



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL (MURDER) CASE NO. 14 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MORRIS OKOTH OLOO.....ACCUSED

JUDGMENT

1. **Morris Okoth Oloo**, the Accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

On 7th April, 2016 at Kaloo Village, Seme Sub-Location within Kisumu County accused murdered one Martin Arego Nyawira

2. The prosecution summoned a total of 6 (six) witnesses in support of its case while the defence called only the Accused.

Prosecution Case

3. **PW 1 Karen Ahono Mulama**, the wife of **Martin Arego Nyawira** recalled that on 7.10.16 at about 5.00 pm, her husband left home to go buy cigarettes. That at about 8.00 pm, one Maurice Oyugi, a shopkeeper went to her home and informed her that her husband had been injured by one Okoth. That the shopkeeper took her and her children outside his house where her husband was lying dead. That police visited the scene and went to the house of accused where they allegedly recovered a blood stained trouser and a handkerchief. She later identified her deceased husband's body to a doctor who conducted a postmortem after which the body was released to her for burial.

4. **PW 2 Bernard Odhiambo Oyugi**, a shopkeeper recalled that on 7.4.16 at about 8.30 pm, accused who was armed with a panga and hammer went to his shop to buy cigarettes and he was shouting that he would kill someone. That before accused left, **Martin Arego Nyawira** also went to the shop to buy cigarettes and the two left the shop together. That at about 9.00 pm, he went outside the shop and found **Martin Arego Nyawira** who was injured lying on the ground. That on his way back to the shop, he met accused unarmed and he denied injuring the deceased. That the witness reported the matter to PW1 who visited the scene in company of her son. That police later visited the scene, arrested accused from his house and took removed the body of the deceased from the scene.

5. **PW 3 APC Evans Tuel**, testified that on the night of 7.4.16, he visited the scene where deceased was murdered and later went to accused's home where he recovered a blood stained trouser and panga which he handed over to officers of Kombewa Police Station.

6. **PW4 Dr. Corazone Deya**, of Jaramogi Oginga Odinga Teaching and Referral Hospital with the consent of the defence counsel produced a postmortem form filled by D. Mboya who conducted the autopsy on deceased's body was on 12.4.16. It shows that deceased had multiple cuts on the face and head, mangled left eyeball with orbital fractures, cut left upper lip with missing upper incisors, 6 cm cut wound on frontal scalp, left temporal cut wound with scalp depression, 8 cm occipital scalp wound, skull fracture, diffuse brain edema and cerebral injury. The postmortem form **PEXH.1** shows that deceased died of contusion brain injury secondary to blunt force trauma on the head.

7. **PW5 Richard Kimutai Kiilu**, a government analyst recalled that he received for examination the following exhibits:

- i. A - Panga
- ii. B – Accused's bloodstained trouser
- iii. C- Deceased's jacket
- iv. D- Buccal swabs from accused

After examination, he found that:

- i. A - Panga was not stained with human blood
- ii. B – Accused’s bloodstained trouser was stained with human blood
- iii. C- Deceased’s jacket was not stained with human blood
- iv. DNA analysis on B – Accused’s bloodstained trouser and D- Buccal swabs from accused belong to an unknown male but not the accused.

8. In cross-examination by counsel for accused, the witness confirmed that deceased’s samples were not submitted for analysis.

9. **PW6PC Joseph Emuron**, the Investigating Officer stated that after receiving the murder report on 7.4.16; he visited the scene and later went to accused’s house where he recovered a blood stained panga PEXH. 1 and a pair of trousers which was also blood stained. That he later collected deceased’s jacket and swabs from accused and together with the panga and trousers sent them to government chemist for analysis. He stated that after he completed investigations, he caused Accused to be charged.

The Defence Case

10. At the close of the Prosecution case this Court ruled that the Accused person had a case to answer and put her on her Defence. In his sworn Defence, Accused denied the offence. He stated that he is a carpenter and that the panga and hammer he went to the shop of PW2 with on 7.4.16 were his tools of trade. He denied meeting the deceased at PW2’s shop, threatening to kill anyone or killing the deceased. He stated that he was arrested on the same night and a trouser and a panga recovered from his house. He denied that the bloodstains were from the deceased.

ANALYSIS AND FINDINGS

11. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. Those ingredients are as follows:-

(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 afterthought which constitutes the ‘mens rea’ of the offence.

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

12. The death of the deceased has been proved by the **PW1, 2, 3 and 6** and by postmortem form that confirms the cause of death of the deceased. The Court therefore finds as a fact that indeed the deceased herein died.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused person

13. From the evidence on record, none of the prosecution witnesses saw accused murder the deceased.

14. That leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence taking into consideration the fact that the Accused being an interested party may have lied to save herself.

15. As we know from **Republic –vs- Taylor Weaver and Donovan (1928) 21Cr. App. R. 20**

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

16. **The circumstances that the prosecution lied on were the blood stained panga and a pair of trousers recovered from accused’s house. The DNA analysis on B – Accused’s bloodstained trouser and D- Buccal swabs from accused revealed that the blood thereon belonged to an unknown male but not the accused. The Government analyst PW5, confirmed that deceased’s samples were not submitted for analysis. From the analysis therefore, there was no nexus between the deceased and the bloodstains on the panga and trouser recovered from accused’s house.**

17. From the foregoing; I am satisfied that the Prosecution failed to prove beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which constitutes the ‘actus reus’ of the offence.

(c) Proof that the said unlawful act or omission was committed with malice afterthought

18. Having found no evidence to connect accused to the unlawful act that resulted in deceased's death, it would be futile to delve into the issue of malice aforethought.

Disposition

19. Consequently, I have come to the conclusion that the state has failed to prove its case beyond reasonable doubt. Accused is found **NOT GUILTY** of the offence of murder and he is accordingly acquitted. Accused shall be set at liberty unless otherwise lawfully held. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 17th DAY OF May, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Accused - Present

For Accused - Ms. Akol/Ms. Alinaitwe

For the State - Ms. Wafula