



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 53 OF 2012

REPUBLIC PROSECUTOR

VERSUS

SHAKAAI OLE AINGISA ACCUSED

RULING

The accused person **SHAKAAI OLE NAINGISA** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the night of 15th and 16th July, 2012 at Kishermoruak Village in Narok South District of the Narok County murdered LEMEMPE OLE MPUYUK”

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced before **Hon. Justice Anyara Emukule** on 7/5/2014. Following the transfer of the Honourable Judge to the Mombasa High Court, I took over the hearing of the case. The prosecution called a total of eight (8) witnesses in support of their case. **PW1 MIKA KANTIRO** a boda boda taxi operator told the court that on 15/7/2012 the accused called him and asked to be taken to a place called Olemini. **PW1** did as the accused requested. He later heard that the deceased had died. **PW1** has no idea how the deceased met his death.

PW2 PARTIA OLE KAURA is the chief of Siana Sub-Location. He told the court that on 16/7/2012 he received a call that the deceased had been killed at Kishermoruak village **PW1** left for the scene and upon arrival found the body of the deceased lying outside with a cut on the neck. Some suspects were arrested and handed over to the police. Later the accused was also arrested and eventually charged with murder.

PW6 JOSEPH OLE TOMPOI told the court that on 16/7/2012 he received information that a man had been found dead in his farm at Oldonyo Rasha. Upon rushing home **PW6** found that it was the deceased who was a herder employed by his father who had been killed.

PW7 NGODIE OLE TOMPOI told the court that the deceased was her herdsman. On 15/7/2012 at night **PW7** prepared supper which she ate together with both the accused and the deceased. After supper everyone retired to bed. Upon waking up the next morning on 16/7/2012 **PW7** heard a commotion of people saying that a man was lying dead in her compound. She went out to check and found that it was her herdsman who had been killed.

The matter was reported to police who took up investigations into the case. The accused was eventually brought to court and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave an unsworn defence in which he denied any and all involvement in the death/murder of the deceased. This court is now obliged to analyse the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt.

Section 203 of the Penal Code defines the offence of murders thus

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

Arising from this definition the offence of murder requires proof of the following key ingredients:

1. Proof of the fact as well as the cause of the deceased’s death
2. Proof that the deceased met his death as the direct result of an unlawful act or omission on the part of the accused.
3. Proof that said unlawful act or omission was committed with malice aforethought.

In this case the fact of the deceased’s death is not in any doubt. Several of the prosecution witnesses testify to having seen the deceased lying dead in a field. **PW3 MARMAR OLE MPUYUK** a brother to the deceased having been called to the scene identified the dead body as that of his brother ‘**Leleme Ole Mpuuyuk**’. **PW4 PC HENRY KIBONA** a scenes of crime officer attached to Narok CID went to the scene and took several photographs of the dead body. These photographs were duly produced as exhibits in this case. **P. Exb 1**.

Having proved the fact of death the prosecution is also under a duty to prove the cause of the death of the deceased. It must be proved that the deceased met his death due to an act of culpable homicide and not due to any illness or other natural cause. The reliable way of proving the cause of death would be by way of the evidence of the doctor/pathologist who performed the autopsy on the body of the deceased and by production of a post-mortem report, detailing the observations, findings and conclusion of such a doctor/pathologist. In this case the prosecution did not call any doctor/pathologist to testify. No post-mortem report was produced as an exhibit. As such the cause of the deceased’s death remains a mystery.

It could be argued that the evidence of the prosecution witnesses to the effect that they saw cuts on the deceased’s neck as well as the photographs produced by **PW4** showing the injuries to the body ought to suffice as sufficient proof of the cause of death. However in the case of **NDUNGU Vs REPUBLIC [1985]eKLR** the Court of Appeal held thus

“..... of course there are cases for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of death in the circumstances relied on by the prosecution”

The Court of Appeal sitting in Malindi in the case of **CHENGO KALAMA Vs REPUBLIC [2015]eKLR**, cited this finding in the **Ndungu Case** and went onto hold that:

“The position then it appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of a medical evidence and in particular, a postmortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt.....”

This means therefore that despite the existence of obvious critical, and life threatening injuries to the

deceased, medical evidence must be adduced to show the effect of such injuries on the life of the deceased and how these injuries led to his death. The evidence is that an autopsy was conducted on the body of the deceased. No exceptional circumstance existed/or has been alleged to have existed which would have prevented the doctor from testifying and producing the post-mortem report. This omission is fatal to the prosecution case. In these circumstances the cause of death has not been proved beyond reasonable doubt.

Even if the cause of death had been sufficiently proved (which is not in the case here) the evidence on record still falls short. There was no witness who saw the accused attack and/or stab the deceased. **PW7** stated that they all took supper together after which everybody went to sleep. She heard no commotion during the night and only woke up the next day to find the deceased lying dead outside.

PW2 the local chief stated that the accused was arrested as a suspect. However, **PW2** admits that he himself has no idea who stabbed the deceased. Yet he goes on to state that

“We carried out investigations and we discovered that it was accused who killed the deceased”.

PW2 does not elaborate as to the nature of investigations which he conducted or how he came to that conclusion.

From the evidence it becomes apparent that several other persons were apprehended as suspects in the murder of the deceased. **PW5 INSPECTOR JOSEPH MUTAI** the investigating officer admitted that several people from that mayatta were arrested as suspects but were later released. **PW5** states in his testimony that

“I handed over five suspects to the DCIO Narok for investigations”

The court is not told why the five (5) people were absolved from suspicion nor why accused was detained as a suspect. **PW5** under cross-examination by defence counsel goes on to state

“The Maasai sat down and investigated the matter and identified the accused as the culprit...”

If this statement was not so ludicrous coming from a senior police officer it would be laughable. It baffles the mind that police would cede their investigative duties to the Maasai and leave it to them to investigate a murder and identify a suspect who is then handed over to police and the police accept this without any question.

PW5 also claims that the accused admitted (confessed) to the offence, **PW5** being a Police Inspector is fully aware of the procedure for recording confessions as set down in Section 25A of the Evidence Act. There is no evidence that **PW5** took any steps to follow or adhere to this procedure at all. The accused was not cautioned and his alleged confession was not reduced into writing for admission by the court.

PW8 MARASWA OLE NJABIT told the court that his brother was arrested by police as a suspect but was later released. **PW8** tellingly admitted under cross-examination that

“Police told me that if the accused confesses my brother will be released”

This court cannot rule out the very real possibility that this confession was manipulated merely to secure the release of the brother of **PW8**. I find that no legally admissible confession exists in this case. **PW5** stated that the accused's rundu and knife were taken to the government chemist for analysis. The government chemist did not testify in this case and no report was produced as an exhibit. **PW5** goes on to state that the accused killed the deceased due to a dispute over the deceased's wife thereby suggesting a motive for the murder. **PW5** states that he was given this information by village elders whose names he conveniently cannot recall, and said village elders were not called to testify in this case.

The police clearly did not bother to investigate this case. They merely relied and acted upon village

gossip coupled with what the local maasai tribes men told them. I find that no tangible evidence exists to link the accused to the death of the deceased. I therefore find that this charge of murder has not been proved beyond reasonable doubt and I acquit the accused of the same. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 6th day of February, 2017.

Mr. Oonge holding brief for Mr.Mongeri.

Maureen A. Odero

Judge