATI

JUDGE.
04/10/2012

Court: The court has taken note of the fact that the accused is a first offender. The court has also heard the plea by defence counsel for a Probation Officer's report which may eventually assist the court in passing sentence. The court is however constrained in dealing with this matter for the reason that the law provides for a mandatory death sentence. I have also considered the circumstances of the case.

Accordingly, the accused is sentenced to suffer death as by law provided. He has a right of appeal to the Court of Appeal against both conviction and sentence within 14 days from today.

RUTH NEKOYE SITATI

JUDGE.
04/10/2012