



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 7 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

1. ESAU OMUNYIN IPOMAI

2. JUSTUS ONGIRO IPOMAI

3. IBRAHIM IPOMAI MAMAI....ACCUSED

JUDGMENT

1. Esau Omunyin Ipomai, Justus Ongiro Ipomai and Ibrahim Ipomai Mamai are 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 9th day of March 2020, at Okuleu village of Teso North sub County within Busia County, murdered Juniors Odipo Ipomai.

3. The prosecution case is that when the deceased beat his wife, his brothers became enraged and decided to “discipline” him. In the process he succumbed to the injuries inflicted and died.

4. Both accused contended that they were called and informed that the deceased had died. Each one of them denied any involvement in the offence and pleaded an alibi.

5. The issues for determination are:

- a. Whether the alibi defence tendered by each accused is plausible;
- b. Whether the fatal injuries the deceased sustained were caused by the accused ; and
- c. Whether the offence of murder was established.

6. The prosecution relied on the evidence of Joseph Omunyin Ipomai (PW2) to charge the accused persons herein. He is a son of the deceased and the accused persons are his paternal uncles. It is trite law that a conviction may be founded on the evidence of a single witness subject to great care being taken in reliance on such evidence. In the case of **Abdullah Bin Wendo vs. Rex 20 EACA 166** the Court of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

Subject to certain well-known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.

In the instant case I will address my mind to the need for care knowing that that the incident took place at night.

7. The evidence of Joseph Omonyin Ipomai (PW2) is that he arrived at home at about 10 p.m. on 9th March 2020. He found the three accused persons and Helda who was not charged, beating the deceased herein outside his (deceased's) house. When he enquired as to why they were beating him, they said that he had beaten his wife. He asked them to stop but they threatened to beat him. He therefore retreated to his house.

8. The accused are his (PW2) paternal uncles. These were people well known to him and they talked to him. There was no issue of mistaken identity that was brought up. However, the accused persons raised an alibi defence. In the case of **Kiarie vs. Republic [1984] KLR** where 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.

This burden does not leave the prosecution even when it is raised for the first time during defence. In the case of **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** the Court of Appeal rendered itself as follows on the issue of alibi:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

I will therefore endeavour to find if the prosecution displaced this burden.

9. In view of the findings I have made hereinabove, the alibi defence is not plausible. It was displaced by the evidence on record.

10. The evidence of Joseph Omonyin Ipomai (PW2) is that except for the third accused who was seated, the first and the second accused were beating the deceased in conjunction with Helda. Since there is no evidence of common intent that was adduced, I find that there is insufficient evidence against accused three. I accordingly acquit him of the offence of murder.

11. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

12. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

13. The prosecution did not adduce evidence to prove the existence of malice aforethought. I therefore find that the offence of murder was not proved against the accused. I accordingly acquit each one of them for the said offence. However, the prosecution has proved the offence of manslaughter beyond any reasonable doubt. I find accused one and accused two guilty and convict each of them for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED and SIGNED at BUSIA this 29th day of January, 2021

KIARIE WAWERU KIARIE

JUDGE