



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 13 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

NAHASHON OMONDI ALIAS CHIEF.....1ST ACCUSED

KENNETH BARASA LUCHU.....2ND ACCUSED

J U D G M E N T

1. The two accused persons herein were charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal code**. The particulars of the offence were that **on the 19th day of March 2008 at Nzoia sugar company Nuclear plantation Block 513 in Bungoma East District within Western Province jointly with others not before court murdered Joshua Nyatuke Orina**.
2. The accused persons denied the charge and the prosecution called a total of 13 witnesses to prove their case. Later the accused were placed in their defence and they tendered unsworn evidence and called one professional witness.
3. The prosecution as well as the 2nd accused did file written submissions which I have had the privilege of perusing the same.
4. Before gleaning the issues for determination it shall be worthwhile to summarise the evidence as presented by the various witnesses called by the parties.
5. **PW1 Jemima Nyamusi Ocharo**, the deceased's wife testified that her husband was the CDF Manager at Saboti Constituency. That on 19/3/2008, at around 12.00 noon, he called her to take water to him at the office. She went but she did not find him but instead met the office messenger one Protus Kaikai. She later went to Liuns where she had gone to make address and she met the deceased. She could not collect the dress as the same needed to be ironed and there was electricity black out. The deceased gave her kshs 300 to buy jackets for the children.
6. She later at 4.00 pm went to the deceased's office and saw a letter addressed to one Isaac Masengeli stapled but not put inside an envelope. The deceased phone rung and he spoke to one Isaac and offered to give the letter to the messenger but the latter told him that he should take the letter to him as he was in court.
7. They left the office with the deceased. The deceased left her at Suam Supermarket and went to deliver the letter to Masengeli. She however waited for him outside the supermarket but he did not turn up. She called both of his phones but they were unanswered and later scotched off.
8. The following day she became suspicious and reported the matter at the D.O's office and explained to the D.O what had transpired. She also informed one Philip Simiyu the CDF Manager Kwanza Constituency who was a friend to the deceased. She reported the matter to the police .
9. They attempted to trace the deceased all the way to the mortuary but in vain. She stated further that on 21/3/2009 a man approached her at C.I. D. Office outside and inquired if she was the deceased's wife. She did not know the person but she later learned that it was the said Masengeli.
10. On 25/3/2008 she went and notified Equity Bank not to allow any withdrawals from the deceased Bank Account but discovered that all the money had been withdrawn.
11. She learned on 27/3/2009 that two people had been arrested in connection with deceased death and that they were the ones who had withdrawn the money from his account. The witness attended the postmortem exercise and identified the deceased's body.

12. **PW2 Philip Munyole Simiyu** testified that he was the CDF Manager of Kwanza Constituency and he knew the deceased. He testified that on 19/3/2008 the deceased went to his office with a letter from their Regional Auditor. Apart from other letters, there was a letter addressed to Isaac Masengeli concerning some unsurrendered imprest of Kshs 700,000/-.
13. He testified further that they had lunch with the deceased together with one Charles Orina who paid for it. On the way to the office they did spot Isaac Masengeli's vehicle and the deceased was surprised as he had told him that he would be away and that they were to meet later.
14. On their way to the District Accountant's office the deceased received a phone call from his wife and they parted ways. Later at 9.00 pm the deceased's wife called him inquiring about his whereabouts. He tried to call the deceased using his two phone lines but they had been switched off. The witness then informed his regional office concerning the disappearance of the deceased. He heard that the deceased body had been traced. He testified that he knew Masengeli very well as the deceased told him that he was demanding audit reports from him.
15. **PW3 Protus Kaikai Wamalwa** had been employed as a messenger with Saboti CDF Constituency. He said that PW1 came to the office that day and the deceased was present as well. He said that Masengeli called concerning a letter to be taken to him but the deceased at the instructions of Masengeli decided to take the letter instead of giving him.
16. He testified further that the deceased left the office at 4.45 pm with Masengeli's letter and at 5.00 pm he closed the office and accompanied the deceased wife all the way to Suam Supermarket.
17. On 20/3/2008 the following day, the deceased's wife came and inquired whether he had seen him. She told her that the deceased had not called and he accompanied her to the police station. They even went to the mortuaries but all in vain. On 27/3/2008 he heard that the deceased's body had been found and he went and confirmed that it was indeed him and was wearing the same clothes.
18. **PW4 Charles Maisi Orina** the brother to the deceased testified that he called the deceased on 19/3/2008 as he had a matter at Kitale High Court. He went and found him at Suam Supermarket with Philip Simiyu. They took lunch together and left.
19. On 20/3/2008 the deceased wife called him and told him concerning the disappearance of the deceased. They attempted to trace him at the mortuaries in vain. They went to the police where Masengeli came and inquired whether PW1 was the deceased wife. He then spoke to Protus Kaikai whom they learned later through him that he was Masengeli. He testified that he saw Masengeli driving his double cabin pickup with a cracked screen. He went to Equity Bank to check the deceased account and was told by the Manager that the money had been withdrawn. He could not however identify the people captured by the CCTV cameras. However Martin and Wekesa both Kenya Police Reservists identified them. They were later arrested and disclosed to them what had transpired and where the body was. He later identified the deceased body during postmortem.
20. **PW5 Kenya Police Reservist Martin Wafula** testified that on 26/3/2008 he received a phone call from one P.C. Sambina who wanted him and John Wekesa to aid in some investigations concerning a missing person. He was shown the photograph of 3 persons who were the 2 accused persons and Masengeli. The same were generated through CCTV at Equity Bank Kitale and Bungoma branches. He said that he knew both accused persons for over 5 years and 10 years respectively. He said that the 1st accused was a body builder while the 2nd accused used to repair T.V. ariels. He said that they acted for Masengeli as his bodyguards during political campaigns when he vied for Saboti Parliamentary seat. He then commenced investigations and arrested the 1st accused on the same day at London Hotel. They also arrested the 2nd accused at Bongo hotel after he was called by the 1st accused. They then explained to them how they had picked the deceased outside the law courts and driven him towards Webuye and later how he was killed.
21. He also testified that he was among the people who visited the scene where the deceased body was recovered and the 4 spent cartridges found. He said that the deceased's body was riddled with bullets.
22. **PW6 P.C. David Kipchumba** attached to CID Crime scene department at Kitale police station. He testified that he was requested to accompany other officer to the scene where they found the deceased's body dumped at a sugar plantation. He testified that he had known both accused persons for a period of 4-5 years. He said that the 1st accused used to be a police informer and a businessman. He did not know however the 2nd accused business. On the way they managed to give a chase to Masengeli's vehicle but unfortunately it was being driven by someone else. At the scene they recovered the deceased body which was in decomposition process. He said that it was the accused persons who led them to the scene. He took several sets of photographs (19 of them) which he produced as pieces of evidence.
23. **PW7 P.C. Evans Sambishe** was called by DCIO to assist P.C. Mwaura carry out the investigations of a missing person. He said that they tried to interrogate Masengeli after getting information from the deceased's wife, but it did not elicit much as he denied having seen the deceased. His vehicle however had a crack on the windscreen.
24. They went to Equity Bank where they were given images which enabled them to arrest the two accused persons. The two led them to where the deceased body was. He also testified concerning the confession by the accused persons where SSP Mwaliko recorded their confessions. He prepared the Memo for the cartridges for analysis.
25. **PW8 Senior Sergeant Benjamin Mwaliko** from the CID headquarters recorded the confessions by the accused in the presence of Sergeant Mwangi. He testified that he cautioned them that the statements would be used in court. The accused persons took him to the scene of the shooting. He prepared a transcript and a certificate which he duly signed.
26. **PW9 Dr. Paul Nyangweso** produced the postmortem report on behalf of Dr. Mwaura who opined after examination that the cause of death was penetrating injuries to the head, chest and abdomen secondary to gunshots.
27. **PW10 Samwel Maina Wanjohi** the branch Manager Equity Bank testified that he was the operations manager at Bungoma branch in

2008. He did produce the details in respect to the deceased account then. He also produced to the police the images of withdrawals undertaken at the banks ATM Machines as provided by the ICT department. They show that there were withdrawals of kshs 20,000/- on 19/3/2008, kshs 20,000/- and kshs 10,000/- on 20/3//2008 respectively. There was withdrawals at Kitale branch on 21/3/2008 of kshs 22,000/-.

28. **PW11 Sergeant Wekesa John** testified that he was a police reservist based at Kitale. He said that they were able to identify the images of the 2nd accused as captured at ATM machines. He equally identified the image of the 2nd accused who was his neighbour. Upon the arrest they led them to where the deceased's body was.

29. **PW12 Nicholas Karani** from Equity Bank and attached to fraud department produced the exhibits related to the deceased account at the said bank. He said that once a transaction is done at any ATM Machine the image is captured and transaction journal generated. The said journal are listed to the images. He produced the-images attached to each of the journals.

30. **PW13 CPL Joseph Mwaura** one of the investigating officers narrated how the whole incident was reported and how the investigations were carried out. He said that the two suspects were identified by the two police reservists when they saw the ATM images. The two accused confessed that Masengeli had killed the deceased and they took them to the scene at Nzoia Sugarcane plantation. He did also produced exhibits which included the vehicle belonging to Masengeli, with cracked windscreens, the cartridges, Masengeli's driving licence and ATM Card found in his car as well as the car key. He confirmed that Masengeli was a licenced gun holder and he produced the relevant letters from the Central Firearms Burea. He equally confirmed that he was present when the recordings of the confessions by the accused persons were undertaken.

31. On cross-examination he said that the vehicle was recovered coincidentally as they went to the scene. That SSP Mwaliko from the CID Headquarters carried out the recording of the video.

32. When put on his defence the 1st accused gave unsworn evidence and stated that on 19/3/2008 he had some work at Milimani estate where he had gone to fix T.V. Aerial for one Jama Noor and later in the afternoon a Mr Rugut. He later came to town and carried on his business the following day.

33. On 26/3/2008 he was called by one police officer called Kipchumba who told him that he wishes to see him at 2.00 pm at police station. On the way he was arrested by police officer and questioned at a garage within the police station concerning a strange person called Joshua. He said that some officers were beating him for unknown reasons. He said that some officers whom he knew were unhappy with those who were beating him. The following day he was handcuffed and taken towards Bungoma. On the way they saw Masengeli's vehicle, a person whom he knew. The body was found. He was locked in the cells for 3 days without food. Later he was questioned and he agreed to give evidence to incriminate Masengeli. He recorded his evidence in a video camera in the presence of armed police officer. They also went to the scene where they continued to record his evidence. He said that he declined to sign the statement despite being framed.

34. He said that he was arrested by Martin Wafula PW5 whom he had political differences. He said that he was in the same political party with the 2nd accused and he was also incriminated by PW5 and PW13.

35. **DW2** testified and in his unsworn evidence stated that he was a businessman operating a shop at Mitume with his wife. He said that on 19/3/2008 he went to Makuti resort where he is a general worker and later went home.

36. On 26/3/2008 he went to town to buy goods and was arrested at Bongo hotel and put in the cells at Kitale police station. He was asked concerning the death of the deceased and his whereabouts but he denied any knowledge. He however knew one Masengeli. He said that he met PW5 Martin Wafula whom he had differed with during campaigns over campaign posters. He beat him with metal bar and handcuffed him on both hands and legs.

37. PW13 Interrogated him and told him that one suspect had spoken. He was taken to spent the night at Moi's Bridge police station. On 27/3/2008 he was handcuffed and boarded a Nissan vehicle where he met the 1st accused.

38. On the way they found Masengeli's Vehicle and they arrested it and was driven by PW13 as they headed to Bungoma. They met the area chief who told them concerning the gunshots which he had heard some few days ago within the area. They recovered the body according to him after about a 5 hours search.

39. PW13 told them that it was Masengeli who was concerned with the deceased's death as his phone signals had been traced to the area and that theirs was just in Kitale. They were told to cooperate. He was promised to be released after 3 days if he recorded his statement voluntarily. He recorded his statement before Benjamin Mwaliko. He was assured that he was to be a witness.

40. **DW3 Raymond Kipkosgei Mutai** testified on behalf of the defence. He said that he was a technology expert, working with Raintake Engineering Limited. He referred to the ATM images produced by the prosecution and according to him the same could not pass the test. He said that they were of poor quality and they did not capture the essential elements of the image of the person alleged to be. He said that one could not tell who they were.

Analysis and Determination

41. Having summarised the evidence as presented before court and having perused the exhibits produced by the prosecution, there is no doubt that the cause of death as found by the postmortem results were associated with gun wounds.

42. there are 3 ingredients that must be established in this offence of Murder.

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

(ii) that the cause of death was the accused

(iii) And that the same was due to malice aforethought.

43. The central evidence herein is the confession by the accused persons made before SSP Mwaliko. I have gone through the transcript, which was very lengthy and in my view thorough in terms of the questions and consistency to follow through every detail.

44. The defence has argued that the same did not meet the threshold as envisaged under Section 25 and 25A of the Evidence Act Cap 80 Laws of Kenya. It is necessary to reproduce the two sections herein verbatim.

Section 25 states that ;

“ A confession comprises words or conduct, or a combination of words and conduct from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

“ 25 A (1) A confession or any admission of fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a Judge, a magistrate or before a police officer (other than the investigating officer) being an officer not below Inspector of Police and a third party of the persons choice.”

(2) The Attorney General shall in Consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

45. The Evidence (out of court confessions) Section 4 thereof has gone ahead to give directions as to how it should be conducted and the general rights of a suspect.

46. The unsworn evidence of both accused persons allude to the fact that indeed they recored their statements before SSP Benjamin Mwaliko. They stated that they were to be considered as witnesses since in any event the main suspect was one Isaac Masengeli.

47. The counsel for the 2nd accused has submitted that the same should have been subjected to a “trial within a trial” before being admitted. Whereas this could suffice, there is no evidence on record that there was any such objection. All that I can see was a situation where the defence counsel sought adjournment to study the video clips and by extension the transcripts.

48. The accused persons in their unsworn testimony suggested that the confession were obtained under duress something which Rule 4 of the aforesated rules prohibits. I do not respectfully, find any truth in that. Infact PW5 Martin Wafula, the police reservist who arrested the accused was not questioned over any violence he met against the accused. Neither was any police officer who testified including pw13, the investigating officer, questioned over any form of torture or violence.

49. Infact, reading the entire transcript in Kiswahili, it appears that the investigator was quick at every turn to inquire from the accused whether they knew that what they were stating would be used as evidence in court and in every case they answered affirmatively.

50. For example the 1st accused at some point stated that

“ Q. Lakini sasa vile mimi nakuuliza nataka unijibu kama ni ukweli wakati nimekuhataharisha umeelewa ni kusema nini. Wakati nakutahadharisha kwamba statement hii ni kitu inaweza kupelekwa kortini kama ushahidi, unaelewa tunakuambia nini?”

A ' -----'

Q. “Mr Omondi do you understand the meaning of that caution that this statement can be given as evidence in court ----- unaelewa.”

A. Nimelewa yanaweza, ni ushahidi”.

51. That is only a portion as captured on page 23 of the proceedings . Generally however I find that the investigators kept warning the suspects.

52. Did they fail to appreciate what was going on? I do not think so. The recordings seemed to have taken place in different scenes including the scene where the body was traced. The language used was Kiswahili and even where English was used, it appears very minimal. In my view the two understood the language and critical analysis of the questions and answers given appears to have been in a very relaxed atmosphere.

53. More importantly, the recording was not done in the absence of any witnesses. Even if the accused did not demand that it be done in the presence of any preferred persons of their choice, they spoke candidly and consistently concerning the incident. I have in fact compared the two confessions and save for minor discrepancies they all agree that they took the deceased from Kitale town, courtesy of one Isaac Masengeli. That on the way the deceased attempted to raise alarm and in the process knocked the vehicles windscreen.
54. The windscreen was shown to the court as well as the vehicle. They also agree that the deceased's two phones rung on the way and were taken by Masengeli. That they restrained the deceased and forcefully held him between themselves so that he could not escape.
55. They also agree that the deceased ATM Card and wallet was taken from him and he gave the PIN number to Masengeli. That at the scene it was Masengeli who left the car with the deceased and shortly thereafter shot him severally. Subsequently he walked into the car, drove for a short while and washed his blood stained hands. Thereafter they went to Bungoma where Masengeli got some money from deceased account and gave each Kshs 2000 and spent the night there.
56. In short their confession simply corroborated each other in every detail. In my view therefore the said confession was rightfully done and was admitted in court as piece of evidence appropriately.
57. Although, the accused persons seemed not to have pulled the trigger, as they allege, they nonetheless cannot escape liability or blame. This is for the simple reason that though they were not sure of what was going on between the deceased and Masengeli, they aided the latter achieved his objective. They pinned the deceased down while he was attempting to raise alarm as they got near the police road block. Had they not restrained him, the deceased would have perhaps alerted the police on what was going on.
58. Secondly and more importantly, they proceeded to withdraw money from the deceased account using the ATM Machines both in Bungoma and Kitale. Save for the recorded confession, the images produced by the Equity Bank Officers clearly corroborate this. It was argued that they were not very clear and not professionally reliable by DW3.
59. DW3 respectfully did not prove in my view to be a professional witness. He did not produce his professional certificates or credentials save to state that he was a technology expert. To simply criticize from the dock, professional evidence is not sufficient. Neither did he produce any comparatives. His evidence did not whitewash that of the prosecution.
60. Taking the totality of the bank statements produced by Equity Bank as well as the ATM images captured and more so the tallying of the dates and the amount produced, I find that the accused person indeed withdrew funds from the deceased account using the ATM card given to them by the accused. In any event they obtained the PIN by duress as they confessed in their evidence.
61. I hold that there was a common intention between the accused person and Isaac Masengeli to harm or murder the deceased. This element of common intention was captured as early as 1943 in *Rex Vs Tabula Yenko S/O Kivya and 3 others (1943) 10 E.A. CA 51* where the court stated that;
- “ To constitute a common intention to prosecute an unlawful purpose ----- it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault.”**
62. Clearly none of them took any pragmatic action to disassociate himself from the heinous act. Even after they parted ways with Masengeli, and if they were truly innocent, they should have reported the matter promptly to the police or any other relevant authority the same night or the same day. More importantly they should not have continued to withdraw money from the deceased account.
63. It is a pity that the said Isaac Masengeli is still at large for he would have told the court his version of events. Nonetheless the gun used appeared to have been his and this corroborate the accused confession.
64. Finally on their unsworn testimony, each of the accused raised a defence of alibi. The same came way after the prosecution had closed its case. Significantly, they did not accord the prosecution the opportunity of being cross examined. Had they given sworn evidence, some of the issues raised herein including the whole evidence of confession would perhaps have been interrogated.
65. Consequently, I find that despite the lengthy period (10 years) this case has taken to conclude, the prosecution proved its case beyond a shadow of doubt. I do not think there is any infraction regarding electronic evidence as argued by the defence. Even if they were any shortfalls, the entire spectra of evidence as presented in my view was seamless. I do not see any rights of the accused persons having been violated or at all.
66. The whole cause of death of the deceased must have been something to do with CDF funds within Saboti Constituency.
67. The accused are therefore found guilty for the murder of Joshua Nyatuke Orina under the provisions of Section 203 of the penal code.

Delivered, signed and dated at Kitale this 17th day of July 2018.

H.K. CHEMITEI

JUDGE

17/7/18

In the presence of:

Mr Kakoi for the State

Wanyama for Accused 1

Accused 1 and 2 – present

Kirong – Court Assistant

Judgment read in open court.