



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL CASE 10 OF 2005

REPUBLIC PROSECUTOR

VERSUS

1. PETER OTIENO NYARIWO)
2. JACTION OCHIENG NYARIWO) ACCUSED

JUDGMENT

The accused were 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 11th day of November, 2004, at Kwandiku sub location, Homa Bay District, within Nyanza Province, the accused murdered **Joshua Akoth Owire**, hereinafter referred to as **“the deceased.”**

The prosecution evidence may be summarized as hereunder:

On 9th November, 2004, at about 11.00 a.m. the deceased visited **Mary Aoko, PW1**, who was a neighbour. PW1 had purchased some wood from the deceased costing Kshs. 40/= and the deceased wanted to collect that money. PW1 gave him 100/= note. The deceased did not have change and he promised to bring the same later. He however did not do so and on the morning of the following day, PW1 sent his nephew, **Collins Otieno, PW2**, to go and collect the change of Kshs. 60/= from the deceased. After a short while PW2 returned without the money and he informed PW1 that the deceased was in his house and wanted to talk to her.

PW1 went to the deceased’s house which was not far away and got there at about 7.00 a.m. She entered the deceased’s house and found him groaning in pain as he lay on his bed. When she enquired as to what had happened to him the deceased told PW1 that he had been beaten by his brother’s sons, the accused herein. The attack was carried out at about 3.00 a.m., he said. The deceased asked PW1 to assist him. PW1 was accompanied by PW2 and together they helped the deceased to get out of the bed but he was unable to walk beyond his door steps. He was holding his stomach and was complaining of severe abdominal pain. He also complained that the accused had peeled off the fore skin of his penis. He was therefore in a lot of pain. PW1 and PW2 took the deceased to his mother’s house.

PW1 screamed and several people rushed to the home of the deceased’s mother. The deceased’s mother enquired from the deceased what had happened to him and he again said that he had been attacked by the accused, whom he referred to by their names.

Sila Obonyo Oreso, PW6, the village elder was informed about the incident. At that time the accused could not be traced as they had disappeared. The deceased died two days thereafter.

PW2 corroborated the evidence of PW1 in all material aspects. He added that when he went to the deceased's home on the material day, the door to his house was not locked. When he knocked the door the deceased merely responded from his bed and asked him to go and call PW1. PW2 reaffirmed that the deceased said in their presence that he had been attacked by the accused.

John Owino Oduya, PW4, was one of the people who rushed to the home of the deceased's mother after he heard screams emanating therefrom. He also testified that the deceased said that he was attacked by the accused.

Margret Awino Okoth, PW5, was the area Assistant Chief. She visited the home of the deceased's mother on 12th November, 2004 after she learnt about the deceased's attack by the accused. She managed to talk to the deceased and he explained how he had been assaulted by the accused. She testified that there had been a land dispute between the accused and the deceased. After the death of the deceased, she managed to have the accused arrested and handed over to the police.

Dr. Ojwang Luai, PW8, conducted a post mortem on the body of the deceased at Homa Bay District Hospital. He testified that the deceased had multiple injuries all over his body and his spleen had ruptured. He formed an opinion that the deceased died due to excessive internal bleeding following the injuries that he had sustained.

In his defence, the first accused testified that on 11th November, 2004 at about 6.30 a.m. he heard screams from his grandmother's house. When he went to find out what had happened he was told that his uncle, the deceased had died. He said that he was informed that the deceased had left his home on the previous day but he had not returned. When the area Assistant Chief arrived at the home he talked to the deceased's mother and thereafter went to make a report at Ndhiwa police station. He returned with some police officers who asked him and other people to assist in ferrying the deceased's body to a police vehicle. They accompanied the police officers to Ndhiwa District Hospital mortuary after which they went to Ndhiwa police station where he was locked up. He claimed that he was held in police cells for 3 months and 24 days. He denied having assaulted the deceased.

The second accused said that on 11th November, 2004 he was woken up by his wife who told him that there was someone who was screaming at his grandmother's home. He rushed to his grandmother's home and found the deceased's body lying on the ground. His grandmother said that the deceased had left home the previous day. The area chief came to the home and after a short while went to make a report at Ndhiwa police station. When police officers arrived he was one of the people who were asked to carry the deceased's body to the police vehicle. Thereafter he was locked up at Ndhiwa police station where he remained until 21st February, 2005, when they were brought to court. He denied having assaulted the deceased.

Mr. Ondari for the accused submitted that no one had witnessed the alleged assault of the deceased by the accused. In his view, the evidence adduced by the prosecution witnesses was insufficient to warrant a conviction. He further submitted that the police violated the Constitutional rights of the accused by holding them for a period in excess of 100 days before arraigning them in court. He urged the court to hold that the charge against the accused was a nullity in view of violation of their constitutional rights as aforesaid.

Mr. Kemo, Senior Principal Prosecution Counsel, submitted that the evidence of PW1, PW2, PW4 and PW5 was clear that they were told by the deceased, shortly before his death, that he had been assaulted by the accused. He

submitted that under **section 33 (a)** of the **Evidence Act**, the deceased's dying declaration was admissible as evidence tending to show the cause of his death.

PW2 was the first person to go to the deceased's home on the material day. The door to his house was not locked and when he called out, the deceased responded from his bed and requested him to go and call PW1. When PW1 and PW2 went to the house of the deceased they found him lying on his bed and explained to them that he had been assaulted by the accused. When the two witnesses assisted the deceased to go to his mother's house, he repeated the same assertion. PW4 and PW5 also testified that the deceased told them that he was assaulted by the accused whom he identified by their respective names.

The deceased remained in his mother's home for two days before he died. According to PW1 the two accused did not go to that homestead between the day the deceased was taken there and the day he died. There is evidence on record that they had disappeared. They were however traced and arrested after the death of the deceased.

The evidence of PW8 revealed that the deceased suffered multiple injuries all over his body including rupture of his spleen. He died as a result of excessive bleeding occasioned by the injuries that he had sustained.

Under **section 33 (a)** of the **Evidence Act**, the deceased's dying declaration is admissible in evidence as to the cause of his death, see **CHOGE -VS- REPUBLIC**, [1985] KLR 1. In that appeal it was held that the general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth.

There is evidence on record that there was a land dispute between the accused and the deceased and that may have been a reason why the accused attacked the deceased. It is also instructive to note that the accused could not be traced shortly after the deceased was found injured in his house.

The accused stated that on 11th November, 2004 they heard screams emanating from their grandmother's house and when they went there they found the deceased lying dead on the ground. That cannot be true. Although the deceased was taken to his mother's house on the aforesaid day he remained there for two days until 13th November, 2004 when he died. The accused were nowhere to be seen.

All the above evidence points to the accused as the only people who must have attacked the deceased and occasioned him grievous injuries that led to his death.

The first accused was arrested on 15th November, 2004 while the second accused was arrested on 13th November, 2004. They were handed over to the police on the same day. They were not arraigned in court until 21st February, 2005 when they appeared before this court's deputy registrar who directed that the plea be taken on 23rd February 2005. No explanation was given by the police as to why they held the accused persons for so long. I agree with their defence counsel that the police violated the accused's constitutional rights as provided under **section 72 (3) (b)** of the **Constitution**.

While there is overwhelming evidence that the accused murdered the deceased, it has repeatedly been held by the Court of Appeal that an unexplained violation of a Constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. See **ALBANUS MWASIA MUTUA - VS- REPUBLIC**, Criminal Appeal No. 120 of 2004. Having so established, I am unable to convict the accused of the charge of murder of the deceased and hereby acquit them of the same. They are set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF OCTOBER, 2009.

**D. MUSINGA
JUDGE.**

14/10/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Kemo for state.

Mr. Ondari for accused.

Court: Judgment delivered in open court on 14th day of October, 2009.

**D. MUSINGA
JUDGE.**