



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Case 73 of 2004

REPUBLIC ..... PROSECUTOR

VERSUS

DUNCUN ODOYO OGOLA ..... 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 are that on the 12<sup>th</sup> day of June, 2004 in Kokech location of Kawino sub location in Rachuonyo District within Nyanza Province the accused murdered **Jenipher Akumu Abila**, hereinafter referred as to the “**the deceased.**”

The prosecution called 8 witnesses but none of them was an eye witness.

**Richard Otieno Pete, PW5**, was a step son of the deceased. He said that the accused is a grand child of the deceased. There was a disagreement between the two over a table that belonged to a son of the deceased who had died earlier. The deceased wanted to sell the table which used to be in her deceased son’s house. The accused went and removed the said table and took it to his house. On 8<sup>th</sup> June 2004 at around 5.00 p.m., the deceased went to the accused’s house and took away the table. At that time the accused was not in the house.

On 12<sup>th</sup> June 2004 at about 1.00 p.m. PW5 was informed by his son known as Kevin that the deceased had been killed and her body was lying outside her house. PW5 rushed to the scene and saw the deceased’s body. It had a fresh injury on the head and blood was coming out. The witness did not know who had killed the deceased. He went to Oyugis police station and reported the incident.

**Isaiah Oudi, PW3**, is also a close relative of the deceased. He testified that on 12<sup>th</sup> June 2004 at about 1.00 p.m. he heard the deceased requesting the accused to carry the said table for her as she intended to go and sell the same. Later he was informed by Kevin, a son of the PW5, that the deceased had died and her body was lying outside her house. PW3 said that he did not know who had murdered the deceased although he was aware that she had quarreled with the accused.

**Timothy Obere, PW2**, was also told by Richard Otieno Pete and Isaiah Odii that the deceased had been murdered. He was however not told who had done it.

The deceased’s body was identified for purposes of post mortem by **Bernard Ochieng Ogola, PW1**, and the post mortem was conducted by **Dr. Peter Ogola, PW6**, at Oyugis District Hospital. **PW6** testified that the deceased was about 76 years old and at the time of the post mortem there was fracture on the skull with internal bleeding in the head. He concluded that the cause of death was cardiopulmonary arrest secondary to head injury caused by a blunt object.

**Tom Ochola Odhiambo, PW7**, is the Chief of Kokech location. He testified that on 19<sup>th</sup> June, 2004, he received a report from

relatives of the deceased that the accused while struggling with the deceased over a radio and a torch, caused the death of the deceased. PW7 went to the deceased's home and saw the body but the accused had disappeared. Later on he managed to arrest the accused and took him to Oyugis police station.

**Police Constable John Mungathia Muila, PW8**, together with other police officers went to the deceased's home and collected the body. After the arrest of the accused, he led PW8 to his mother's house where he showed the police a panga which he allegedly used to kill the deceased. The panga was produced before the court as an exhibit.

In his defence, the accused testified that on the material day, he was informed by some people that his grandmother had been killed. On the following day, that is 13<sup>th</sup> June, 2004 he was arrested by the area Chief and taken to Oyugis police station. He said that the police assaulted him and PW8 took him to his mother's house and was forced to produce a panga. The panga was the one that was produced in court as an exhibit. He denied having assaulted the deceased as alleged. He said he was kept in police custody for over three months. He contended that his constitutional right had been violated on account of the long detention in police custody.

Mr. Kemo, Senior Principal State Counsel, submitted that all the evidence on record pointed to the accused as the only person who could have murdered the deceased. He urged the court to find that there was sufficient circumstantial evidence to warrant his conviction. However, Mr. Kemo conceded that the accused's constitutional rights had been violated.

Having considered the evidence on record as well as the submissions by the state, it is clear that no one witnessed the murder of the deceased by the accused. While there is evidence that there was a disagreement between the deceased and the accused over a table and a torch, there is no sufficient evidence that the accused slashed the deceased to death. The panga that was produced before the court as the alleged murder weapon had no blood stains. The post mortem report showed that the cause of death was cardiopulmonary arrest secondary to a head injury caused by a blunt object. A panga cannot be described as a blunt object. The panga that was produced before the court cannot therefore have been the murder weapon.

The accused stated in his defence that PW8 took him to his parents' home and forced him to produce any panga that was in that home. That kind of defence seems to be supported by the findings of PW6 as contained in the post mortem report. In my view therefore there is insufficient circumstantial evidence to warrant conviction of the accused.

It was also conceded by Mr. Kemo that the accused's constitutional right was violated because he was not arraigned in court within 14 days of his arrest or as soon as was reasonably practicable. That being the case, even if the prosecution had adduced sufficient evidence against the accused, the violation of his constitutional right would have vitiated the charge against him. In the circumstances, I do not find the accused guilty of murder as charged and is hereby acquitted. He should be set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISII THIS 14<sup>TH</sup> DAY OF OCTOBER, 2009.**

**D. MUSINGA**

**JUDGE.**

**14/10/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Kemo for the state

Mr. Ondari for the accused.

**Court:** Judgment delivered in open court on 14<sup>th</sup> October, 2009.

**D. MUSINGA**

**JUDGE.**