



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CRIMINAL CASE NO. 23 OF 2001**

**JACKTON OYIEYO ADUKE.....ACCUSED**

**VERSUS**

**REPUBLIC.....STATE**

**JUDGMENT**

**JACKTONE OYIEYO ODUKE** the accused in this case is charged with murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of this charge are that on 7th June 2001 at Kaila sub-location in Kisumu District within the Nyanza Province the accused person murdered **Monicah Odhiambo Ogesi** the deceased.

The prosecution called 12 witnesses before closing its case and put in a post mortem report, the P3 of the accused person and the accused person gave unsworn statement.

PW1 who was a brother –in-law of the deceased said that on 7th June 2001 between 11.00 a.m and 12.00 noon a woman told him that the deceased had been killed. PW1 said that he went to the Police Post at Holo and found that there were only two policemen present at the post. He made the report and left for the scene where he found that many people had gathered. PW1 said he saw the body and noticed some cut wounds. PW1 said he remained at the spot until police arrived at 5 p.m. and took away the body to mortuary. He added that he had seen two cut wounds on the body, one on the back and another one on the hand.

PW2 Dr. Okal produced a P3 of the accused which he had filled on 20th June 2001 at the request of the O.C.S. Maseno Police Station. PW2 denied that the accused told that he had been tortured.

Police Constable Erick Mutuku PW3 told the Court that he was at Maseno Police Station on 7th June 2001 when he was instructed by the officer i/c of Crime to visit the scene with Sgt Agnes Masibo. PW3 stated that when they reached the scene they found many people where the body of an adult female was lying which had severe cut wound at the neck and hands was lying. PW3 added that they also recovered a panga which they collected when they took the body to the New Nyanza Provincial Hospital mortuary.

PW4 Mary Anyango said that she heard the deceased's screams while she was working in her shamba on 7th June 2001 at about 11.00 a.m and that she recognized the voice as that of the deceased. PW4 claimed that she went and informed Alphonse Aoko PW7 about them and that he advised he to go to the scene and find out what was happening. PW4 claimed that when she reached the scene she found the deceased lying on ground and that the accused person who was in the scene threatened her. PW4 claimed she went back to PW7 and reported to him what she had seen. She claimed that PW7 sent her to go and relay the

information to the deceased's sister who is living at a short distance. PW4 said that the deceased's sister in turn sent her with her two daughters and two male neighbours to the scene . PW4 claimed that on their arrival they found that the deceased had died and that the accused was no longer at the scene. PW4 denied having heard any dispute between the deceased and the accused person over land.

IP, Charles Chege, PW5 who was the OCS Akala Police Station when he testified said that on 7th June 2001 while he was the Officer in charge of Crime at Maseno Police Station, when a report of the murder was made. PW5 said he instructed PW10 and PW3 to go to the scene and to commence the investigations. PW5 added that on 8th June 2001 the suspect came and surrendered to Police at Maseno Police Station and was arrested. On 13th June 2001 PW5 recorded a statement of the accused person under inquiry which he wanted to produce as an exhibit but the same was objected and that objection was upheld, after a trial within trial on the voluntariness of it was conducted. Rev. Boniface Obando Ogosi PW6 said that he identified the body of the deceased to the doctor who performed post mortem examination.

PW7 Alfonse Ooko stated that while he was at home on 7th June at about 11.30 a.m he heard some screams, and that he called PW4 his daughter in-law whom he sent to go and find out the cause of the screams. PW7 said that PW4 went and came back immediately and told him that the accused was attacking the deceased and that he had chased her away with a panga. PW7 stated that he walked to the scene and when he was near the home of the deceased he saw a shoe on the path . PW7 claimed that when he was about to reach the deceased's house the accused person who was armed with a panga and without a shirt suddenly emerged from a bush and demanded to know what had brought him there. PW7 claimed that the accused person held up a panga against and he retreated. The witness said that then the accused person changed his mind and told him that he would show him what he was looking for. PW7 claimed that he followed the accused to where the deceased lay on the ground. According to PW7 the deceased was still breathing and that when the accused person noticed that she was still alive he threw a stone at her ribs.

PW7 claimed that the deceased had several wounds and was profusely bleeding. PW7 claimed that he thereafter went to the area Assistant Chief and made a report 1. PW7 admitted that he is illiterate.

Maurice Okellow Okum the Assistant Chief of Kaila S/Location testified as PW8 and said that PW7 reported to him the murder of the deceased and that he visited the scene and found the body of the deceased at the scene before it was taken to the mortuary. PW8 stated that during the night they looked for the accused person without any success. This witness claimed that the accused person had had a land dispute with the deceased and PW1..

Dr. Margaret Oduor PW9 produced a post mortem report of the body of the deceased which she had filled. According to PW9 the 1st cut wound on the right lower arm was 4 cm long ; the 2nd one was on the left hand at the wrist with a dislocation of wrist joint; 3rd was on the left index finger and the last one was a 7 cm long deep cut on the left neck which cut through the blood vessels. She added that the death was caused by the bleeding resulting from the severe assault to the deceased.

PW10, Sgt Agnes Masibo said that at about 5 p.m. on 7th June 2001 she was sent with PW3 by PW5 to visit the scene of the murder. PW10 claimed that she found the body of the deceased at the scene with many villagers near it. Pw10 noticed the wounds on the body while they were taking the body to New Nyanza Hospital Mortuary in Kisumu. PW10 added that she was at Maseno Police Station on 8th June 2001 . When the accused surrendered to Police and she arrested and placed him at cells.

PC. Augustine Kimaiyo Kili PW11 said that on 7th June 2001 he was at Holo Police Post when a report of an incident murder was made. PW11 claimed that he proceeded to the scene and found the body of an adult female lying on the ground and that he noticed the cut wounds on it. PW11 said that he called Maseno Police Station and the body was later on removed from the scene and taken to mortuary. PW11 said that he saw a panga which was next to the body.

Rev. Ezekiel Otenda identified the body of the deceased to the doctor who carried out post mortem examination.

Thereafter the accused person gave unsworn statement as DW1 and said that he is 40 year old a farmer who is married with children. He denied the charge and said that he knew the deceased only in the year 2000. The accused person claimed that he had lived in Nandi Hills for some years and that when he went home he found a house on their land. He said that he asked his father Erasto Adugo about it he was told that the house belongs to the deceased and her brother in-law PW1. The accused person added that his father before he died had asked the two to move out of his land as he had granted them a temporary stay on it. He claimed that he reported the dispute to the Assistant Chief, PW8 but before anything was done a daughter of the deceased drowned and that she died. DW1 claimed that the deceased claimed that he had bewitched her daughter. He claimed that PW8 convened a meeting in the year 2001 but the deceased and her brother in-law refused to attend but a meeting held later on before the elders the deceased and PW1 had claimed that they had bought the land from the accuseds father but they had no documents to support their claim. The accused person further said that on 7th June 2001, he was working on his piece of land while the deceased was cutting grass within her compound. According to the accused person the deceased threw grass which she had cut onto his land but when he stopped her she abused him calling him a witch doctor and that he had bewitched her daughter. The accused person added that when he went near the deceased she threw a stone at him but it missed him. He further claimed that he began to struggle with her over her panga and that during the struggle she got cut and she fell down crying that he had attacked her. DW1 said that he ran away and later on in away and later on in the evening he learned that the deceased had died. He stated that he had not intended to kill the deceased and that PW7 lied when he claimed that he saw him throw a stone at the deceased.

From the above resume of the evidence in this Court is patently clear that there was no eye-witness to the incident. Both PW4 and PW7 whose evidence is relied by the prosecution arrived at the scene after the incident and PW4 said that when she arrived she did not witness any assault of the deceased. It is only PW7 who said that when the accused person noted in his presence that the deceased was still alive he threw a stone at her.

In those circumstances I have to direct my mind to the rules which guide the Courts when evidence adduced in a case is wholly circumstantial. In the case of *Simoni Musoke V R* (1958) EA 715 at page 718 it was held that in the case depending exclusively upon circumstantial evidence, the Court, must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt.

Applying that rule to the circumstantial evidence adduced in this case it is clear that the evidence of both PW4 and PW7 who were about the first people to reach the scene, the admission of the accused person that he was at the scene and bearing in mind the severe injuries sustained by the deceased as disclosed by the post mortem report establish in my view that the incubatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypotheses than that of guilt. I therefore agree with the assessors that the accused is guilty . I therefore convict the accused person of murder as charged and is sentenced to death as provided under the law.,

Dated and delivered at Kisumu this 29th September 2003 in the presence of Mutai for the state and Pandit (Ms) and the accused person.

**B.K. Tanui**

**JUDGE**