



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL (MURDER) CASE NO. 39 OF 2013**  
**BETWEEN**  
**REPUBLIC.....PROSECUTOR**  
**AND**  
**PIUS ONGARO OSALA.....ACCUSED**  
**J U D G M E N T**

**Introduction**

1. The accused person and the deceased herein are father and son. It is alleged by the prosecution. That on the 27<sup>th</sup> day of July, 2013 at Emukusa Village, Ebutanyi Sub-location within Vihiga County, the accused person murdered the deceased. When the accused person appeared for plea before Hon. Mr. Justice Chitembwe on 14<sup>th</sup> August, 2013, he denied the charge. The prosecution has since called 6 witnesses in an attempt to prove the allegations of murder against the accused person.

**The Facts of the Case**

2. Briefly the facts of the case are that on 24<sup>th</sup> July, 2013 at about 6.00pm the accused person who was perpetually drunk assaulted the deceased and as a result of the assault the deceased died. The incident was allegedly witnessed by Bernard Ongaro Naoh who testified as PW2. After assaulting the deceased the accused went away and when he returned home at about 11.00pm, in the company of two of his colleagues, his colleagues beat him up and ran away.

3. On the morning of 28<sup>th</sup> July, 2013, the accused person went to the home of Moses AKoyi Munai, PW3, and informed him (Moses) of the death of the deceased who he alleged had died when he (deceased) was being disciplined. On the previous day, 27<sup>th</sup> July, 2013, John Collins Alinyo who testified as PW1 (Alinyo) received news around 8.30 am that the accused person had assaulted the deceased.

4. According to Dorcas Ambetsa, PW4 (Dorcas). The accused person was heard telling his two children on the morning of 27<sup>th</sup> July, 2013 at about 11.00 am, the accused person was heard abusing his two children and telling them he was not going to feed them anymore. Dorcas also stated that the accused person always assaulted his wife and children.

5. The matter was reported to the police after the deceased died. Number 63897 Police Constable Laban Gaturu of Luanda Police station who testified as PW5 received the information concerning the deceased's

death. He visited the scene on 28<sup>th</sup> July, 2013 accompanied by other officers and saw the dirty body of the deceased lying on a sofa set in the house. The body was removed to Dolphine Nursing Home for preservation and post mortem. PW5 also arrested accused. The post mortem was conducted by Dr. Philip Athero, PW5. Dr Athero formed the opinion that the cause of death was severe head injury. The post mortem report was produced as PEXH 1.

### **The Defence Case**

6. At the close of the prosecution case, the accused person was found to have a case to answer and was accordingly put on his defence. In his sworn testimony, he denied killing the deceased. He testified that until just before his death, the deceased was staying with his mother who was not married to the accused person. When the deceased was eventually brought home to the accused person's step mother, the child looked sickly and had a swollen hand after he allegedly fell. The deceased was treated with traditional herbs known as "OLUKALA" to integrate him into the family of the accused person, but on the same 27<sup>th</sup> July, 2013, the accused person took the child to the local health dispensary, but the child died in the night.

7. The accused person denied being drunk as alleged by Collins and Dorcas. He blamed Collins and Dorcas for his woes alleging that Collins did not kike him and that Dorcas framed the charges against him. Though he does not say why Dorcas should have framed the case against him. The accused did not call any witnesses.

### **Issues for Determination**

8. In view of the provisions of Section 203 and 206 of the Penal Code the prosecution must prove the following if its case against the accused person is to succeed:-

1. That the deceased died and cause of such death:
2. That the deceased died as a result of an unlawful act or omission on the part of the accused and
3. That in killing the deceased, the accused person had malice aforethought

### **Submissions**

9. Mr. Shifwoka, counsel for the accused person made spirited submissions urging this court to find that the prosecution has not proved its case against the accused person to the required standard, for reasons that; none of the witnesses saw the accused person kill the deceased. The post mortem report does not give age of the injuries which allegedly led to the death of the deceased; there is no indication from the post mortem report of any haematoma or oedema of the brain to support the doctor's conclusion that the cause of death was blunt trauma to the head; the prosecution case is based on mere suspicion.

10. For his part, prosecution counsel Mr. Ng'etich relied on the evidence on record.

### **Analysis and Determination.**

11. Having set out the evidence, the law and the submissions, I now proceed to consider whether the prosecution has proved the ingredients of the offence of murder to warrant this court making a finding of guilt against the accused person.

12. On the first issue of whether the deceased died, there is ample evidence to this effect. (Others testified to this fact when he aid:- "I went to the scene ..... I found the deceased's body at the scene. I called the OCS Luanda Police. The police took the body to Dolphine Mortuary", Benard Ongaro Noah, PW2 (Bernard) said, "the following morning was a Sunday, I heard that the accused's son had died. .... We went to notify the Assistant Chief (PW1). Police came and took the body." Both Moses and Dorcas, and even PW5 and PW6 also testified to the fact that the deceased died.

13. The next issue is whether the prosecution proved the cause of the death and whether it is proved that the accused person as the one whose acts/omissions resulted in the death of the deceased. According to the post mortem from dated 4<sup>th</sup> August, 2013, the cause of death was some head injury resulting from depressed skull fracture. The question is: who caused the fracture. Bernard testified during his evidence in chief that he saw the accused assaulting the deceased, yet during cross examination, he stated that he did not witness the beating of the deceased by the accused person. What he said was that the accused normally assaulted his child, and that he (Bernard) had reported the accused person to the Assistant chief before. Bernard also testified that on the material evening, he heard the accused screaming as he uttered words to the effect that “Today you will die helping me.” Bernard’s evidence leaves some considerable doubt in the mind of this court as to whether the accused assaulted the deceased at 6.00 p.m. on 27<sup>th</sup> July, 2013.

14. Moses stated that the accused person himself told him the child had died when he (accused) was disciplining him, though there was a contradiction between what he stated in court and what was contained in his statement – DMFI – 1. Dorcas stated that on the day in question, the accused swore not to give his children any food as he also abused them, but she did not see him assaulting the deceased.

15. From all the above evidence, there is no clear evidence pointing at the accused person as having assaulted the deceased on the material day. My sixth sense tells me it is very likely that in his drunken state the accused person assaulted the deceased, but all the witnesses who alleged to have been at the scene do not say so. What they say is that they did not witness the accused beating the deceased on the material day and further apart from making a general statement that the accused was ferocious, a quarrelsome and used to assault his wife and children, they did not confirm the fact of the assault on 27<sup>th</sup> July, 2013.

16. So, although the deceased died, and that he died from severe head injury, the evidence on record does not point at the accused person as the person who inflicted that injury. Even if I were to stretch the argument to consider circumstantial evidence, the circumstances of the case do not form an unbroken chain pointing at the accused person as the culprit of the injury to the deceased’s head.

17. The final issue is whether the prosecution proved malice aforethought. In my considered view, this issue is only of academic significance in the circumstances of this case since the prosecution has failed to pin down the accused person as the one who caused the injury. That led to the death of the deceased.

### **Conclusion.**

18. In view of the above findings, the conclusion I have come to is that the prosecution has failed to prove the charge of murder against the accused person beyond any reasonable doubt. In the circumstances, I find the accused person not guilty of murdering Samwel Sikalo Adiado and acquit him of the same under section 322 (1) of the Criminal Procedure Code.

19. Unless he is otherwise lawfully held, the accused shall be released from prison custody forthwith.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 11<sup>th</sup> day of May 2017.

RUTH N. SITATI.

JUDGE

In the presence of:-

Mr. Juma (present)..... For state.

Mr. Osango holding brief for Mr. Shifwoka..... For accused.

Polycap..... Court Assistant.