



**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE NO.40 OF 2006**

REPUBLIC

.....

PROSECUTOR

~VRS~

ROMANO OLUKU ENYOGOI

.....

ACCUSED

JUDGMENT

The accused person Romano Oluku Enyogoi is charged with murder contrary to section 203 as read with 204 of the Penal Code. It is alleged that on the 25th October 2006 at Alikito Village, Odioi Sub-location, Aremit Location of Teso District, jointly with others not before the court, murdered Enderika Mukande. He pleaded not guilty to the offence.

The facts of the case are that on 25/10/2006 around 11.00 p.m, the deceased was sleeping in her house with PW1 and PW8 who are her close relatives. The door was forced open and two strangers entered the house. PW1 and PW8 were chased out and the strangers hacked the deceased to death. The accused who was a close relative was arrested as a suspect the following day.

The testimony of PW1 is that she was the daughter in-law to the deceased. A few days before the deceased was attacked, she had been accused of bewitching the child of the accused who had been buried only a week earlier. During the funeral, the accused had chased away the deceased from his home on allegations that she had bewitched his child. PW1 said that when the two men entered the house, she took her baby and ran out of the house. She met the accused outside who asked her whether she knew him. She answered in the negative fearing for her life. She escaped to the home of a neighbour while her daughter went to call another neighbour for help. When the witnesses returned to the house, they found the deceased dead.

PW2 did not witness the incident. It is PW1 who went to his house and told him that they had been attacked by some people including their cousin the accused. He went to the scene and found the deceased dead.

PW3 was also called from his house by PW2 after the incident. He saw the body on the floor with cut wounds on the head. It is PW1 who told him that the accused is the one who killed the deceased.

PW4 the area assistant chief testified that a chief's baraza was held on 23/10/2006 two days before the deceased was killed. The residents of the area complained of too many incidents of witchcraft. It was decided that the people in attendance write the names of the suspected witches. Most of the people mentioned the deceased's name as a suspected witch. The accused did not attend the baraza. PW4 learnt from the village elder that the accused and deceased had some differences on 19/10/2006. The accused informed PW4 that he had chased away the deceased from his home.

PW5 the village elder said the deceased reported to him on 23/10/2006 that the accused chased her and her child away from his home during the funeral of his child. The accused had accused the deceased of being a witch. PW5 was present in the chief's baraza where people complained of rising incidents of witchcraft.

PW6 did not witness the incident. He was informed that his sister the deceased had been killed. On arrival at her home, he found police had already taken the body to the mortuary. During post mortem, PW6 identified the body to the doctor.

PW7 received the murder report at Malaba Police Station. Accompanied by the officer commanding

the police station, PW7 visited the scene of crime. They removed the body to the mortuary and arrested the accused from his house.

PW8 was sleeping in the house of the deceased with PW1 when the incident occurred. She testified that around 11.00 p.m three people came inside after forcing the door open. PW1 and PW8 were thrown out of the house. PW8 escaped to a neighbour's house about 50 metres away. PW1 went to the house later and informed PW8 that the deceased had been killed.

PW9 was the investigating officer then stationed at Malaba Police Station. He accompanied the O.C.S and PW7 to the scene of crime. He observed that the timber door was broken. The witness interviewed PW1 and other witnesses at the scene, arrested the accused and charged him with the offence.

PW1 Dr. Otido produced the post mortem report of Dr. Waringa. She formed the opinion that the deceased who had several deep cuts on the head, jaw, neck and forearm died of internal bleeding due to the spinal cord/neck injury.

The accused gave a sworn defence. He told the court that his official names are Romano Enyogoi Eleboi and produced his identity card and his driving licence bearing the said names. It was accused's contention that the names used in the charge sheet Romano Oluku Emogoi were not his names. He denied killing his aunt, the deceased. A few days before the death of deceased, the accused's own child had died of anaemia. He denies chasing away the deceased from the burial or even accusing her of bewitching his child. He added that PW1 bore a grudge against him after she and her husband failed to repay Ksh.600/= accused had lent them. The grudge had led to PW1 and the wife of the accused fighting.

The defence filed written submissions in which they critically analysed the evidence of the prosecution referring to it as contradictory, inadequate and doctored to bring up the element of malice aforethought.

The only eyewitnesses in this case were PW1 and PW8. PW1 said that when the two attackers entered the house forcefully, she ran out where she met with the accused. The accused asked her whether she had identified him and she answered in the negative. She managed to escape from the accused and was to return to the house after the attackers were gone just to find her mother-in-law dead. It was 11.00 p.m and it was a dark night as PW1 recorded in her statement to the police. Although PW1 had said in cross-examination that there was moonlight, she later agreed that her statement to the police which stated that it was dark was true. PW1 did not tell the court the light which aided her to see the accused outside the house. If there was any light at all, then the intensity of that light ought to have been described. Without light to aid PW1, an inference may be drawn that she never saw or identified the people who attacked the deceased. While outside the house, PW1 narrated to the court the conversation she had with the accused. The accused even asked her whether she identified him. PW1 was married to the son of deceased who was a cousin to the accused. The deceased was an aunt to the accused. The parties were also neighbours. It raises a curious question as to how the accused who had come to kill the deceased would expose himself to PW1 which act could result in PW1 identifying him. The evidence of the prosecution and that of the defence (accused) agree on one thing. That the accused and PW1 and their families were close relatives and lived in the same neighbourhood. As such they knew one another too well. It follows that one would identify the other through his/her voice. It is therefore incredible how the accused could converse with PW1 for so long as his accomplices were busy hacking the deceased to death.

PW8 said that three men entered the house of the deceased while PW1 who was with her in the same house said the men were two. PW8 contradicted the testimony of PW1 when she said that the accused entered the house. PW1 said the accused remained outside the house while his two accomplices entered the house. Again PW8 admitted that it was a dark night. There was no light and the obvious question comes into play: How did PW8 see and identify the accused person whether inside or outside the house? Neither PW1 nor PW8 witnessed the hacking of the deceased to death. When it happened, the two were either outside the house or had escaped to their neighbours house. On whether PW1 knew or identified the accused, PW1's evidence was contradicted by PW8 in that positive. She said that PW1 told the accused: **"Yes I know you."** PW1 testified that the answer given by PW1 was that she had identified the accused. PW1 testified that she feared for her life and told the accused that she did not identify him.

These are a major contradiction of the only two eye witnesses in this case rendering their evidence incredible. PW8 went on to describe what the accused did. She said that he knocked Mary (PW1) down and removed her clothes. PW1 never talked of her clothes being removed by the accused.

The other witnesses never witnessed the incident. PW2 and PW3 said it was PW1 who told them that the accused is the one who killed the deceased. The issue of the chief's baraza where PW4 said most

people wrote down the name of the deceased as a suspected witch does not add much value to this case. The accused did not attend that meeting. PW5 said that the crowd was charged and wanted to be allowed to identify the witch. The chief refused and asked them to write the names down and hand them in secretly. The deceased was in that meeting and she was killed only two days later. There is a possibility that some people from the charged crowd may have ended up killing the deceased whom they believed would bewitch them or their relatives. The accused may or may not have been among the group in execution of their evil plan. PW4 testified that another resident had been killed in the area for a similar reason around the same period.

PW1 said she witnessed the accused chasing away the deceased and her child from the funeral. Her evidence was not corroborated by any independent witness. The credibility of this witness is questionable given her testimony about the attack which raised a lot of doubts as to what really happened.

PW1 knew the accused physically and could not have confused him with any other person. It is possible that “*Oluku*” was the name the accused was popularly known while the official names in the identity card were Romano Enyogoi Eleboi. The only issue which arises is whether the evidence of PW1 and PW8 is credible as to point guilty at the accused in exclusion of any other person.

There is no doubt that the deceased died of the injuries inflicted during the attack in the material night. However, I find that the prosecution face an uphill task in establishing that it was the accused jointly with others not before the court who did the act that caused the death of the deceased. I have analysed the evidence of PW1 and PW8 the only eyewitnesses to the incident. The contradictions in their evidence is quite glaring rendering their evidence unworthy of credit. The narration of the purported encounter between PW1 and the accused did not strike me as the truth. The identity or recognition of the accused in the dark night by PW1 and PW8 was not established to the standards required. It is my finding therefore that the prosecution have failed to prove the offence against the accused beyond any reasonable doubt.

I give the accused the benefit of the doubt and acquit him accordingly. He is set at liberty unless otherwise lawfully held.

F. N. MUCHEMI
JUDGE

Judgment delivered and dated at Bungoma this 24th day of November, 2010 in the presence of the accused and Mr. Waswa for Onsango for the accused person and the State Counsel Mrs. Leting.

F. N. MUCHEMI
JUDGE