



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 39 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JAMES OTIENO OJJOACCUSED

JUDGMENT

1. James Otieno Ojijo 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 17th day of October, 2018, at Kalanya Kanyango location, in Homa Bay Sub County of Homa Bay County, murdered Stephen Ochieng Ouma alias Reagan.
3. The prosecution case is that the accused went to the home of his aunt (PW3) for a visit at about 11 a.m. almost immediately, the accused went to the home with a group of people and removed the deceased from therein. He was ferried on a motor cycle to his home where he was fatally injured.
4. James Otieno Ojijo, the accused, contended that he was not present when the deceased was killed by an angry mob.
5. The issues for determination are:
 - a) Whether the accused was present where the deceased was killed and if he was present;
 - b) Whether he was involved in the death of the deceased and if he was; and
 - c) Whether the offence of murder has been proved against him.
6. The accused in his defence pleaded an alibi. In the case of **Kiarie vs. Republic [1984] KLR** the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

I am aware that throughout the proceedings, the burden remains on the prosecution. I will therefore endeavour to find whether the prosecution discharged this burden.

7. Margaret Arwa Obonyo (PW3) is the aunt of the deceased herein. She testified that the deceased in this case went to visit her at about 11 a.m. It would appear the deceased had not stayed long in the home after arrival for she testified that the accused went in a group of people and ordered the deceased on a motor cycle after accusing him (the deceased) of killing his (accused's) son.
8. Morris Ouma Ayoko (PW1) testified that the accused took his son to his home on a motor cycle and beat him using a metal bar before he was joined by villagers in beating up the deceased.
9. These two witnesses therefore place the accused at the scene where the deceased was fatally injured.
10. On his part the accused contended that at the time of the incident that led to the death of the deceased was at Jaramogi Oginga Odinga Teaching and Referral Hospital in Kisumu. He was with his son whom the deceased herein had injured.

11. These two versions are competing. Before making a finding on which of the two is convincing, I wish to give the background facts that led to the death herein.

12. Alphonse Okello Ochanga (DW2) testified that on 13th October, 2018 he was studying with Raila and Mzee. The deceased herein went and accused Raila of having damaged his motor cycle's mirror and before he could respond he cut him on the head and on the hand. Reagan is the son of the accused herein. Raila ran out. This is when he went to inform the accused what had transpired.

13. The accused testified that when he went to the home where his son was injured from, he found him having bled profusely and his brain matter was oozing out. He took him to Homa Bay hospital from where he was referred to Kisumu. He said on 17th October, 2018 he was in Kisumu where he was making a follow up of his son's treatment.

14. I have seen the discharge summary concerning the treatment of Wilson Daniel Ojijo. He was admitted for seven days in surgery ward at Jaramogi Oginga Odinga Teaching and Referral Hospital. The treatment involved surgical toilet and blood transfusion.

15. Judith Atieno Otieno (DW3) and Pamela Otieno Musa (DW4) testified that the accused was in Kisumu with his admitted son when a mob killed the deceased herein.

16. When an offence of this nature has been committed, it is imperative upon the prosecution to call independent witnesses to testify. In this case the witnesses called are members of the same family who place the accused at the scene of the offence at the time it was committed. The accused called witnesses who were not members of his family who testified that at the time of the offence he was taking care of his son in hospital.

17. I therefore find that the prosecution did not displace the alibi defence of the accused. This therefore means that the prosecution has failed to prove its case against the accused. I accordingly acquit him of the offence of murder and set him at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 29TH DAY OF MARCH, 2022

KIARIE WAWERU KIARIE

JUDGE