



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MURDER 2 Of 2007

REPUBLICPROSECUTOR

VERSUS

JOASH OMAL JUMAACCUSED

J U D G M E N T

1, The accused **JOASH OMOL JUMA** was charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars of the offence were that on the night of 19th October 2004 at Ayucha Sub-location in Nyando District, Nyanza Province murdered **MARK OKOTH ONDULO**.

2, The prosecution called several witnesses to prove its case. The following 3 witnesses namely Roselyn Obala Okoth, PW1, Pamela Adhiambo Okoth PW2 and Eunice Akinyi Okoth PW4 were deceased's wives who testified that on the material day they were together with the deceased at the farm having harvested sugarcane and were awaiting a tractor to collect the same. They testified that the accused came to the farm and confronted PW1 by telling her that he heard she wanted to talk to him. He also asked the deceased the same question. Immediately he pulled a knife from his clothes and stabbed the deceased 3 times. PW1 tried to intervene but she was also stabbed. The accused then took off.

3. PW2 WASHINGTON ODIYO received information that the deceased had been killed by the accused. He went to the scene where he ascertained. He also went to Nyanza General Hospital mortuary to identify the body for post mortem purposes.

4. PW5 STEVEN ODHIAMBO GOMBE is the chief of Awasi Location. He went to the scene after the murder. He also notified the police who came and took the body.

5. PW6 P.C. JOSEPH KOSKEI together with the deceased's wives arrested the accused on 16.12.2006 at Awasi Market.

6. PW7 DR. MATILDA WENDO testified on behalf of Dr. Dickson Michana who had filled the postmortem report. He said that the conclusion of the cause of death was penetrating soft injury. The body had stab wound on the chest, abdomen and left forearm. The said witness did mark the postmortem report as MFI.

7. PW8 P.C. EDWIN OJOROGOTI was the investigation officer. He testified that the accused reported on 20.10.2004 at Boya Police Station that he had been assaulted by the deceased after a fight. He contacted the OCS Awasi Police station who confirmed that the accused was wanted at the said station. He arrested him and thereafter handed him over to the Awasi Police station.

8. When put on his defence the accused gave unsworn evidence. He said that on the material days they were harvesting sugarcane at the deceased's farm. Thereafter the deceased gave them alcohol to drink. From there he did not know what happened till the following day on 20th when he found himself at the police station.

9. He further said that he was incarcerated for 14 days but later released. Later on 17/12/2006 he wanted to build a house but was arrested and later charged for the offence of Murder.

10. I have read the parties written submissions together with the entire proceedings herein. For the offence of murder to be established *mens rea* has to be proved. It must be proved that the accused had the intention to harm the deceased. In this case the evidence of PW1, PW2 and PW4, corroborated each other. All the three knew the accused as he was their cousin. They saw him approach the deceased and pulled the knife from his pocket or clothing and stabbed him severally. In an attempt to rescue the deceased PW1 was equally injured. The offence took place at between 5 p.m. and 6 p.m. The question of identification was equally proved. There was nothing to suggest that the witnesses were unable to identify the assailant.

Having found that indeed the accused assaulted the deceased which apparently caused his death, there was no medical evidence to

suggest the above findings! From the record although Dr, Matilda Wendo PW7 marked the post-mortem report the author of the same Dr. Dickson Michana was not called to produce the same. Its trite law that for the offence of murder to be established the postmortem report ought to be produced. Infact this court vide its ruling of 17th November 2014 re-opened the case afresh under the provisions of Section 150 of the Criminal Procedure Code and Article 159 of the constitution so as to allow the prosecution time to call the said doctor. The prosecution for the reasons best known to it failed to seize the opportunity. That opportunity was well seized as expected by the defence.

11. Although, therefore there is factual evidence that its the accused who assaulted the deceased based on the evidence on record, medically there is no such sufficient evidence. There is nothing to verify the cause of deceased's death.

12. In the premises the case against the accused herein ought to fail. Clearly, the prosecution will forever take the blame for its failure to produce the postmortem report despite the court *suo moto* granting it a window of opportunity.

The accused is therefore set free unless lawfully held.

Dated, signed and delivered this 8th day of March 2016.

H. K. CHEMITEI

J U D G E

In the presence of

..... for State

.....fpr accused

.....Court clerk/interpreter