



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MURDER CASE NO. 36 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

NICHOLAS ONYANGO NYOLO.....ACCUSED

J U D G M E N T

Introduction

1). The accused was charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars were that on the 31st day of May 2011 at West Koguta sub location in Nyakach district within Kisumu county murdered **Elias Onyango Owinyo**. Prior to the charge of murder the accused had been charged with the offence of assault of the deceased at Nyando Law Courts.

2). The prosecution called six witnesses to establish their case. When the accused was put on his defence he gave sworn testimony and did not call any witness. He denied knowing the deceased as well as the charge before him.

Facts

3). **PW1 Kennedy Atito**, who is a boda boda operator told the court that on the 24-2-2011 at around 11 am he was standing at a place called Olweny near a road side stall. He saw the accused approach on a bicycle when he reached where the deceased was he pulled a panga which was wrapped in a cloth and cut the deceased on the left shoulder and took off. The deceased and PW1 were standing about one meter apart. PW1 recognised the accused since he had seen him at the market before. The said witness however told the court on cross examination that he did not see the deceased being taken to hospital.

4). PW5 the investigating officer told the court that the deceased had made a report at the Sondu Miriu police station on 21-2-2011 concerning a threatening text message from a phone No. 0724-530598. PW5 however did not bother to investigate the registered owner of the said phone number.

5). On 24-2-2011 at around 1.20 p.m the deceased went to the police post and reported that he had been assaulted by the accused who had accused him of having an affair with his wife. PW5 and other officer laid an ambush later and arrested the accused. As indicated earlier he was charged with the offence of assault at Nyando Law Court.

6). On 31-5-2011 the deceased passed away while undergoing treatment at Nyando District Hospital. PW3 reported to the police and the accused was arrested on 1-1-2011 by PW4 and charged.

7). **PW2 Tobias Odongo Auma**, identified the deceased body at Jaramogi Oginga Odinga hospital during autopsy. He also told the court that the deceased prior to his death was a smoker but had stopped.

8). Dr. Jela who carried out the autopsy observed that the deceased had a stab at the apex near the neck but was dry. The stab wound was measuring 2 x 2 cm but not penetrating the chest wall. The lungs were massively fibrosed and edematous and had deposits of smoke. He concluded that the cause of death was cardiopulmonary arrest due to chronic pulmonary disease with fibrosis.

Analysis and Determination

9). There is no doubt that from the evidence on record that it is the accused who assaulted the deceased. PW1 easily recognised him as it was daytime and was so close to him. PW5 equally saw the bandaged wound when the deceased reported the assault at the police posts. Dr. Jela who carried out the post mortem arrived at this finding.

10). The question however is whether the stab wound caused the death of the deceased. Although the charge sheet reads that the deceased was killed on 31-5-2011, the evidence on record states otherwise. The injury to the deceased was on 24-2-2011 and therefore it is erroneously to state that the deceased was killed on 31-5-2011.

11). There are three ingredients of the offence of murder which ought always to be established, namely:

- a. **Proof of the fact and the cause of death of the deceased.**
- b. **Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the “actus reus” of the offence and**
- c. **Proof that the said unlawful act or omission was committed with malice afterthought- which constitutes the “mens rea” of the offence.**

12). The first ingredient requires the cause of death to be established. In this case the prosecution alleges that the cause of death was the result of the stab wound. The autopsy report by Dr. Jela shows that the cause of death was cardiopulmonary arrest due to chronic pulmonary disease.

It indicates that there were smoke deposit on the lungs. In the two competing causes herein, the court takes the view arrived by the doctor. This is buttressed by PW2's evidence that the deceased used to smoke but had since left.

13). The next issue is to established whether it was the accused who caused the death of the deceased by an unlawful act or omission. Having reached the conclusion on the cause of the death I find that the prosecution did not establish this ingredient.

14). I do not think also that the ingredients of mens rea alone cannot stand. The death occurred several months, almost 3 months, later out of a different cause pointing towards the fact that the ingredients are not intertwined or connected in any way.

15). Having established this however I do not think that the accused person is not guilty of other offences in as much as it cannot be established that he caused the death of the deceased.

“Section 179 (2) of the Criminal Procedure Code states- when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of minor offence although he was not charged with it”.

16). This court finds that the act of attacking the deceased was intended to cause actual bodily harm which it did. The evidence of PW1, PW5 and PW6 are clearly satisfactory. He was clearly seen and recognised by PW1 who saw the attack.

17). In the premises I find that the prosecution did not establish the offence of murder against the accused

person for the reasons stated above. I shall set him free over the said charge unless lawfully held. However, by virtue of the provision of section 179 of the Criminal Procedure Code do convict him of the lesser charge of assault pursuant to the provision of section 251 of the Penal Code.

Dated, signed and delivered at Kisumu this 13th day of March, 2014.

**H.K.
JUDGE**

CHEMITEI