



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA.**

**CRIMINAL CASE NO. 35 OF 2018**

**REPUBLIC.....DPP**

**VERSUS**

**WYCLIFFE OPURU OYAKAPEL.....ACCUSED**

**J U D G M E N T**

The case against the accused has its own history. He was charged in Busia Criminal No. 16 of 2013 with this offence of murder contrary to section 204 of the Penal Code. The particulars were that on the 5<sup>th</sup> day of September, 2013 at Kakemer East in Kakemer sub-location in Chamasir location of Teso North District within Busia County murdered **RUTH IMACHUDANG IMO.**

After full trial he was convicted and sentenced to suffer death by Tuiyot J on 18.5.2016. Dissatisfied with the conviction and sentence he appealed to the Court of Appeal in Kisumu C.A CRA 18/2016. His appeal against conviction and sentence was dismissed on 20.7.2017.

The accused then filed Busia Criminal petition NO. 7 of 2017. By judgment dated 28.5.2018. Kiarie Waweru Kiarie J, ordered;

***“ I have perused the affidavit in support of the petition and I am satisfied the petition has merit. I therefore quash the conviction and set aside the sentence. The petitioner to be taken to court for re-trial.***

In compliance with this order, the accused was charged before High Court Busia in the Busia HCCR 15/2018 and the file transferred to this court by order dated 21.11.2018 by Kiarie J, and given Bungoma H.C.C.R 35/2018.

The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 5<sup>th</sup> day of September, 2013 at Kakemer east village in Kakemer Sub location in Chamasir location of Teso North District within Busia County murdered **RUTH IMACHUDANG’IMO.**

The case for the prosecution is that the deceased was an aunt to the accused. On 5.9.2013 PW 1 David Imo Oyakapel who is cousin to the accused and step-son of the deceased was at a funeral of his uncle. Accused also attended the funeral. At 2 pm he left and was joined by accused. He asked to borrow a battery from accused. They went to accused home where he picked the battery and went with it. At 6 pm he received a telephone call from Jeremiah alias Jairo who informed him that the deceased had been assaulted by accused and Jeremiah was taking her to Omoding Health Centre. He went to the Health Centre where he found the deceased had died. On being cross-examined by Onkangi Counsel for the accused, he testified that he was not present when accused was assaulting the deceased.

PW 2 **RICHARD IMO MASAI** the husband of the deceased was on 5/9/2013 at the funeral of one **SILVESTER ETYANG.** After the funeral he went to the home of Moses. That while there he received a telephone call from his other wife Miriam who informed him that accused had killed the deceased. He left and on the road he found the deceased lying down. He went to Kakemer AP camp and reported the matter. When he came back he found Jeremiah had taken her to Moding Health Centre. He went to the hospital in company of police officers from Moding police station where he found the deceased had died. On being cross-examined by Onkangi for accused, he stated that on arrival at the scene he found Miriam, Margaret, Okombo and his wife and that it is Jeremiah who took deceased to hospital on a motor cycle. He confirmed he was not present when accused killed the deceased.

**PW 3 MIRIAM IMO TATA** the co-wife of the deceased was at her home on 5.9.2013 at 6.00 pm when accused went to her home. She came out and welcomed him. He asked her where her husband and deceased was. She told him she did not know where both of them were. He then left. After about 20 minutes, her other co-wife Margaret came and informed her accused was assaulting the deceased on the road. She ran there and found accused walking away. She saw deceased who asked her to hold her as she (deceased) was dying. Deceased vomited a green substance and died. The witness called the husband (PW 2) who came and found deceased already dead. He reported to police. The deceased was taken to hospital where she was confirmed to be dead. On being cross examined she testified she went to the

scene and found Margaret (who is now deceased). She stated she was not present when accused started assaulting the deceased.

PW 4 **MARGARET AMIJAR IMO** the other co-wife of the deceased was at her home on 5/9/2013. At 6 pm she heard a person crying on the road. She ran there. She saw the accused holding the deceased and fell her down. The accused had held the deceased's head and was turning it round. He then kicked her on the chest, lower abdomen and then stood on her. She pleaded with the accused to leave the deceased. Accused then threatened her with a pistol. She ran to call Miriam and they ran back together to the scene. She then saw accused hit the deceased and she left. She heard the deceased crying "raise me up I am dying". She vomited. People came and took her to hospital where she was pronounced dead.

On being cross-examined by Mr. Onkangi for the accused, she stated that when she saw what was happening she raised an alarm and people came. These included Okambo and his wife, Inyakasi and the late Margaret also came. She stated that accused used his feet to hit and step on deceased. She confirmed that it was at 6.30 pm going to 7 pm and she saw accused well. She denied that accused had gone to Nairobi and stated he was arrested by police. She denied any knowledge of lost sheep.

PW 6 **DR. DAVID WANKINA** produced a post-mortem report performed by **DR. CYNTHIA CHEMOGESI** who performed the Post-mortem on body of deceased. Dr. Chemoges findings were;

1. External finding.

- There was collection of blood under the skin on the thighs and mammary region.

#### **INTERNAL FINDINGS.**

- Blood within the chest cavity.

- Fracture on left rib – 8 – 12.

- Blood within the abdomen cavity with ruptured spleen.

- Fracture of vertebrae C2 and C3.

As a result of the examination she formed opinion of that cause of death was due to bleeding as a result of trauma using a blunt object.

The accused upon being placed on his defence gave sworn evidence. He testified that on 5.9.2013 he attended the funeral and left at 4 pm together with David Onyakapel (PW 1). He went with David to his home where he gave him a battery and escorted him to the road. While on the road, the deceased met and greeted them. David then asked her why she was walking and yet her husband was unwell. The deceased then told David who was her step son not to be following her. A quarrel ensued between deceased and David and David hit the deceased with a fist and she slipped and fell down. She then started to expose her nudity to curse David. The accused then restrained David from further assaulting the deceased. Many people came including Silas who advised accused to go to his house. On being cross examined by M/S. Nyakaibia for state, he denied that his evidence is an after thought."

Accused called DW 2 Silas Stephen Masai who testified that on 5/9/2013 he was from a funeral when he found David (PW 2) and deceased fighting. Accused was also present trying to persuade David to set the deceased free. He then saw the deceased fall down. He urged the accused to leave. He agreed and left. He then saw David running away. He went away. After 2 days he heard that accused had been arrested for assaulting the deceased. On being cross-examined by M/S. Nyakibia for state, he stated he was not present when the quarrel started and that he did not see accused assault the deceased.

**DW 3 JOSEPHINE ASERE OYOKAPEL** was on her way at 6.00 pm when she saw David running away. After walking about 20 metres she saw deceased lying down crying. She spoke to deceased who told her it was David who had assaulted her. She did not find the accused at the scene. On being cross-examined she stated that on arrival at the scene she found deceased had already been assaulted.

Mr. Ocharo for the accused filed written submissions that the death of the deceased was proved by the prosecution on the evidence of the doctor who performed the post-mortem.

On whether it is accused who committed the unlawful act which caused the death of deceased, counsel submitted that from the evidence adduced there are two possible scenarios as to how the deceased lost her life.

a) One scenario presented by PW 4 that she witnessed the accused assaulting the deceased and

b) The other scenario that was presented by the accused and his witnesses that the deceased was assaulted by PW 1 whilst the accused trying to convince him from hurting the deceased.

Counsel then submitted that on the issue of credibility and reliability of the prosecution witnesses in particular. PW 1 and PW 4. In **HMA (2011) KCJAC SCL 927 Lord Jenctons v Clarke** went on to say as follows on credibility and reliability:

***"It is important to have in mind that while questions of credibility and reliability are said often to shade into each other, they are distinct concepts. A witness may come across as entirely credible but, on reflection, be held to be unreliable. A person***

***who is credible is one who is believed. A person who is reliable is one upon whom trust and confidence can be placed on credibility may be judged on the evidence, whereas reliability may be only capable of being addressed having regard to the various traced record.***

Counsel submitted that PW4 is PW 1's mother. The accused and the witnesses pointed an accusing finger towards PW 1 for causing the death of the deceased.

Counsel submitted further that it is peculiar that the only prosecution witness who alleges to have seen the ordeal on how the deceased lost her life was the deceased's co-wife who has impending conflict with the accused person over his non-payment to her over two sheep and who ordinarily would protect her child. Counsel submitted that both PW 1 and PW 4 were neither a credible nor reliable witnesses that the court should find as such.

On whether the accused had malice afterthought counsel submitted that the prosecution did not prove that the accused person did any acts or omission that led to the death of the deceased. Further, he submitted that all of the prosecution witnesses gave evidence that the accused had no reason to kill the deceased herein. In the absence of ill motive proven he submitted that the court should find that the murder charge against the accused person cannot be sustained.

Finally counsel submitted that the investigating officer was not called to testify and that the failure to call the investigating officer was fatal to this prosecution case. He urged the court to find accused not guilty and acquit him of the offence.

The accused is charged with the offence of murder C/S 203 of the Penal Code. Section 203 provides.

***203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

The ingredients of the offence of murder from Section 203 of the Penal Code which the prosecution must prove are:-

1. The fact and cause of death of the deceased.
2. The unlawful act or omission that caused the death.
3. That it is accused who occasioned the unlawful act or omission.
4. That there was existence of malice afterthought on the part of the accused.

All those ingredients of the offence must be proved by the prosecution and the standard of proof is that of beyond reasonable doubt. The burden of proof is and always remains on the prosecution.

On the fact and cause of death, PW 6 DR. David Wakina produced a post mortem report prepared by Dr. Cynthia Chemonges who performed the post mortem. The report showed that the deceased had fractures on the ribs, fracture s spinal column ruptured spleen all caused by severe blunt force trauma, which caused the death. She issued death certificate NO.523044 as per the post mortem Exhibit 1. This witness therefore confirmed not only the fact of death but also confirmed the unlawful act that caused the death was injury inflicted by blunt force trauma on the deceased.

Were the injuries the deceased died from inflicted by the accused? From the evidence adduced by both the prosecution and doctor there are facts which are not disputed.

- a) That the deceased died from injuries sustained while on the road is not disputed. Indeed even the accused in his defence admits this.
- b) It is not disputed that the accused was at the scene where the deceased was assaulted. The accused in his defence admits to have met the deceased on the road while escorting David from his home as the act occurred during day time.

The issue is, who inflicted the injuries on deceased?

The positive identification of an accused is an essential element of any criminal offence. It is a fundamental part of the criminal process. This is so for two reasons.

- a) That guilt is attached to the person who committed the offence and
- b) Punishment is meted out by the court to the offender and the principles of sentencing are targeted at the offender.

In every criminal prosecution certainty is required in establishing the identity of the accused as the perpetrator of the crime. The fact to determine the certainty of identification can be proved by recognition by visual, voice, distinguishing marks, finger prints, DNA or any other physical factor that set the individual apart from the rest of humanity.

In this case the prosecution called 5 witnesses. PW 1 David Imo testified how he left with accused from the funeral and together went to his home where he borrowed a battery from accused. At 6. Pm he received information from Jairo that accused was assaulting

deceased who was his step mother. He went there and found deceased had been taken to hospital. He went to the hospital and found her already dead. PW 2 Richard Imo the husband of deceased was informed that accused had killed deceased. He went to the scene and found deceased lying down. She was taken to hospital while he went to report to the police and she was pronounced dead on arrival at the Omoding Health Centre. He did not witness the assault. PW 3 Miriam Imo Tata the co-wife of the deceased was at her house when accused came inquiring the whereabouts of deceased and Imo the husband. She was later called by her co-wife Margaret who informed her accused was assaulting the deceased. She went there and saw accused walking away from the scene. She called the husband PW 2 and informed him. She did not witness when accused was assaulting the deceased.

PW 4 Margaret Amijor Imo the co-wife of the deceased in explaining what happened stated in her evidence.

***Remember on 5.9.2013 I was in my house at 6 pm. I heard a person crying on the road. I went and found accused holding the deceased. He fell her down. He then held the deceased head on the thighs and was turning it around. He then started kicking her on chest, lower abdomen and stepping on her. I told him to leave the deceased. Accused told me he must finish her. He then threatened me with a pistol. I then ran to Miriam and asked her if our husband was at home she said he was not there. I called her and we ran together to the scene. I saw accused then hitting the deceased and then left. Deceased then said 'rise me up I am dying'. She then vomited foam from the mouth. People came. A boda boda was called and she was taken to hospital. I did not know the reason for assault.***

***The accused calls me aunt. His father and my husband are brothers. I am now 74 years old. I raised an alarm and my in-law Okambo and his wife and child called Masai came. The late Margaret also came. Inyakasi also came. Kakemar Secondary school is near. Thadeus had left.***

The accused in his defence called 2 witnesses. DW 2 Silas Stephen Masai testified that he was on the way when he met David (PW 1) and Ruth the deceased struggling. The accused was also present trying to convince David to leave the deceased, and that the deceased fell down. He urged the accused to leave the scene and he left. He confirmed in cross examination that he was not present when the quarrel started. DW 2 Josphat Asere Oyokipal testified that she was from the river when she saw David (PW 1) running away. After walking for about 200 metres she found the deceased lying down. The deceased was saying it is David who had assaulted her. She confirmed she did not find accused present nor did she see who assaulted her.

The accused in his evidence explaining what happened stated.

***I had attended a funeral and after the funeral at 4 pm I went home. I was with David Oyakapel. He had borrowed a battery as he had visitors. He came to my home. We stayed for one hour taking tea. I gave him the battery and escorted him to the road. As we were walking Ruth Kimore found us on the road. We greeted her. David asked her why she was wailing and yet her husband was unwell. David was step-son of deceased. She told David why he was following her. A quarrel started between David and the deceased. David hit the deceased with a fist and she slipped. She started removing her clothes cursing David and exposing her nudity. I restrained David from continuing beating the deceased. Many people came. Among them was Silas Masai. He found when David wanted to beat the deceased. Silas advised me to go back to the house. I went to my house leaving David and other old men.***

***I had no grudge with deceased. I know PW 4 Miriam Imo. I heard what she said in court. It is not true. She wanted to absolve David from being charged. I left David at the scene. I did not cause the death of deceased.***

The evidence of PW 4 Margaret is that she said she saw the accused assaulting the deceased on the road, and on trying to intervene the accused threatened her with a pistol. She ran to call her co-wife that it is when she raised an alarm that other witnesses including PW 1 David came. Her evidence was therefore that she was at the scene and saw clearly what happened. She confirmed that she knows accused well and that accused father is a brother to her husband and is therefore an aunt to the accused. She also confirmed that the incident occurred at 6 pm and was able to not only see the accused well but that the accused threatened her with a pistol.

The accused on his part while admitting to have been present, states that the injuries on deceased were inflicted by one David and not him. His witness DW 2 Silas testified that he saw David struggling with the deceased and that the accused was only separating them when he saw the deceased fall down. His evidence is that though the accused was present, he did not assault the deceased.

The main evidence on what happened that material day is that of PW4 Margaret Amijor Imo which has been reproduced above. Her evidence is detailed on every step of the proceedings on the road between the accused and the deceased. She was present, know both accused and deceased and the incident occurred during daytime.

In evaluating the believability of any witness and the weights you will give the testimony of any witness you will consider the demeanor of the witness while testifying, the frankness or lack of frankness of the witness, the intelligence of the witness, any interest the witness may have in the outcome of the case.

This witness who is 74 years old was frank, candid and I found her to be a credible witness. Her evidence that it is accused who inflicted the injuries was truthful and unshaken even under cross-examination. I am therefore satisfied that from the evidence it is accused and not David who inflicted the injuries.

The other ingredient of the offence of murder which the prosecution must prove is that accused had the requisite malice aforethought. Section 206 defines malice aforethought as:

***Section 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –***

*(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit a felony;*

*(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

PW6 DR. David Wakini testified that from the post mortem examination the deceased sustained the following injuries:

**EXTERNAL FINDINGS.**

- There was collection of blood under the skin on the thighs and mammary region.

**INTERNAL FINDINGS.**

- Blood within the chest cavity.
- Fracture on left rib – 8 – 12.
- Blood within the abdomen cavity with ruptured spleen.
- Fracture of vertebrae C2 and C3.

These are injuries caused by blunt force trauma. There is evidence that the injuries were not sustained from one single but multiple blows and blunt force trauma inflicted on the deceased. The amount of force, viciousness and part of the body targeted by deceased were meant to cause grievous harm and or death as it did in this case. I therefore find from the evidence the prosecution has established the existence of malice aforethought on the part of the accused.

I therefore find that the prosecution in this case has established the fact and cause of death of deceased, that the unlawful act causing death was injury by blunt force trauma, that it is accused who did the unlawful act and that he had the requisite mens rea to cause death. I am therefore satisfied that the prosecution has proved the charge of murder against accused beyond reasonable doubt.

I therefore find accused Wyclife OPuru Oyakapei guilty of the offence of murder contrary to Section 203 as read with Section. 204 of the Penal Code and convict him accordingly.

**DATED AT BUNGOMA THIS 18TH DAY OF NOVEMBER, 2021.**

**S.N RIECHI**

**JUDGE**