



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: A.K. NDUNG'U J.)

CRIMINAL CASE NO. 18 OF 2020

BETWEEN

REPUBLIC.....PROSECUTOR

AND

PATRICK ONG'AU OKIOMAACCUSED

JUDGEMENT

1. The accused, **PATRICK ONG'AU OKIOMA**, was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. According to the information dated 9th June 2020, the accused murdered Peter Sure Babu on 5th June 2020 at Nyabiosi Village, in Bomariba Sub-location, Kisii South Sub-County within Kisii County.

2. The prosecution called 6 witnesses to testify in support of its case. The first witness, Lydia Kerubo Sure (PW1), told the court that the deceased was her father and the accused had been her boyfriend since 2018. PW1 recalled that on 4th June 2020, the accused had asked her to go to his home to assist in washing. The next morning, at 10.00 am she left for the accused person's home and assisted him in the washing. PW1 took off when the deceased came to the accused's home with 2 police policing (sic) members to question the accused person.

3. The accused alerted her when the old men had left. He also complained that the deceased was disturbing him and threatening his life. The accused asked PW1 to help him but she declined as he was asking her to help him kill her father. He threatened to kill her and she agreed to assist him. The accused gave her a black sweater to wear and picked up an axe. At around 7:00 pm, she and the accused went to their home and got into a bush on their land. Her mother was cooking supper and her father was grazing near the road.

4. PW1 testified that the accused asked her to untie a bull to attract her father's attention. She went untied the bull which got into the compound. PW1's father came out, tied up the bull and went back to the house. The accused asked her to untie the bull again and the deceased came out with a torch and a *panga*. As he returned the bull to its tether, the accused who was hiding in some flowers, came out and hit him on the back of the head with the axe. The deceased fell down bleeding. The accused hit the deceased 4 times on the back of the head.

5. PW1 stated that when her mother came out they went their separate ways. The accused picked up the deceased's torch and ran to his home. PW1 left for the accused person's home.

6. After 2 days, PW1 disclosed to her mother what had happened. Her mother called the chief who had her arrested and taken to the police station. She explained that she had not told anyone about the accused's plan as the accused was armed and she was afraid that he could have harmed her. She told the court that she had once taken poison for being asked to stop the relationship with the deceased and the accused had also taken poison over her.

7. During cross examination, PW1 stated that the distance between accused's home and the scene of the crime was about 200 metres. She stated that she was wearing a grey short and a black sweater and the accused was wearing a black trouser and black sweater. She also stated that her mother could not identify who she was when she came out of the house, as it was dark.

8. PW1's mother, Prisca Sure (PW2) testified that on the day he died, the deceased, had gone to look for Napier grass. He returned to find that PW1 was not home. The deceased called a village elder and went in search of PW1. He returned home at about 3.00 pm and told PW2 that he had found PW1 but she had run away on seeing him. The deceased had found PW1's shoes and phone where she was washing clothes. The deceased then went to graze cows at about 5.00 pm till about 7.00 p.m. when he tethered them.

9. Later on, the deceased heard a cow moving outside and went to tether it again. PW2 testified that when she heard groaning sounds, she came out and saw 2 people running away in different directions. She testified that one was wearing black and white and the other was in black. One of them was also wearing a short and a T-shirt. She testified that she was unable to identify the two people since it was at night. She ran back to the house and locked herself in. She went out and found the cow untethered again. As she returned the cow, PW2 saw the deceased on the ground, bleeding from the back of the head. She screamed and people came to the scene. The police later picked the deceased's body.
10. PW2 testified that her last born, Dominic Orina came to the scene at about 8.00 p.m. together with the crowd attracted to the scene by screams. He was drunk and was wearing a yellow T-shirt which he got stained with blood when he hugged the deceased. PW2 testified that Dominic was picked up by the police and placed in the cells because of this.
11. When cross examined, PW2 testified that she was sick on the night the deceased was killed and did not know what was happening. She stated that she had heard the deceased go out the first and second time and later heard the groaning sound coming from the road which was about 5 metres from the house. She testified that the deceased had reported the accused to the police as he wanted the accused to stop the relationship with PW1 to allow her study.
12. When she woke up on Sunday, PW1 told her that it was the accused who had killed the deceased because he was against their relationship.
13. Nyamira Babu (PW3) testified that the deceased was his brother. On 5th June 2020, at 3.00 pm. his mother sent him to the deceased's home to pick some money. He found the deceased visibly annoyed. The deceased told him that the accused was disturbing him over his daughter, PW1 and that he had had to go to the accused's home.
14. PW3 left the deceased and went home. At 8.00 pm he heard screams. He crossed over to the home of the deceased and found the deceased lying on the road with an injury on the occipital region. He reported the matter at the police station and went back to the scene, where he found the deceased's son Dominic, hugging the deceased. Dominic was arrested but later released.
15. Dominic Orina (PW4) testified that on the day the deceased died, he had gone for a burial in the neighborhood and went back home at 5:00 pm. He saw his father, the deceased, grazing cows along the road but they did not talk.
16. He then went to the bar and stayed there until a report came around 8.00pm. or 9.00 p.m. that someone had died. A lady told him it was his father who had died. PW4 testified that it was dark and he found many people at the scene. He saw his father lying down and held him but realized that he was dead. He testified that the deceased's body had blood which got onto his shirt. Police officers arrested him as a suspect but after 2 days he was told that the real suspect had been found and he was released.
17. PW4 told the court that he knew that the accused had a relationship with his sister PW1.
18. In cross examination, PW4 stated that he had seen his sister at home at 8.00 a.m. but did not know where she was the whole day. PW4 added that by the time he left the den, he was not sure who had died. He stated that when he held his father, his uncle PW3 had pulled him off the body. He removed his yellow T-shirt which had blood and placed it on the flowers. He insisted that he had not hidden the shirt.
19. Benjamin Ayuma Opanga (PW5), the assistant chief, Omariba sub-location, testified that on 7th June 2020, he was at home when the deceased's wife summoned him to her home that morning. He went and met PW2 and PW1. PW1 told him that she had witnessed her boyfriend killing her father. She accompanied him to the police station where he explained what had happened. He recalled that he had gone to the home of the accused in the company of police officers and PW1 had identified the clothes the accused wore during the killing. PW5 identified the clothes as those placed before the court and marked "MFI I (a) & (b)."
20. During cross examination, PW5 testified that he had never dealt with a case involving the accused. He stated that he had been told that PW4 had been arrested for disturbing the peace at the scene of the murder. He also stated that he had nothing to show that the clothes came from the accused person's home and could not recall signing an inventory about the recovery. PW5 further stated that the black clothes he had identified in court were a lady's clothes and did not appear as though they could fit the accused.
21. P.C. Gisiri Samuel (PW6) from DCI attached at Kisii South testified that he was the investigating officer in the matter. He produced photos taken by scenes of crime personnel and a report prepared by P. W. Obae Marika attached to DCI Kisii Central.
22. PW6 stated that on receiving a report from PW3, he proceeded to the scene. He saw the deceased lying dead in a pool of blood next to his home. They searched the home and recovered a yellow blood stained T-shirt on a flower bed. They inquired as to who the owner was and found that it belonged to PW4. After interrogating the first people to arrive at the scene, they decided to arrest PW4 as the first suspect. He testified that Orina was drunk and when PW6 questioned him separately, he noted he was not at scene when the incident occurred. PW6 interrogated one of the neighbours who had been at the scene and gathered that PW4 had found his father murdered and touched the body.
23. On 7th June 2020 they received information that PW1 had confessed to her mother that she knew who had murdered the deceased. PW1 narrated how the accused had planned the murder of the deceased. PW6 testified that they collected the 2 suspects from Igonga police station and placed them in custody. They took PW1's confession and decided to use her as their key witness in the matter because they learnt that the accused had threatened to kill her if she did not co-operate.
24. PW6 produced the report of the post mortem conducted at Nyangena private hospital by Dr. Morebu, which indicated that the cause of death was a severe head injury secondary to sharp trauma to the head.

25. In cross examination, PW6 stated that his investigations were based on PW1's confession. He confirmed that the clothes in court were recovered and insisted that a man could wear them.

26. When placed on his defence, the accused gave a sworn statement claiming that on the day the deceased died, he and his younger brothers and father made a chicken cage together until about 1.00 p.m., when he went to his kiosk. He closed his kiosk at 6.00 p.m. He went back, prepared supper and at about 7.00 p.m. he decided to study with his younger brothers.

27. They heard screams from outside and his father, DW2, left to check what was happening. DW2 left them in the house and they went to sleep. The accused testified that they did not know what time their father came back. The following day, their father told them that the screams were over the killing of the deceased. On Sunday, as he was taking water from a well in preparation to go to church, he saw a group of people in the company of PW1. He was pointed out. A policeman took him to the police station but did not tell him what he had done. He was given a piece of paper which he refused to sign.

28. The next day, a police officer took him to a room and asked him to sign 2 forms admitting he killed the deceased. They told him that they would charge him with manslaughter. The accused told the court that he had been handcuffed, beaten and forced to sign, but he refused. He was returned to the cell and the officer remarked that he was becoming hard to beat. He stated that the son of deceased who had been arrested was released. He was taken to court and charged.

29. He insisted that the clothes taken to court were not his. The clothes belonged to a young lady and could not fit him.

30. In cross examination, the accused testified that he never saw the deceased on the day he died. He testified that he was a neighbour and they never had any disagreements. He stated that he knew PW1 as she used to go to their home. He denied being her friend and that she was in school with his brother. He stated that on the night the deceased died he was wearing a flowered *kitenge* shirt and bluish jeans. He insisted that he had not killed the deceased.

31. The accused's father, Joseph Nyaede Okioma (DW2) reiterated that they had organized to make a chicken cage with his sons. They finished the work at 1.00 and he left and returned at 6.45pm. At about 8.00 p.m. he left the house and met many people running to the deceased's home. He found the body of deceased lying near his home.

32. He testified that the police had arrested the son of the deceased who had blood on his hands. According to DW2, there had been a dispute between the deceased and the son. 2 days later, DW2's son was arrested as a suspect. DW2 was told that they had been told by PW1 that the accused killed the deceased. He kept following up with the police but they never took his statement. He insisted that he was with the accused and the other children when the screams were heard and he was the only one who left the house. DW2 asserted that the accused did not kill the deceased.

33. In cross examination, DW2 testified that he saw Dominic in a white T-shirt and that there was another bloody yellow T-shirt which was hidden somewhere on flowers. He stated that people were saying PW4 to produce the T-shirt he had worn. DW2 testified that he had never seen PW1 at his place. He added that John had gone to school with PW1 and he only saw her at his place when she was in primary school. DW2 also told the court that he received a report that PW4 had sold sugarcane and left with the money but he could not point out who talked about the dispute over cane.

SUBMISSIONS

34. At the close of the defense's case, the accused's counsel filed written submissions. He argued, that although the fact of the deceased's death was ascertained, the cause of his death was not proved. He argued that although the postmortem report indicated that the cause of death was a severe head injury secondary to sharp trauma to the head, the murder weapon was never recovered. It was also not clear what weapon had been used to kill the deceased, as PW1 had testified that he had been killed using an axe and PW5 had indicated that a *panga* had been used.

35. It was counsel's further submissions that the prosecution failed to link the accused to the death of the deceased. He pointed out that PW6 had confirmed that his investigations were based on PW1's confession yet her confession was not adduced in court and her account contradicted the testimonies of other witnesses. For instance, PW1 had testified that when PW2 got out of the house, she asked "what was that?" But PW2 testified to not calling out to anyone.

36. Counsel further submitted that the clothes purportedly recovered by PW 6 were female clothes which were too small to fit the accused thus "*if the glove doesn't fit*", there was no option but to have the accused acquitted. PW5 had also confirmed that there was no inventory with reference to the clothes recovered from the accused person's house. The accused's witnesses had also confirmed that he was home on the fateful night.

37. On the other hand, PW4's blood stained clothes had been discovered hidden and the prosecution's narrative that the blood was due to hugging the deceased did not add up due to the contradictions on the particular time PW 4 was at the scene.

38. Counsel added that the prosecution failed to establish a motive by the accused person to kill the deceased. In his view, the allegation by the prosecution that the deceased had differences with the accused due to a purported love affair with PW 1 did not hold water as the same was an afterthought to fix the accused person and shield the prime suspect, PW4. Other than PW5 and PW6, the prosecution's witnesses were family members and other witnesses present on that night were not called to testify. He submitted that in the end, the prosecution had failed to discharge its burden of proof and he thus urged the court to acquit the accused person.

39. Despite being given an opportunity to file submissions, the prosecution failed to do so.

ANALYSIS AND DETERMINATION

40. The offence of murder is prescribed under **section 203** of the **Penal Code** thus; “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” From this definition, the prosecution was expected to prove the following ingredients beyond reasonable doubt:

- a. The death of the deceased and cause of that death;
- b. That the accused committed an unlawful act or omission that led to the death; and
- c. That the accused committed the unlawful act with malice aforethought.

41. Throughout a criminal trial, an accused person bears no duty to prove his innocence. The burden is on the prosecution to prove their case beyond reasonable doubt.

In **Stephen Nguli Mulili v Republic [2014] eKLR** this is what the court had to say;

“...it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V WOOLMINGTON, (1935) UKHL 1* where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *FESTUS MUKATI MURWA V R, (2013) eKLR*”

42. In the famous case of **Miller v Ministry of Pensions [1947] 2 ALL ER 372** Lord Denning stated with regard to the burden of proof beyond reasonable doubt.

“That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to defeat the cause of justice. If the evidence is so strong against a man as to leave only remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that shall suffice.”

43. In the Nigerian case of **Bakare v State (1987) INNLR (PT 52) 579**, the Supreme Court stated;

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means what it says. It does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”

44. The fact of the deceased’s death is not in question. To prove the cause of his death, the prosecution relied on a post mortem report produced by PW6. In the report, Dr. Morebu, indicated that the cause of death was due to severe head injury secondary to sharp trauma to the head. PW2 and PW3 confirmed that the deceased’s body had an injury on the back of the head.

45. The accused person’s counsel argued that the prosecution did not prove the cause of death as they did not recover or identify the murder weapon. The recovery of such a weapon would serve as corroborative evidence but is not the only means by which the prosecution can prove the cause of death.

46. In the case of **Kyalo Kalani v Republic CRIMINAL APPEAL NO. 586 OF 2010 [2013] eKLR**, the Court of Appeal cited with approval its decision in the case of **Ekai v Republic (1981) KLR 569** where the Court found that even though the murder weapon had not been produced, the post mortem examination had established beyond all reasonable doubt that the fatal injury had been caused by a sharp bladed weapon.

47. The Court in **Kyalo Kalani (supra)** also cited the case of **Karani v Republic, (2010)1 KLR 73** where the court held as follows;

“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit”.

48. I therefore find that the prosecution proved that the deceased died due to a severe head injury secondary to sharp trauma to the head.

49. Next, the prosecution was required to prove that the accused person caused the death of the deceased.

50. The prosecution’s star witness was PW1. She told the court that the accused had been her boyfriend since 2018 and her father, the deceased, did not approve of their relationship. This claim was supported by her mother, PW2, her uncle, PW3 and her brother PW4.

51. From the evidence on record, it is manifestly clear that this case turns on the accomplice evidence of PW 1 who is the only eye witness to

the alleged crime. The other material evidence available is that of PW1, PW2, PW3 and PW 4 which only goes as far as showing the existence of a relationship between the accused and PW1 which relationship the deceased did not approve of.

52. PW1 was the sole eyewitness of the crime. Depending on the facts, a witness to a crime can be taken to be an accomplice. This was the finding of the Court of Appeal in the case of **Antony Kinyanjui Kimani v Republic Criminal Appeal 157 of 2007 [2011] eKLR** which defined an accomplice thus;

“What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda [2000] 2 EA 559, the supreme court held that “in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial”, The same definition was restated by the same court in the case of Nasolo v Uganda [2003] 1 EA 181 where the court further stated:

“On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case.

53. I have anxiously considered the evidence before this court. From her evidence, PW1 actively participated in the crime and fit the above description of an accomplice. **Section 141** of the **Evidence Act** provides that an accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.

54. PW 1 admitted knowing that she was participating in the commission of a criminal offence. I must, accordingly, treat her evidence as that of an accomplice. I warn myself of the dangers inherent in relying on such evidence. I have considered the facts, the law and practice that courts are to bear in mind when confronted by accomplice evidence.

55. In **Benard Munungi Njau v Republic [1979]eKLR**, the Court of Appeal in a coherent, authoritative and plain manner laid down the law on accomplice evidence. The court stated;

“Section 141 of the Evidence Act lays down that an accomplice shall be a competent witness against an accused person; and conviction shall not be illegal merely because it proceeds upon the uncorroborated

evidence of an accomplice. It was said by Scott J in Emperor v Maganlal, 14 Bom 119 that though there may be cases of exceptional character in which an accomplice’s evidence alone convinces the judge of the fact required to be proved the uncorroborated evidence of such a witness should generally be held to be untrustworthy for three reasons, namely: (1) because the accomplice is likely to swear falsely in order

to shift the guilt from himself; (2) because as a participator in the crime he is an immoral person who is likely to disregard the sanctity of an oath; and (3) because he gives his evidence under promise of pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution.

In Canisio s/o Walwa v The Republic (1956) 23 EACA 453, after reviewing a number of decisions and dicta in years gone by, the judges concluded their judgment with a compendious statement of what they

regarded as the true rule of law as to convicting on the uncorroborated evidence of an accomplice and the proper manner of applying that rule to any given case. On page 458 the said passage reads as follows: “Generally speaking it is a practice, founded upon prudence when applying the rule as to the onus of proof, not to convict without any evidence corroborating that of accomplices. But there are exceptional cases in which a departure from that general practice is justified. The criterion as to whether such an exceptional case has arisen is the credibility of the accomplice or accomplices combined with the weight to be attributed to the facts to which they testify. The principal factors to be considered when assessing their credibility are not only their demeanor and quality as witnesses but also their relation to the offence charged and the parts which they played, in connection therewith, that is to say, the degree of their criminal complicity in law and in fact. A departure from the general rule of practice is only justifiable where, on applying that criterion in that manner, it clearly appears that the accomplice evidence is so exceptionally cogent as to satisfy the Court beyond reasonable doubt, and where accordingly the judge or judges of fact, while fully conscious of the general inherent danger of any such departure, is or are convinced that in the particular instance concerned the danger has disappeared.”

56. In **Haroon Haji Abdulla v State of Maharashtra**, the court laid down that an accomplice is a competent witness and his evidence could be accepted and if the court feels there is enough evidence to support the testimony of the accomplice then a conviction can be based on such testimony.

57. Thus, the court must take caution not to base a conviction on the uncorroborated evidence of an accomplice for reasons that; firstly, the accomplice is likely to swear falsely in order to shift the guilt from himself; secondly, a participator in the crime is an immoral person who is likely to disregard the sanctity of an oath; and thirdly he gives his evidence under promise of pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution. (See **Emperor v Maganlal, 14 Bom 119**). That is not to say that a conviction shall be illegal merely because it proceeds from the uncorroborated evidence of an accomplice. It is the duty of the court to weigh the evidence and make a finding whether an exceptional case is made to warrant a departure from the general rule not to convict on the uncorroborated evidence of an accomplice. In doing so, care must be taken at all times not to shift the burden of proof to the accused.

58. I have reviewed the evidence of PW1. She was clear on what transpired on the material day upto the point when the accused attacked the deceased. Her evidence on the relationship with the accused which the deceased did not approve of is corroborated by PW2, PW3 and PW4.

59. On his part, the accused's evidence is that he had no relationship with PW1 and that at the material time he was not at the scene. He was home.

60. In raising an alibi defence, the accused did not assume any responsibility of proving his defence. It was held in the case of *Mwamusi & another v Republic 226 of 2002 [2003] eKLR* that an accused person who put forward an alibi did not in law, assume any burden of proving his defence. It was sufficient if an *alibi* introduced into the mind of a court a doubt that was not unreasonable.

61. Ultimately, the duty to prove the case lies squarely on the shoulders of the prosecution based on the evidence adduced, the strength or lack of which would displace or fail to displace the alibi raised by the defence.

62. Having considered the evidence as a whole including the defence and the submissions made and upon directing myself on the law and practice, it is clear in my mind that PW 1 spoke the truth when she testified that it is the accused who attacked the deceased leading to his (deceased's) death. She spoke the truth when she confirmed a relationship with the accused which was disapproved of by the father, the deceased. I believe her evidence. The existence of this relationship is corroborated and confirmed by PW2, PW3 and PW4. There is evidence from PW3 that the deceased had confided in him that the accused was disturbing him over his (accused's) relationship with Lydia (PW 1).

63. On the material before court, it is clear that PW1 participated in the unfortunate incident leading to the death of her father. She was later pricked by her conscience to reveal the truth. There is nothing to show that she stood to gain anything from framing the accused and neither is there any iota of evidence that she had a motive to hurt the accused by framing him with the offence.

64. To the extent of her participation in the commission of the crime, she was an accomplice and her evidence must be treated with caution.

65. I am, however, satisfied that this is a case that merits a departure from the general rule of practice as am satisfied that the accomplice evidence by PW1 is so exceptionally cogent, devoid of malice against the accused and based on no gain on the part of the accomplice as to satisfy me that the accused is the person who hit the deceased on the back of his head leading to his death.

66. I need to make a mention and consider the fact of a blood stained T-shirt that belonged to Dominic Orina (PW4) who was initially arrested as a suspect. I have applied my mind to the evidence in that regard. There is no doubt aroused in my mind by the fact of his bloody T-shirt. This fact was well explained. The son found the father immobile on the ground and embraced him as he wailed. His T-shirt became bloody from the blood of the deceased.

67. As regards the question of the existence of malice aforethought, as stated above, the accused had expressed his displeasure with the deceased whom he had asserted "was disturbing him and threatening him" over the relationship with PW1. The existence of the animosity is confirmed by PW2, PW3 and PW4. In light of the evidence on record, the accused's assertion that he had never had disagreements with the deceased and that he was not in a relationship with PW1 is hollow and unsustainable when juxtaposed with the evidence on record.

68. Am satisfied that the ingredients of the offence of murder have been proved beyond reasonable doubt against the accused. I find the accused guilty as charged and convict him for the offence of murder contrary to **Section 203** of the **Penal Code**.

Dated, Signed and delivered at Kisii this 23rd day of September, 2021.

A.K NDUNG'U

JUDGE