



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL CASE NO. E037 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

NICHOLAS OKWANGA OWINO ALIAS JACKSON OKWANGA

ALIAS WALTER OWINO MATO.....ACCUSED

JUDGMENT

1. Nicholas Okwanga Owino alias Jackson Okwanga alias Walter Owino Mato is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 24th day of August, 2021, at Remba Island, Mfangano West location in Mbita Sub County of Homa Bay County, murdered Darrel Gift Omondi.
3. Baby Darrel Gift Otieno was born to a hostile world where rivalry between his biological father and another man over his mother cut short his life after two days of his existence. The prosecution contends that the accused was the one who caused the death.
4. Facts that emerge from the evidence are that in February, 2021 the accused and his wife Linet Akinyi Odera (PW2) parted ways and in the same month she married Peter John Musa (PW1). At the time she was married to her new husband, she was expecting the child who is the subject of this case.
5. The accused, denied the offence. He contended that he went to see his wife who had just delivered and who was staying with her sister but a stranger prevented him from accessing the house. He just went back home.
6. The issues for determination are:
 - a. Whether the accused caused the death of the deceased; and
 - b. Whether the offence of murder was established.
7. The prosecution adduced evidence which gave three versions of the incident that led to the death of the deceased.
8. According to the evidence of Peter John Musa (PW1) the accused went and stood at the door of his house. He (PW1) therefore passed under arms to enter into his house. He requested the accused to go away and return the following day but the accused was adamant. He therefore pushed him away and a struggle between the two ensued. He managed to disentangle himself from the accused. He went and reported to the police. He returned with a police officer and the accused was arrested. His wife reported to him that when the accused attempted to go in, she ran away and in the process she slipped and the child fell down.
9. Linet Akinyi Odera (PW2) gave a different version of the incident. Her evidence was that when the accused and Peter John Musa (PW1) were still fighting, she left the house to seek refuge from a neighbor. As she was walking backwards she slipped and the child fell down.
10. This witness was declared hostile. In her statement to the police she had recorded that the accused had pushed her down. She disowned this statement and contended that what she testified in court was the truth. In **Batala v Uganda [1974] E.A. 402** the Court of Appeal for East Africa at page 405 said:

The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight.

In **Abel Monari Nyanamba & 4 others v Republic [1996] eKLR** the Court of Appeal said:

The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.

11. The three versions of the incident are attributed to this witness. There is therefore no reasonable tribunal that will convict on such evidence; two versions show that whatever happened was accidental without the involvement of the accused while the other alleges that the action of the accused was deliberate and was the cause of the death.

12. From the evidence on record, there is no sufficient evidence to show that the accused caused the death of the deceased. I accordingly find that the prosecution has not proved the offence of murder against him. I acquit him of the charge and set him free unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF MARCH, 2022

KIARIE WAWERU KIARIE

JUDGE