



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MURDER CASE NO. 19 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JACOB LIMAH AGA.....ACCUSED**

**J U D G M E N T**

The accused was charged with murder contrary to sections 203 and 204 of the Penal Code. The particulars were that on 13-3-2010 at Kadong valley within Lower Kadong sub location in Kisumu West District of the Nyanza Province he jointly with other not before the court murdered Hesbon Ponge Kidera (“the deceased”). He denied charge. He was represented by Mr. Olel.

The deceased's wife Benta Achieng Ponge (PW1) testified that on 13-3-2010 at about 2 p.m she was at home with him when the accused came and introduced himself as a teacher at Kombedi primary school. He wanted the deceased to go and plough for him. The deceased had an animal plough. The accused's farm was at Kadong. He asked the deceased to come along to see the farm. The two left together. PW1 did not know the accused's house but she had seen him at a neighbour's house. An hour or so later, Peter Njer Ayoo (PW3) and Charles Otiende (PW4) were grazing in the same sub location when they heard a voice of a person crying for help. The voice was from a bush in an area infested with leopards and snakes. They went and found it was the deceased whom they knew. He was PW3's uncle. He had a deep cut on the right leg almost to the point of amputation. He was lying down and still able to talk. They asked him what had happened. According to PW3 he said:

**“people took him from home. He did not mention them.”**

According to PW4 he said he had been cut by “some jambazi.”

PW3 rushed back home, took a bicycle and went to inform pW1 who went to the scene which was at Got Kabongo hill, about 20 minutes walk from her house. PW1 went to the scene with the deceased's brother Elly Otieno Kidera (PW2).

PW1 and PW2 found the deceased cut on the legs and was lying on the ground. He was able to talk. PW1 rushed back home to get clothes to have him change before being taken to hospital. When she returned, she found him dead. PW2 had been left here. He had talked to the deceased who told him that he had been called by people who had been sent to kill him. The deceased further told him that he had a land dispute with Ongoro. PW2 knew about this dispute. Infact, following the death of the deceased villagers burnt the home of Ongoro. The dispute between Ongoro and the deceased was pending in court.

The post mortem report (exhibit 4) showed that the deceased had a deep cut on the right leg causing a fracture of the tibia and fibula. There was deep cut of the left leg, extensive bruises on the back and a

bruise along the anterior surface of the neck. The cause of death was cardiorespiratory arrest secondary to asphyxia following strangulation.

The accused was arrested on 14-5-2010 at Paga beach by Inspector Wilson Yegon (PW13) of CID Kisumu. He ordered an identification parade to be conducted by Inspector Steven Ndungu Rufus (PW12) at which he was identified by PW1 and Julia Auma Otieno (PW6). PW6's evidence was that at 1 p.m on 13-3-2010 she was at home when she saw the accused, a stranger, in the home of Ongoro. He was with Ongoro near a borehole. After a while the accused left the home and went to deceased's home. 20 minutes later, she saw the deceased and the accused passing. She saw all this while in her home which was next to Ongoro's, and was next to the road where the deceased and the accused passed.

The accused made a sworn statement in defence in which he denied knowing the deceased, or having gone to his house. He denied knowing Ongoro or having been to his home. He stated that the parade in which he was identified by PW1 and PW6 was not properly conducted as the witnesses saw him in the police station before the parade, and that he was the only member of the parade with a scar on the head. He did not call any witness.

The prosecution was under the duty to prove the guilt of the accused beyond all reasonable doubt. No witness testified that he saw the person (s) who cut or injured the deceased. The prosecution case was therefore depended on circumstantial evidence. It was stated in **Simon Musoke -VS- Republic [1958] EA 715** that:

**“In a case depending exclusively upon 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 reasonable hypothesis than that of guilt.”**

It is necessary that before drawing the inference of accused's guilt from the circumstantial evidence care be taken to ensure that there are no other co-existing circumstances which would weaken or destroy the inference.

Neither PW1 nor PW6 knew the accused's name, and neither did they describe him to the police. They did not lead to his arrest. PW13 is the officer who effected the arrest of the accused. He did not say who led him the arrest. He testified that the statements of PW1 and PW6 had no descriptions of the man who took the deceased away.

The evidence of PW1 and PW6 was that the accused collected the deceased from his home and an hour or so thereafter the deceased was found seriously injured and died from the injuries. However, the deceased was found still able to talk and gave inconsistent story about who had injured him. He told PW4 that he had been cut by a jambazi and told PW3 that he had been injured by people who had taken him from home. He told PW2 that he had been called by people who had been sent to kill him. The people had been sent by Ongoro with whom he had a land dispute. He told Julius Odundo Otwallo (PW11) that he had been cut by a teacher. These are different versions. Not all can be true.

PW1 testified that the accused told them that he was a teacher at Kombedi Primary School but did not give his name. She (PW1), however, was not reliable. She recorded three statements to the police. They were recorded on 16-3-2010, 30-4-2010 and on 15-3-2010. It was only on 15-3-2010 that she stated that she had seen the accused at her neighbour's home before he came to her house. The neighbour was Ongoro who had a dispute with the deceased. The fact of her having seen the accused in Ongoro's home before he came to collect her husband was such crucial information that she could not have left out during her first two statements to police.

The accused denied that he was a teacher at the school, or at all. PW13 confirmed this. But the other crucial aspect of the case was that Ongoro was arrested as a suspect. He had a land case with the deceased. The neighbours suspected him to the point of destroying his property and house. He was later released by police who found that he was not connected to the murder. If the prosecution case was that the accused went to the home of Ongoro with whom they discussed before he went for the deceased, and

they released Ongoro because they investigated him and found he was not connected with the murder of the deceased, why would they charge the accused and connect the murder with Ongoro?

In conclusion, the available evidence is insufficient to connect the accused with the murder by the deceased. I find the accused not guilty of the charge and acquit him.

**Dated, signed and delivered at Kisumu this 7th day of May, 2014.**

**A.O.  
JUDGE**

**MUCHELULE**