



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL CASE NO. 17 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

1. EUNICE ACHIENG OTIENO

2. JULIUS OWITI OTAL.....ACCUSED

JUDGMENT

1. The accused persons herein are a mother and a son respectively. They were jointly charged with the murder of a one **Erick Ochieng Patkea** (hereinafter referred to as '**the deceased**'). The accused persons were charged with others not before Court for the murder of the deceased on 10/08/2017 at Ngege village within Migori County.
2. The accused persons denied committing the offence and the case was set for hearing.
3. Five witnesses testified in support of the information facing the accused persons. **PW1** was a cousin to the deceased. He was **Reagan Ouma Makuri. Nick Otieno** testified as **PW2**. He was a brother to the deceased. Another brother to the deceased one **Henry Otieno Orinda** testified as **PW3**. **Dr. Sylvester Ochieng Olang** who conducted the post mortem examination on the body of the deceased testified as **PW4** and **No. 87935 Cpl. Luke Rotich** attached at the Migori CCIO Offices was the investigating officer who testified as **PW5**.
4. At the close of the prosecution's case the accused persons were placed on their defences. Both denied taking part in the death of the deceased. They gave sworn testimonies without calling any witnesses.
5. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.
6. The prosecution's case was fairly straight forward. In the night of 10/08/2017 the deceased was arrested, assaulted and tied on allegations that he was caught breaking-in and stealing from the first accused person's shop. The shop was at Ngege Trading Centre alongside many other shops. **PW1, PW2 and PW3** were variously called and informed that the deceased had been arrested and assaulted at the centre. They proceeded to the scene where they found the deceased tied and seriously beaten. There were many people at the scene including the accused persons. The first accused person's shop was also broken into and several items stolen.
7. **PW1, PW2 and PW3** then took the deceased home. They put him in his house and went to sleep. In the morning, they found the deceased dead. The Area Assitant Chief was informed who in turn informed the police.
8. **PW5** was tasked to investigate the case. He organized for the scene visit in the company of his colleagues. When **PW5** visited the scene he interrogated several people and had both the body of the deceased and the scene photographed. The police then retrieved the body and took it to Migori County Referral Hospital Mortuary for preservation and further police action.
9. **PW5** recorded witness statements. He also organized for a post mortem examination of the body of the deceased on 16/08/2017. **PW4** conducted it. **PW4** found 3 deep cut wounds on the body. One of the wounds was on the chin and the other two wounds on the thighs. There was multiple petechia under the scalp. **PW4** also noted multiple clots on opening the skull. **PW4** formed the opinion that the cause of death was epidural haematoma due to head injury from blunt trauma. **PW4** filled in a Post Mortem Report and produced it as an exhibit.
10. In the course of the investigations **PW5** was informed that the accused persons were among the ones who had assaulted the deceased when the deceased was arrested breaking-into the shop of the first accused person. On 14/08/2017 members of public arrested the accused persons and led them to Migori Police Station. They were re-arrested and placed in police cells. **PW5** escorted the accused persons to Migori County Referral Hospital for mental assessment. They were mentally examined and found to be fit to stand trial. **PW5** produced the Mental

Assessment Reports as exhibits.

11. At the close of the prosecution's case, the accused persons were placed on their defences. They both opted to give sworn testimonies. Each denied committing the offence.

12. At the close of the defence cases Counsel for the accused persons **Mr. Mwita Kerario**, filed written submissions. The prosecution relied on the record.

13. It is on the basis of the foregoing evidence that this Court is called upon to decide on whether the accused persons are guilty of the information of murder.

14. As the accused persons were charged with an information of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the 'mens rea' of the offence.

15. I will deal with the ingredients separately.

(i) Proof of the fact and the cause of death of the deceased:

16. There is no doubt that the deceased died. All the prosecution witnesses and the accused persons so confirmed. As to the cause of death, PW4 took this Court through the Post Mortem Form which he prepared after conducting the examination. He found that the cause of death was epidural haematoma due to head injury from blunt trauma. Since there is no contrary evidence to that end this Court concurs with that medical finding. The first ingredient was therefore sufficiently proved in favour of the prosecution.

(ii) Whether the death of the deceased was the direct consequence of any unlawful act or omission on the part of the accused persons:

17. The accused persons denied causing the death of the deceased. Whereas they admitted being at the scene where the deceased was, they nevertheless denied ever assaulting the deceased. Both stated that they reached the scene long after the deceased had already been beaten and tied up. The first accused person contended that since the deceased was her relative she pleaded with the close family members that the deceased be taken to hospital in vain. The members allegedly stated that they did not ask the deceased to engage in crime.

18. PW1, PW2 and PW3 were all at the scene. They arrived at different times. All of them found the deceased tied up, thoroughly beaten and bleeding from the head. They also saw the accused persons at the scene. There were many other people at the scene and many more kept on streaming in.

19. None of those who were at the scene witnessed any of the accused persons assault the deceased. In fact it appears that all the people found the deceased already beaten and tied up. The first accused person stated in her defence that she was called by a Doctor who operated a Chemist at the trading centre and told that her shop had been broken into. The first accused person then proceeded to her shop where he truly confirmed the break-in and also saw the deceased. The first accused person testified that she recorded her statement with the police and disclosed as much.

20. PW5 testified that in the course of the investigations he learnt that the accused persons were part of those who attacked and fatally wounded the deceased. The source of such information was not disclosed neither were witnesses called to testify as such. The best such information can be is hearsay.

21. I must find in this case, which I hereby do, that none of the witnesses called by the prosecution connected any of the accused persons with the death of the deceased. PW5 would have at least interrogated the Doctor who called and informed the first accused person of the break-in. That did not happen and there was no explanation to that end. (See **Bukenya & Others versus Uganda (1972) E.A. 594, Kingi versus Republic (1972) E.A. 280** and **Nguku versus Republic (1985) KLR 412**).

22. The foregoing analysis renders the second ingredient not proved. For avoidance of doubt, the prosecution failed to prove that the death of the deceased was caused by both or any of the accused persons herein.

23. Consequently, there is no need to deal with the third ingredient. The charge of murder against the accused persons is hence not proved and each of the accused persons is hereby found **NOT GUILTY** of the murder of **Erick Ochieng Patkea**. The accused persons are hereby set at liberty forthwith unless otherwise lawfully held.

24. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 20th day of February, 2020

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Mwita Counsel for the accused persons.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant