



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Case 26 of 2009

REPUBLIC PROSECUTION

=VERSUS=

PETER LOKO KISAKA ACCUSED

JUDGEMENT

The accused **PETER LOKO KISAKA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the offence were that:

“On the 27th day of June 2009 at around 9.00 p.m. at Chumvini Irrigation Farm in Taveta District within Coast Province murdered MICHAEL OSUI”

The accused entered a plea of **‘Not Guilty’** to the charge and his trial commenced before me on 7th September 2011. The prosecution led by **MR. ONSERIO**, learned State Counsel called a total of seven (7) witnesses in support of their case. **MR. MATHEKA** Advocate appeared for the accused.

The evidence in brief is as follows. **PW6 SIMON NZOMO MISOI** told the court that on 27th June 2006 at 9.00 p.m. he was in his shamba guarding his crops against wildlife. He heard some noise nearby and went to check. Upon arrival at the scene he found the accused **‘Peter Kisaka’** whom he knew searching for something in the bush. Lying next to the accused was the dead body of the deceased **‘Michael Osui’** which was facing upwards. **PW6** noticed blood coming from a wound in the deceased’s chest. **PW6** shouted for help. **PW1 NZIOKA MEJA MUKUNGU** responded to the call for help and together they caught hold of the accused overpowered him and tied him up. The matter was reported to the village chairman **JAMES MAKAU MULEI PW3** who came and viewed the scene and then called in the police. Police came the next day and removed the body to the mortuary. A blood-stained dagger was also found in the nearby bushes the following day and was produced as an exhibit **Pexb1**. The accused was taken to the police station and was later charged with this offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He elected to make a sworn statement in which he denied having murdered the deceased. This court now has to make a determination on whether the prosecution have adduced evidence sufficient to prove the charge of Murder beyond a reasonable doubt.

The offence of Murder is defined thus by Section 203 of the Penal Code:

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

The offence of murder has three crucial ingredients all of which must be satisfactorily proved by the prosecution. These are:

- (1) Proof of the fact of death of the deceased and the cause of that death.
- (2) Proof that the death resulted from the unlawful act or omission of the accused
- (3) Proof that said unlawful act or omission was committed with malice aforethought

In this case the death of the deceased has been satisfactorily proved. Several witnesses who included **PW1**, **PW6**, and **PW3 JAMES MAKAU MULEI** all testified that they saw the body of the deceased lying dead at the scene with a stab wound to the chest. **PW2 ZAKAYO WAMBUA MUSUA** and **PW4 SALIM MOSES KILAMBO** both nephews of the deceased identify the dead man as '*Michael Osui*'.

The cause of the deceased's death has equally been proven. **PW5 DR. HESBORN DIANGA** a medical officer based at Taveta District Hospital confirms that an autopsy was conducted on the body of the deceased. The relevant findings were as follows:

- Cut wound to left side of chest
- 8 cm laceration on left upper lung
- 6 cm cut wound on anterior aspect of the heart

The cause of death was opined to be "*haemorage from both lung and heart leading to shock and respiratory and cardiac arrest*". Thus it is clear that the deceased met his untimely death due to the unlawful act of being stabbed in the chest.

The next crucial question is whether there exists sufficient evidence to prove that it was the accused who committed this unlawful act of stabbing the deceased to death.

The closest person to an eyewitness was **PW6**. He told the court that he heard a noise whilst he was out in his farm guarding his crops. **PW6** went to the scene to investigate what the noise was. He stated that he found the deceased already lying dead on the ground and the accused who was also at the scene was rummaging in the nearby bushes looking for something. When **PW6** questioned him the accused said that he was looking for his dagger. It is pertinent to note that **PW6** was candid enough to admit to the court that he did not actually witness the accused stab the deceased. He got to the scene after the fact and found the deceased already dead. The identity of the accused is not in any doubt. **PW6** told the court that although the incident occurred at night there was moonlight. In addition **PW6** said that he knew the accused very well as a fellow villager. This evidence on identity is corroborated by **PW1**. He told court that he heard **PW6** shout for help. When he rushed to the scene he found **PW6** struggling with accused in an attempt to subdue him. **PW1** joined in and together they managed to overpower the accused and tied him up. **PW1** confirms having found the body of the deceased whom he knew well lying dead on the ground. Likewise **PW1** identifies the accused '*Peter Kisaka*' as the man whom he and **PW6** overpowered and tied up. In his defence the accused does not deny having been at the scene on the night in question although he does deny having stabbed and killed the deceased.

There being no eyewitness to the murder the prosecution seeks to rely on circumstantial evidence as proof of the guilt of the accused. In the case of **OMAR MZUNGU CHIMERA –VS- REPUBLIC CR.APP. 56/1998** the Court of Appeal set out three tests all of which must be satisfied in order to prove guilt by way of circumstantial evidence. These are as follows:

- “(i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- (ii) These circumstances should be of a definite tendency unerringly pointing towards the guilt of the

accused.

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else”

In the present case the incriminating circumstance was that the accused was found literally **‘standing over’** the dead body of the deceased. No other person was at the scene when **PW6** got there. He found only the accused looking for his dagger. The bloodstained dagger was recovered in the nearby bushes the following day. In addition to this accused still had around his waist the sheath for the dagger. From this set of incriminating facts only one conclusion can be drawn – that it was the accused who stabbed and killed the deceased.

In his defence the accused claims that the prosecution witnesses have fabricated evidence against him. He states that he too like others only stumbled upon the dead body of the deceased. However the accused gives no explanation as to why though not found holding the knife, he was busy looking for a knife in the nearby bushes. How could the accused have possibly known that there was a knife nearby? Counsel for the accused in his submissions suggests that the witnesses all being from the Kamba Community decided to frame the murder on the accused who was from the Taita Community. I find no tangible evidence to suggest that there existed tension between the two communities at the time. I do not accept the theory that one would frame a murder charge on another just because he happens to hail from a different community. There is no evidence of bad blood between either **PW6** or **PW1** and the accused. Even if the court were to accept the claim that tribal tensions were at play in this case, then how would one explain the evidence given by the police officers. Did the police also decide to **‘side’** with the Kamba Community and to what benefit? In his evidence **PW7 CORPORAL NICODEMUS MAMBO LEO** told the court that he was the first officer to arrive at the scene at 1.30 A.M. He states that he found the holster (sheath) for the dagger still attached to the waist of the accused. He recovered it and produces it as an exhibit **Pexb3**. **PW7** did not know the parties before and had no reason to lie against the accused. The presence of the sheath around his waist implies that the accused had in his possession a dagger. It is unlikely that the accused would be walking about with an empty sheath around his waist.

The suggestion is made by the defence that the blood-stains found on the dagger could have been the blood of an animal. Whilst it is true that no analysis was done to determine if this was human blood, no animal dead or alive is said to have been seen within the vicinity. The only bleeding thing found at the scene was the body of the deceased. It is no to far-fetched to posit that the blood on that dagger was human blood and that its source was the deceased. The defence raised in my view is hollow and does not in any way displace the prosecution evidence. From the preponderance of evidence adduced the finger of blame points squarely at the accused alone as the one who stabbed and killed the deceased. No other hypothesis is possible. As such I find that the guilt of the accused has been sufficiently proved. By stabbing the deceased directly in the chest with enough force to puncture his heart and lung it is quite clear that the intention was to kill the deceased. As such I am satisfied that there was malice aforethought in the accused’s action. Finally I find that the prosecution have proved the charge of murder and I hereby convict the accused as charged.

Dated and Delivered in Mombasa this 14th day of November, 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Mbuya holding brief for Mr. Matheka

Mr. Onserio for State

MR. ONSERIO: Treat as 1st offender.

COURT: Mention on 27th November 2012 for mitigation.

M. ODERO
JUDGE
14.11.2012

27.11.2012

Before: Hon. Lady Justice M. Odero

Court Clerk – Mutisya

Mr. Onserio for State

Counsel absent for Accused

COURT: Mention on 30th November 2012. Hearing Notice to Mr. Matheka.

M. ODERO
JUDGE
27.11.2012

30.11.2012

Before: Hon. Lady Justice M. Odero

Court Clerk – Mutisya

Mr. Tanui for State

Mr. Matheka for Accused

COURT: Hearing 6th December 2012 for mitigation.

M. ODERO
JUDGE
30.11.2012

6.12.2012

Before: Hon. Lady Justice M. Odero

Court Clerk – Mutisya

Mr. Matheka for State

Mr. Onserio for Accused

MR. MATHEKA: I have been unable to talk to my client.

Hearing 17th December 2012 for submissions.

M. ODERO
JUDGE

6.12.2012

17.12.2012

Before: Hon Lady Justice M. Odero

Court Clerk – Mutisya

Mr. Onserio for State

Mr. Matheka for Accused

MR. MATHEKA: In mitigation the accused having been found guilty of murder he is remorseful. We seek for a lenient sentence. The death penalty is no longer mandatory in murder cases. Accused is a husband and has 4 children the youngest being five (5) years old.

MR. ONSERIO: The deceased was also a family man. We pray for a deterrent sentence.

COURT

Mitigation is noted. The murder resulted in the loss of a human life. As such a stiff and deterrent sentence is called for. I hereby sentence the accused to serve 30 years imprisonment.

M. ODERO
JUDGE
17.12.2012