



REPUBLIC OF KENYA

HIGH COURT AT KISII

CRIMINAL CASE 2 OF 2006

REPUBLIC PROSECUTOR

VERSUS

CHARLES MIRORO OKEO ACCUSED

JUDGMENT

The accused faced two counts of murder contrary to **section 203** as read with **204** of the **Penal Code**. The particulars of the offence were that on the night of 16th November, 2005 at Nyamagwa sub location in Kisii Central District, within Nyanza Province, he murdered **Gladys Kerubo Okeo**, hereinafter referred to as “**the first deceased**” and **Johnstone Okeo** as “**the second deceased.**”

The prosecution called four witnesses.

Elijah Mokano Miroro, PW1, is an uncle to the accused. He said that the first deceased was married to the accused while the second deceased was the accused’s son. On the night of 16th November, 2005, when PW1 was asleep in his house, he heard screams coming from the home of the accused’s mother. The home of PW1 shares a fence with that of the accused.

When PW1 rushed to the accused’s home, he found the 2nd deceased being held by a brother of the accused known as Peter. The accused was in his house. The 1st deceased was lying outside the house. She had been injured on both hands. She was unable to talk but was crying. PW1 called the area Assistant Chief and informed him about what he had found. The Assistant Chief came to the home but the accused did not talk to him. The first deceased was taken to Kisii General Hospital but died shortly after admission. A report was made at Keumbu police station.

Meanwhile the police went to the accused’s home and arrested him. He appeared drunk with alcohol. PW1 added that the accused had a habit of beating his wife whenever he was drunk.

George Nyanchoka Ongeri, PW2, is a cousin of the accused. On the night of 16th November, 2005, he heard the accused singing loudly from his home. After a short while PW2 heard a lady screaming but after a few minutes the screams stopped. The accused and his wife used to fight whenever the accused was drunk. After about 15 minutes PW2 heard screams again. He decided to go to the accused’s home which was not far away. He met Peter, the accused’s brother, who was carrying something. PW2 asked Peter what he was carrying and Peter told him that the accused had killed his son, the second deceased.

At the home of the accused, PW2 found the accused lying at the door of his house with his head inside the house while the rest of his body was outside. The accused’s wife was not in the house. After a short while they discovered that the wife was lying outside the house below a window. She had injuries

on her body and she was unable to talk. They decided to take her to Kisii General Hospital. They also went to Keumbu police station to report the incident and PW2 said that the accused accompanied them to the said police station where he was left as they proceeded to the hospital. The 1st deceased was already dead by the time she reached the hospital.

Josephat Mogaka Auka, PW3, the area Assistant Chief, corroborated the evidence of PW1 in all material aspects.

In cross examination, PW3 said that on the material night the accused was very drunk to the extent that he could not support himself.

Joseck Ondimu Mokano, PW4, identified the bodies of the deceased to the doctor who performed the postmortems.

In his defence, the accused said that on the night of 16th November, 2005 he was very drunk and could not remember what happened then. On the following day he found himself at Keumbu police station. He was transferred to Kisii police station where he was held for 62 days before he was taken to court on 19th January 2006.

Mr. Ondari for the accused submitted that the prosecution did not produce any post mortem report or death certificate to prove that the deceased were actually dead. In the absence of such proof the court had no basis of finding that the accused had murdered the deceased, counsel submitted. He further submitted that the police violated the accused's constitutional right by holding him for a total of 62 days before arraigning him in court. As no explanation was given for that delay, he urged the court to hold that violation of the accused's constitutional right vitiated the charge of murder. He cited **GERALD MACHARIA GITHUKU –VS REPUBLIC**, Criminal Appeal No. 119 of 2004.

From the evidence on record, there was no eye witness as to how the 2nd deceased met his death. By the time PW1, PW2 and PW3 went to accused's home the 2nd deceased had already died. The three witnesses found him being held by the accused's brother, Peter, who was not called as a witness.

As regards the 1st deceased, the three witnesses also testified that they could not tell what had happened to her except that she had serious injuries and was unable to talk. However, there was no one else in the accused's home at the material time apart from the accused and the deceased. The circumstances under which the deceased met their death indicate that the only person who may have assaulted them was the accused. PW1 and PW2 had heard the 1st deceased screaming shortly before she was found lying outside her house with serious injuries. The accused was very drunk at the material time. There is evidence on record that the accused and his wife used to fight whenever he was drunk. I believe it is the accused who assaulted his two family members.

PW1, PW2 and PW3 said that the accused was very drunk on the material night. The accused himself said that he was so drunk that he could not remember what had taken place. He only found himself at Keumbu police station on 17th November, 2005.

The prosecution was unable to call several witnesses who would have given important evidence. No good reason was given as to why those witnesses could not be called. No police officer testified as to why the accused could not have been arraigned in court within 14 days from the date of his arrest. It seems as though he was just kept in police custody for over two months. In the absence of any explanation for that delay I am constrained to hold that his constitutional right as provided for under **section 72 (3) (b)** of the **Constitution** was violated. For that reason alone I acquit the accused of the charges of murder. He is set at liberty unless otherwise lawfully held.

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

D. MUSINGA

JUDGE.

22/9/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Minda for Mr. Ondari for the accused

Mr. Mutai for the state

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

D. MUSINGA

JUDGE.