



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII**

Criminal Case 30 of 2005

REPUBLIC PROSECUTOR

VERSUS

ROBERT MOENIA OMOLO ACCUSED

JUDGMENT

The accused was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on the 9th day of April, 2005 at Mecheo Trading Centre in Esine Location in Nyamira District, the accused murdered **John Onduso Ombati**, hereinafter referred to as “**the deceased**.”

The prosecution called seven witnesses and two of them were eye witnesses to the accused’s assault of the deceased that led to his death. **Evans Okari Makori, PW4**, was living next to the accused’s rental room at Mecheo Trading centre.

On 9th April, 2005 at about 2.00 a.m., while PW4 was asleep, was woken up by noise of someone who was wailing. PW4 decided to wake up his neighbour, **Jackson Okioma Nangira, PW2**. The two went out and met a lady known as Phyllis who had also come out of her house with a lamp that was on. PW4 took the lamp and they went to the house of the accused where the loud cry was coming from. He knocked the door and the accused opened. He had a stick which was broken. There was a man in the house who was being beaten. They asked the accused why he was beating the man but the accused did not tell them the reason. PW4 and PW2 went to a nearby Administration police camp and reported. An Administration police constable known as **Lawrence Wangila, PW3**, accompanied PW4 and PW2 to the accused’s house. They found the accused dragging the man he had been assaulting outside the house. The man was badly injured and had blood all over his body. The accused said that the deceased was drunk.

The accused told PW2 and PW4 to go back to their houses, which they did. Even PW3 left after a short while. The injured man was left outside the house of the accused. When PW4 went to the scene early in the morning, the deceased had died and his body was lying at the same place where the accused had dragged it to. PW3 arrested the accused and took him to Manga police station where he was handed over to **Police Constable Chrisantus Ateba, PW5**.

PW5, the Officer Commanding the station and other police officers went to Mecheo Trading centre. They found the deceased lying outside the accused’s room. They went inside the accused’s room and found a broken stick, a slasher, a sandal and a white jacket, all stained with blood. All the aforesaid items were produced as exhibits by **Police Constable Paul Kiprop, PW7**, the Investigating Officer. There was also blood on the floor. The body of the deceased had cuts on the cheek, neck and injuries below the knees. The body was taken to Kisii District Hospital mortuary.

The body of the deceased was identified for post mortem by **Makote Ombachi, PW6**, the deceased's brother. The post mortem was conducted by **Dr. Makovu Kimani, PW1**, on 15th April, 2005. He said that the deceased had nose bleeding, the area under the eyes looked pale indicating that he had bled much and there was also a wound on the left color bone. Internally, the left lung had collapsed and there was blood in the thorax cavity. He formed the opinion that the cause of death was due to accumulation of air in the chest cavity due to collapse of the left lung.

In his unsworn defence, the accused person said that on the material day, outside his house, he found many people standing next to a dead body. An Administration police officer who was there asked some people, including himself, to accompany him to Manga police station to record statements, which he did. He was arrested and remained in police cells for one month and eight days. Thereafter he was charged with murder which he said he knew nothing about.

From the evidence on record, PW2 and PW4 woke up in the middle of the night when they heard someone wailing in the room occupied by the accused who was living in the same plot with them. They went to the room of the accused. They had a lamp that belonged to their neighbour known as Phyllis. They knocked the door and the accused opened the room. They saw the accused assaulting the deceased. The accused was well known to PW2 and PW4. They asked the accused why he was assaulting the deceased but the accused was very hostile to them and gave no reason. PW2 and PW4 reported the incident to a nearby Administration police camp and PW3 testified about what he saw. PW3 arrested the accused on the morning of the material day, after the deceased's demise.

The accused was seen by the aforesaid two prosecution witnesses who knew him. The deceased died as a result of the injuries that he sustained at the hands of the accused.

The accused's defence is a sham and a mere denial.

But the accused raised a complaint regarding the long delay in arraigning him in court. He was arrested on 9th April, 2005 but was not taken to court until 26th May, 2005 when he appeared before a Deputy Registrar, but the plea was taken on 13th June, 2005. No explanation was given by the police for this long delay. Between 9th April, 2005 and 26th May 2005 is a period of 48 days, while under **Section 72 (3) (b)** of the **Constitution of Kenya**, the police were supposed to arraign the accused in court within 14 days from the date of his arrest.

It is now trite law that unexplained violation of an accused's constitutional right will normally lead to an acquittal, irrespective of the weight of evidence that may be adduced in support of a charge, see the Court of Appeal decision in **ALBANUS MWASIA MUTUA –VS- REPUBLIC**, Criminal Appeal No. 120 of 2004.

In view of the aforesaid violation of the accused's constitutional right, he is acquitted of the charge of murder. The accused is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF JULY, 2009.

D. MUSINGA

JUDGE.

22/7/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Sagwe HB for Mr. Nyauntu for the accused

Mr. Mutai for the state

Court: Judgment delivered in open court on 22nd July, 2009.

D. MUSINGA

JUDGE.