



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRC NO. 3 OF 2016

(CORAM: J.A. MAKAU – J.)

REPUBLIC PROSECUTION

VS

DANIEL OLUOCH OCHIENG..... ACCUSED

RULING

1. The accused **DANIEL OLUOCH OCHIENG** is facing a charge of murder contrary to **Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya**. The particulars of the charge are that on the **28th day of December 2015** at Ng'opu village, Tingare East Sub-location, North Uholo Location in Ugunja Sub-County within Siaya County murdered one **PETER OCHIENG ONYANGO**.

2. The facts of the Prosecution's case are that on 28th December 2015 at around 7.30pm, PW1 Fredrick Opondo Otieno while at his home with his wife Mary Apondi (PW2) with their five children, he heard the voice of Daniel Oluoch Ochieng as if he was crying, 10 metres from PW1's gate. On arrival, PW1 enquired from the accused why he was crying and the accused told him that there was someone who had killed his father using a *jembe*. PW1, PW2 and their children proceeded to the accused father's home, a distance of about 200 metres and on arrival, they found the body of the deceased lying on its stomach inside the house with the legs outside the door in a pool of blood oozing from the deceased's head. There was a tin lamp on the floor, 1 metre from the deceased. PW1 did not see anything at the scene. Police officers came to the scene. The police officers recovered a *jembe* from a pit latrine which was still being dug which was 12 feet deep. PW1 stated the *jembe* had blood stains and a whitish substance which PW1 stated appeared to be brain matter. The police collected the deceased's body and had it taken to Siaya Hospital Mortuary. The accused was arrested and taken to Sigomere Police Station.

3. The Prosecution called six (6) witnesses. PW1, Fredrick Opondo Otieno, testified that the accused came to his home crying and told him his father had sent him to go and buy paraffin and on his return, he found someone had killed his father using a *jembe*. PW1, PW2 and their children together with the accused proceeded to the deceased home and confirmed the deceased had been killed. PW2, Margaret Apondi, wife to PW1, stated she was at home with her husband PW1 and their seven (7) children when she heard screams from outside from the road. PW2 went to where her husband PW1 was and heard him ask Daniel Onyango, the accused, why he was screaming and he told him he had gone to buy paraffin and on returning home he found somebody had killed his father using a *jembe*. PW2 and PW1 then proceeded to the deceased home and confirmed the deceased was already dead. That PW2 screamed for help and when neighbours came she left for her home. PW2 stated the deceased was staying alone whereas the accused was staying at his grandmother's home at Wanyango, Tingare, but on that day the accused informed PW1 and PW2 of his father's death he was staying with his father, with whom he had stayed with for one month. PW2 stated he knew the accused very well.

4. During cross-examination, PW2 stated the accused had stayed with his father for 2 months. PW2 stated the accused told them he had been sent to buy paraffin, and when he returned he found his father murdered. PW2 stated brother to the accused; Victor Omondi Ochieng was also at the scene of murder. She stated he was beaten by the members of the public but she did not know why Victor Omondi Ochieng, was staying at his grandmother's home. She stated that the deceased was in good terms with the accused and not with Victor Omondi Ochieng. On re-examination, she stated at the scene of murder she did not see Victor Omondi Ochieng but she had seen him during daytime.

5. PW3, David Oyomna's evidence is that on 8th January 2016, he identified the body of the deceased for postmortem purposes to the doctor. PW4, Victor Omondi Ochieng, son to the deceased and brother to the accused told court that on 25th November 2015 after 7.00pm he received a report of death of his father and proceeded to his father's home and confirmed that was true, however, the members of public wanted to beat him, as they suspected him to be involved in his father's death. That the police at the scene arrested him and took him to Tingare Police Station, then transferred him to Sigomere Police Station together with the accused. He was subsequently released. PW4 stated he had not seen the accused before 25th December 2015 as he had gone to stay with the deceased for 2 weeks before the incident whereas PW4 was staying with his grandmother. PW4 stated the accused and his father were in good terms.

6. PW5, No. 63312 Cpl Elias Ndirangu, the Investigating Officer in this case testified that on 28th December 2015, he was working at Tingare Patrol Base, when at 8.19am he received a telephone call from a member of public informing him of a murder of someone at Ng'opu Area, he called PC Omuse and the OCS Sigomere Police Station and proceeded to the scene of crime, they found a crowd of people in the house and were led to where the deceased's body was lying. They found the door open and body lying on the floor with a tin lamp on. He noted the deceased had a deep cut on the left side of the head at the back with a pool of blood on the floor and bed. PW5 secured the scene and started looking for the murder weapon and witnesses. PW1 came and told him what the accused had told him when he went to PW1's house. That after he talked of the *jembe* they started searching for the *jembe* which PW1 stated he was told by the accused was used as the murder weapon. PW5 looked for the accused and found him amongst the crowd. On interrogation, he told PW5 that his father had sent him to buy paraffin in a nearby home about 100 metres away and on return he found his father murdered. PW5 enquired from him whether he found the murder weapon and he told him he did not find any. PW5 searched for the murder weapon. PW5 was told by members of public there was a toilet which was being dug and proceeded to the toilet and saw a *jembe* inside the pit latrine which the accused confirmed belonged to the deceased, leading to members of public becoming hostile towards the accused and threatening to beat him. PW5 then directed his fellow officers to take the accused to a safer place and he was taken to Tingare Police Base. OCS and DCIO from Ugenya, came to the scene and organised on how the *jembe* was to be removed from the pit latrine. On removal, PW5 testified it was noted it had blood stains on the sharp part. DCIO then took the deceased body and the *jembe* to Siaya while the accused was taken to Sigomere Police Station for further interrogation. PW2 told PW5, the accused stayed with the deceased for 2 weeks in the deceased's home in a single room. PW5 stated when he went there, PW4 Victor Omondi Ochieng was also found there and members of public wanted to beat him and he rescued him by taking him to Tingare Police Base. PW5 testified that after recording witnesses statements he decided to charge the accused with the offence. He identified him (pointing at him at the dock) as the person he arrested. He produced the *jembe* MFI-P1 as an exhibit P1 stating on it, he sees blood stains and white material, stating he did not bother to find out whether it was human blood or brain.

7. During cross-examination, PW5 testified the *jembe* had fresh blood. He stated he did not take the exhibit for forensic tests to confirm if the blood is of a human being or not. He stated he was not told the accused was the one who used the *jembe* to kill his father but he had been told by PW1 the accused had gone to his home crying and saying his father had been killed by someone using a *jembe*. PW5 stated that he was led to the pit latrine by PW1 and other members of public. That the accused told him he did not find the weapon used to kill his father. PW5 stated he arrested the accused simply because the *jembe* belonged to his father.

8. PW6, Doctor Jeremy Oduor Chek, produced the postmortem report carried out by Dr. Philip Okoth on

8th January 2016 at Siaya Referral County Hospital Mortuary on the body of Peter Ochieng Onyango. The report exhibit P2 revealed a deep laceration 10cm in length on the left temporo-parietal area of the head (posteriorly) with depressed skull fracture; with injury to the brain tissue over the posterior aspect of the temporal and parietal areas. That there was mixed crush and laceration injury to the brain tissue. The doctor opined the cause of death was due to severe head injury with depressed skull fracture resulting from a blow to the head. PW6 stated the probable type of weapon was a blunt object such as a butt or a rungu.

9. During cross-examination, PW6 stated the probable weapon that might have been used is a blunt weapon or a rungu as according to the injuries as are on the deceased could only have been caused by a blunt object and not by a sharp object.

10. At the close of the Prosecution's case, the Advocate for the deceased **Mr. Ingosi, Learned Advocate**, submitted that the charge of murder against the accused person herein had not been proved and urged the court to find the accused has no case to answer and acquit him for lack of evidence.

11. **Section 203 of the Penal Code** defines what murder is in the following terms: -

“203. Any person who of a malice aforethought causes death of another person by unlawful act or omission is guilty of murder.”

12. The essential ingredients of an offence of murder are: -

(a) The death and cause of death the deceased.

(b) That the accused caused the death through an unlawful act or omission.

(c) That the accused possessed an intention to cause harm/kill/ or malice aforethought.

13. **Section 206 of the Penal Code** defines malice aforethought in the following forms: -

“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 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, by a wish that it may not be cause;

c) an intent to commit a felony;

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

14. **Whether Prosecution proved death and the cause of death?** In the instant case, there is no dispute as regard the death of the deceased and the cause of the death. PW1 identified the body to the doctor for postmortem. PW2, PW3, PW4 and PW5 confirmed the death of the deceased occurred. The doctor in his postmortem report exhibit P2 proved that the cause of death to be due to severe head injury with depressed skull fracture resulting from a blow to the head. I therefore find the death and its cause was proved.

15. **The second issue that the Prosecution is required to prove is who caused the death of the deceased?** In this case, there is no direct evidence as to who caused the death of the deceased as there

was no eye witness.

16. I note the only evidence against the accused is the evidence of PW1 and PW2 who claimed the accused told them he had been sent by the deceased and on return from buying paraffin he found his father murdered with a *jembe*. I want to point out what PW1 and PW2 stated that they were told by the accused cannot be taken as a confession by virtue of **Section 25A(1) of the Evidence Act** which provides as follows: -

“25A. (1) A confession or any admission of a 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 the rank of Chief Inspector of Police, and a third party of the person’s choice.”

PW5, the Investigating Officer told this court that the accused told him that he did not know what was used to kill his father and he didn’t find any weapon. The case against the accused is therefore based on circumstantial evidence and on suspicion.

17. In the case of **James Mwangi V Republic (1983) KLR 522**, the Court of Appeal set out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of the guilt of an accused person. In that case it was held as follows: -

“In a case depending exclusively in circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.....”

18. In the instant case, both PW1 and PW2 testified the accused came to their home crying stating that he left his father to go and buy paraffin and on return, he found his father murdered with a *jembe*. They went and confirmed that indeed the deceased was killed. There is evidence also from PW1, PW2 and PW5 that PW4 was also found at the scene of crime. The accused’s statement that he had gone to buy paraffin and on return found his father murdered has not been challenged or controverted or dislodged by the Prosecution witness as it is possible what the accused told PW1 and PW2 as regarding finding his father murdered with a *jembe* was true but the accused did not state to any one he is the one who killed his father. An accused person in a criminal case is not supposed to prove his innocence and the burden of proving a criminal case against an accused person do not shift to the accused at any one time in a criminal case. It is upon the Prosecution to prove their case beyond any reasonable doubt. In my considered view, the chain of events from the time the accused went to buy paraffin after he allegedly was sent by his father to the time he returned and found his father dead were not broken. The concatenation of events and the short interval between going shopping and returning home are circumstantial evidence, that I have taken into account before coming to my own conclusion as to whether the accused was the one who attacked and killed his father. On record, I find that there are other co-existing circumstances that would weaken or destroy the inference that the accused was the only person who could have attacked the deceased. The evidence shows that the accused left his father at home and went to buy paraffin. He did not leave any other person there. No single witness has rebutted his evidence or placed him at the scene of crime throughout the incident. PW5 arrested the accused when he told him the *jembe* belonged to his father. I find that the inculpatory facts are not incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. I am also satisfied that there are other coexisting circumstances which would have weakened or destroyed the inference. It is possible someone else unknown to the accused immediately he left his father alone committed the offence. The *jembe* was produced as exhibit P1. PW1 and PW5 stated it had fresh blood stains and white matter, which PW5 assumed was human blood and assumed was the blood of the deceased. The blood and the grey matter was not subjected to any forensic tests and failure to do so weakened the Prosecution’s case. PW6 in his evidence stated the injuries sustained by the deceased could only be caused by blunt object

and not a sharp object. The evidence of PW6 did not corroborate the evidence of PW1, PW2 and PW5 hence weakening the Prosecution case in that the *jembe* exhibit P2 according to PW6 is not the murder weapon as the injuries was not caused by a sharp object, then that leaves the question if the *jembe* had blood stain and white matter as stated by PW6 and as the deceased suffered as a depressed fracture of the head and no brain came out, where did the alleged blood and grey matter come from as PW5 alleged was found on the *jembe*? The Prosecution's case was based on mere suspicion which in my view, however, strong suspicion is, the court cannot convict basing its conviction on suspicion. The Prosecution in view of the evidence so far adduced has not proved who caused the death of the deceased.

19. Whether malice aforethought has been proved? Malice aforethought is a very important ingredient in a murder case. The Prosecution must prove that the accused person had intention to cause the death of the deceased or to do grievous harm to any person, that he had knowledge that his act or omission would cause death either to the person intended or to some other person. That he had intention to commit a felony.

20. The question for my consideration is whether in the instant case, there is any evidence on record to prove the above ingredients of the offence of murder as set out above against the accused person to warrant him being put on his defence. In my considered opinion, there is neither direct nor indirect or circumstantial evidence tending to prove any of the above ingredients of an offence of murder. The only evidence is that of PW1 and PW2 who testified that the accused went to their home crying and screaming that he found his father murdered by someone who had used a *jembe*. The accused act is not an act of a guilty person and he did not admit to them or anyone, that he killed his father nor did he tell them who did it. I have already stated what PW1 and PW2 stated the accused told them do not amount to a confession and is inadmissible evidence as against the accused. The prosecution did not adduce sufficient evidence linking the accused with the death of the deceased at all.

21. In view of the above, I find and hold that the prosecution did not produce sufficient evidence before this court to warrant the accused person being put on his defence. Accordingly, I make a finding that the accused has no case to answer. I find the accused is not guilty of the offence of murder and he is accordingly acquitted under Section 306(1) of the Criminal Procedure Code, the accused is set at liberty forthwith unless otherwise lawfully held.

DATED AT SIAYA THIS 9TH DAY OF FEBRUARY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 9TH DAY FEBRUARY, 2017.

In the presence of:

Mr. Ingosi: for the Accused

M/S Odumba: for State

Accused - Present

Court Assistant:

1. George Ngayo
2. Patience B. Ochieng
3. Sarah Ooro

J.A. MAKAU

JUDGE