



**Republic v Odhiambo (Criminal Case E027 of 2022)
[2024] KEHC 13243 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E027 OF 2022**

DK KEMEL, J

OCTOBER 31, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

AGRIPPA OLUOCH ODHIAMBO ACCUSED

JUDGMENT

1. The accused herein Agrippa Oluoch Odhiambo is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the charge are that on the 17th October 2022 at Ondu City Street, Barkowino sub location, Bondo township location, Bondo Sub- County in Siaya County, murdered Joshua Juma Omuya.
2. This matter had been fully heard by Ogembo J and who had reserved it for judgement. I have now been called upon to write the judgement.
3. I have perused the proceedings and not that the prosecution called a total of five witnesses in support of its case which was as follows:
4. PW1 Collins Ochieng Oyule testified that he was a resident of Bondo and a musician by profession. That he knows both Joshua Juma Omuya (the deceased) and Agrippa Ochieng Odhiambo (the accused) who were both his friends. That on the night of 17/10/2022 they were at Ondu City, a joint at Bondo where they were taking Simba Waragi. That at about 2.30 AM, the accused arrived at the joint and likewise the deceased Joshua alias Stevo. That he gave the accused the drink that was in his hand. The deceased also wanted the same drink. A quarrel ensued over the same. The accused informed the deceased that he (deceased) should not drink as he was already drunk. Angry that he had been denied alcohol, the deceased started to walk away but he was brought back by one Collins Onyango who was directed by the accused to bring the deceased back and who slapped the deceased and who fell to the ground on his back. At that point, as the deceased lay down, the accused took a stone and hit him



three times before throwing the stone on his head the fourth time. That they all ran away leaving the deceased who was found dead at the scene the following day. He identified the huge stone in court and which was marked as PMFI 1.

On cross examination, he reiterated that they were all drunk and that he is the one who was selling Waragi at Ondu city. That they were together with Nyabondo, Jimo, Laristo. That Collins Onyango was the first person to slap the accused and swept him to the ground and that the said Collins Onyango escaped and disappeared since then.

On re-examination he stated that he was selling alcohol at Ondu city.

5. PW2 Eric Omuya Onyiko testified that he was a mason from Bar-Kowino. He testified that on 18/10/2022 while at home with his friends, they learnt of the incident. That they rushed there and on enquiring they found that the police had taken the deceased's body to the mortuary. They rushed there too only to confirm that it was their relative Steve who had died. That the deceased had head injuries. That they went to Bondo police station and found that a report had already been made. They were told that one of the person who had assaulted the deceased was Agrippa Oluoch. They proceeded to his house as they wanted to attack him but who pleaded with them and so they instead apprehended him and took him to Bondo police station.

On cross examination, he stated inter alia; that the deceased was his brother; that he did his private investigations and found out that the accused and the deceased fought over alcohol and that Agrippa was the one who killed the deceased.

6. PW3 was John Ochieng Omuya. He stated that he was a driver and a resident of Vihiga. He testified that the deceased was his brother. That on the night of 18/10/2022 at about 9.30 PM when he had just arrived at Bondo, he received a call from his cousin John Odupa who informed him that Stephen had been killed at Ondu city bar. That he followed his family to Bondo mortuary where the body lay with head injuries. That on 31/10/2022 he went to the mortuary and identified the body during the post-mortem. examination

On cross examination, he testified that he was informed that the suspects were Collins and Agrippa. That he did not know what Collins did for a living.

9. PW4 was Cyrus Mutua from DCIO Bondo. He testified t that he was investigating a case of murder that was reported on 18/10/2022 by one Edwin Orimba, Assistant chief. It was reported that a dead body lay at Ondu city, Bondo town. That they visited the scene and found a dead body with head injuries and that a stone was recovered-PEX 1. That the body was taken to Bondo mortuary and that a post-mortem was conducted on it. That on 20/10/2022 Agrippa Oluoch was brought by members of the public and that on the same day, another suspect Collins Oyule presented himself for fear of mob justice.

On cross examination, he testified that he wrote a statement then went to court to look at (DMFI-1). That he had the investigation diary (DMFI-2). That he had recorded a statements of two suspects one of them being PW1. That the accused denied being at the scene at Ondu city but that the following day he had gone to buy a dog chain and that a confrontation ensued with the seller leading to his injuries.

That nobody pointed the stone to him as the murder weapon but as an investigating officer, it was his duty to find the murder weapon, which he did find it next to the body. That one of those who arrested the deceased was a witness- Eric Omwega Onyimba.

11. PW5 was Dr. Daniel Wanjovu stated that he was a doctor at Bondo Sub- County hospital. That he and Dr. Rita did the post-mortem of Joshua Juma on 31/10/2022 at 11.00 AM. That the body was an African of good nutrition and well built. On injuries, he had multiple bruises on the face, with



swelling on left side of the scalp and a cut wound on left occipital region. There were no injuries on the back, chest and abdomen. Internally, there was hematoma on the left temporal region of the scalp. Extension skull fracture 24 cm extending laterally along the parietal region posterior to occipital region. Depressed skull fragments, brain tissue and hematoma. All other systems were okay. He formed an opinion that the cause of death was severe head injury with extensive depressed fracture secondary to a blunt trauma. He filled a certificate No. 152576. He produced the postmortem form as PEX 2.

On cross examination, he stated that the occipital region is the back of the head. That a blunt object can cause a sharp wound. That bruises on the face indicated a brawl or struggle. That two of them did the postmortem and that there was no request for DNA analysis.

13. At the close of the prosecution's case, a prima facie case was found to have been established against the accused who was subsequently placed on his defence.

14. DW1 Agrippa Oluoch Odhiambo gave a sworn statement. He stated that he is a brick maker. That on 19/10/2022, he woke up and went to work as usual. That at about 11.30 AM, he went to his house for breakfast. That later on some men went and arrested him and took him to the police station. That on the night of the incident, he was sleeping in his house and was not at Ondu city where the incident happened. That Collins (PW1) lied to the court. That he was detained in the police cells for twenty one days.

On cross examination, he testified that he was at Ondu city earlier that day where chang'aa, bhang and waragi are sold. That he does not know Joshua Juma Omuya (the deceased). That he didn't see him that day. That he had been there between 9-10.00AM. That he saw drunk people quarrelling with the changaa seller and pulling each other. That he does not know if one was later beaten after he left.

16. The defence closed its case. The prosecution filed their submissions while the defence opted not to file submissions.

17. The prosecution submitted that the accused faces a charge of murder contrary to section 203 as read with Section 204 of the penal code. It was submitted that there are four ingredients in a charge of murder as below:

- a. Proof of death.
- b. The cause of death.
- c. Proof that the death was due to an unlawful act or omission.
- d. That the unlawful act or omission was on the part of the suspect and that it was with malice aforethought.

19. As regards the fact of death, the prosecution submitted that PW5 gave evidence that he did the post mortem and examined the deceased's body and reached a conclusion that the cause of death was severe head injury with extensive depressed fracture secondary to blunt trauma. The ingredient of proof and cause of death were proved.

20. The other element as submitted by the prosecution was whether the death was unlawful. They relied on article 26 of *the constitution* which guarantees every person the right to life. They submitted that the death was unlawful as per the testament of pw5.

21. On the third element of the accused being placed at the scene of the crime, the prosecution submitted that the testimony of PW1 indicated that it's the accused who killed the deceased. When he skated in his testimony "the accused took a large stone and hit the deceased four times on the head" That from



the acts of the accused, he intended to cause death to the deceased. In conclusion, the prosecution submitted that it has proved its case beyond reasonable doubt.

21. I have considered the evidence of both prosecution and defence as well as the submissions filed. I find the only issue for determination is whether the prosecution proved its case beyond any reasonable doubt.
22. It is trite that the burden of proving the guilt of an accused person charged with a criminal offence rests with the prosecution throughout and that the standard of proof is one of beyond reasonable doubt. In a charge of murder, the prosecution is under a duty to prove the following essential ingredients
 - a. That the deceased died.
 - b. That the death was unlawfully caused.
 - c. That it was actuated by malice aforethought.
 - d. That the accused person is the perpetrator of the crime.
23. As regards the issue of fact of death, the evidence of the pathologist (PW5) left no doubt that indeed there was death of the deceased herein. It was his testimony that he together with his colleague conducted the autopsy and opined that the cause of death was severe head injury with extensive depressed skull fracture secondary to a blunt trauma. The autopsy report was produced as an exhibit. I find that the prosecution satisfactorily proved this ingredient beyond reasonable doubt.
24. As regards the issue of whether the death was unlawful, it is trite law that every homicide is unlawful unless expressly authorized by law. Article 26 of *the constitution* enshrines the right to life upon every person. The deceased herein had gone to Ondu City to enjoy a local drink popularly called Waragi and that even though he was then drunk, he was in good health and did not deserve to die in the manner that he did. The injuries inflicted upon the deceased as narrated by PW1 were so severe to suggest that the assailant did not wish the deceased to survive at all. Indeed, the deceased died at the scene and his body remained at the drinking joint until the following day. The circumstances are rather tragic and that had the accused not bothered with the deceased after the deceased had left the bar, the deceased would be alive today. It was the accused who requested another reveler to get hold of the deceased as soon as he had stepped out of the bar and that the accused went and viciously hit the deceased with a huge stone until he died. The deceased did not deserve to die in the manner he did. It is clear that the death was unlawful in the circumstances and that the same was proved by the prosecution beyond reasonable doubt.
25. The third issue is whether the death was actuated with malice afore thought and that the perpetrator actually intended to kill the deceased. I have evaluated the evidence on record particularly that of PW1. It was his testimony that he knew both the deceased and the accused person who were his friends. That the quarrel ensued over alcohol and in which PW1 had offered his drink to the accused only for the deceased to also stake a claim thereto and who pointed out to the accused that he will not allow him (accused) to drink. Apparently, the deceased was then already drunk. On cross examination, PW1 testified that they were all drunk. The evidence on record shows that all parties involved in this scuffle were intoxicated with alcohol. This therefore means that the accused did not have the intention (mens rea) to kill the deceased prior to them getting intoxicated and that they were all friends. It seems the incident took place after the accused and deceased squabbled and exchanged words prior to the incident. It is therefore my finding that the element of malice aforethought was not proved.
26. The last issue is whether the accused was placed at the scene of crime as the assailant at the time of the incident. From the evidence of PW1, it is the accused who hit the deceased four times with a huge



stone. This evidence was corroborated by that of PW2 who testified that when they went to Agrippa's house, he confessed to have killed the deceased and who pleaded with them not to hurt him. That they apprehended him and took him to Bondo police station. This evidence was corroborated by PW4, the investigating officer who testified that "on 20/10/2022 Agrippa Oluoch was brought by members of the public and who had already been assaulted by a mob." It is clear that the accused was present at Ondu bar in company of the deceased and PW1. In fact, it was PW1 who had offered his drink to the accused before the deceased objected and sought to snatch the drink and that it was the accused who later attacked the deceased with a huge stone with the help of another assailant who is still at large. The evidence of PW1 was quite cogent and believable and who was not shaken even on cross-examination. It did not transpire from the evidence of PW1 that there were any differences between PW1 and accused herein. In fact, the two were great friends and thus there is no evidence of a frame up. Hence, I find the defence alibi is not truthful since the accused was squarely placed at the scene of crime. His defence evidence did not shake or cast doubt upon that of the prosecution. I am satisfied by the evidence tendered that the accused was the assailant.

27. The sum total of the entire evidence leaves no doubt that the same proves a charge of manslaughter under section 202 as read with section 205 of the Penal Code. Both accused and deceased were at the time drunk. The evidence does not support a charge of murder under section 203 as read with section 204 of the Penal Code.
28. In the result, it is my finding that the prosecution has not proved the charge of murder under section 203 as read with section 204 of the Penal Code but that it has proved a charge of manslaughter under section 202 as read with section 205 of the Penal Code beyond any reasonable doubt. Consequently, I find the accused herein Agrippa Oluoch Odhiambo guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and is hereby convicted accordingly.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 31ST DAY OCTOBER, 2024

D. KEMEI

JUDGE

In the presence of :

Agrippa Oluoch Accused

Owuor for Mshindi for Accused

Ms. Kerubo for Prosecution

Ogendo Court Assistant

