



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO 25 OF 2019(MURDER)

REPUBLIC.....PROSECUTOR

VERSUS

EMMANUEL ONGARE WAWUYE.....ACCUSED

JUDGMENT

1. By an information dated the 10th July 2019 EMMANUEL ONGARE WAWUYE is charged with the offence of murder contrary to **section 203** as read with **section 204 of the Penal Code**. The particulars of the offence are, on the 3rd July 2019 at Enoosawn location in Transmara West Sub-County within Narok County murdered ARON KIPNGENO CHEPKWONY.

2. The accused pleaded not guilty. The prosecution called six (6) witnesses.

3. Joshua Okiba Maoga (Pw1) testified that he knew the deceased who used to sell scrap metals. He also told court that he knows the accused person who is also known as "Waingo". He recalled to have seen the deceased on the 1st July 2019. He testified that on 3rd July 2019 the accused came to his place of work and told him that he had met with the deceased at night and that he had beaten him and left the deceased in a serious condition, "*hali maututi*". He testified that the accused told him that if he had known he would have hit the deceased two more times to finish him. That the accused explained to him that he had an issue with the deceased as there is a church they sold but the deceased failed to give him the money. That he later found out that the deceased who had died. He recalled that the deceased was lying on the grounds of the church with a deep cut wound on the head.

4. Shem Mukwabe Uhuru (Pw2) testified that he did not know the deceased. He recalled that 3rd July 2019 at 7:00 a.m. the accused came and said "*nime piga huyu jamaa*". He testified that when they went to Full Gospel Church they found the deceased dead lying on the ground with head injuries.

5. Janet Nyaruri Momanyi (Pw3) recalled that on 30th June 2019 she was at her *shamba* when she saw a probox stop and 2 boys came out and entered a plantation and they came out with rims of a tractor. The deceased was among the boys and they headed towards Kilgoris.

6. Snr. Sgt Haron Niurandi No. 48671 (Pw4) testified that he is in charge of Enoosaen police post under Kilgoris police station in Transmara West. That on 3rd July 2019 he received a report that there was a dead body along the road at Methodist church. He proceeded to the scene and saw footsteps leading towards a church compound. He found a dead person lying on the ground half naked with deep cuts on the face at the church compound. That whilst at the scene, Pw1 told him that there was a deal that went sour between the deceased and the accused person. He then received a phone call with information that the accused was seen at Mongas Petrol station, 400 km from the scene of crime. Pw4 rushed there and arrest him. Pw4 told court that the OCS took the body of the deceased to Kilgoris at a catholic mortuary.

7. PC Julius Kyalo No 85187 (Pw6) testified that he commenced his instigations by requesting for custodial order and thereafter recorded the statements of several witnesses. He later charged the suspect for the offence of murder. He testified that the accused deferred with his friends on how to share money after selling scrap metal. The accused then hit the deceased who later died.

8. The accused was found to have a case to answer and he gave sworn testimony testifying as Dw1. He recalled that on 4th July 2019 he was led to the police station and later informed that charges of murder had been preferred against him. He testified that he did not know the deceased and that he did not kill him.

ANALYSIS & DETERMINATION

9. For the offence of murder under **section 203** of the **Penal Code** to be proved, the prosecution must establish the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act

with malice aforethought.

10. The fact and cause of death of the deceased person is not in dispute. Pw5, Dr. Kennedy Owalla who performed the postmortem on the deceased stated that the deceased had a cut wound on the left side of the head on the parietal and a depressed skull fracture. He testified that the skull injury was about 6cms long and beneath the skull injury was a massive hemorrhage. The deceased also had a comminuted skull fracture extending from the front part of the head to the forehead. He had also suffered a brain contusion and had a massive intracranial bleeding on the layer that covers the brain. Pw5 also observed that the deceased was pale meaning that he had lost a lot of blood. He concluded that the cause of death was massive intracranial hemorrhage, massive epidural hematoma with subsequent brain stem coming secondary to severe head injury – blunt but deadly weapon.

11. I now turn to consider whether it is the accused person who inflicted the fatal injuries on the deceased. The prosecution did not avail any direct witness who saw the accused beat the deceased leading to his death. The prosecution case therefore lies squarely on circumstantial evidence. *Neema Mwandaro Ndurya versus Republic, Criminal Appeal No.446 (2007) (UR)* where this Court reiterated that:-

“It is now settled that for a court to convict on circumstantial evidence there must be evidence which points irresistibly to the accused person to the exclusion of any other person. At the same time there must be no co-existing factors or circumstances which may weaken or destroy the inference of the guilt of the accused person”.

In *Sango Mohamed Sango & another v Republic [2015] eKLR* the Court of Appeal held as follows;

“There is no dispute that the evidence against the appellants was circumstantial evidence to the extent that the prosecution did not adduce any direct evidence regarding the murder of the deceased. But as has been stated time and again, that in itself does not render circumstantial evidence valueless, because, subject to satisfying well-known conditions, circumstantial evidence is as good as any other evidence and can prove a case with the accuracy of mathematics. At times, its deemed the best evidence ever. (See *MUSILI TULO V. REPUBLIC, CR. APP. NO. 30 OF 2013*). In *SAWE V. REPUBLIC (2003) KLR 364*, this Court stated that to pass muster, circumstantial evidence must be incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of his guilt and further that for circumstantial evidence to form the basis of a conviction, there must be no other existing circumstances which would weaken the chain of circumstances”

12. In *Mwangi and Another v Republic (2004) 2 KLR 32*, the Court of Appeal exhorted that:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge”

13. The only evidence that the prosecution has against the accused is that of Pw1 and Pw2 who testified that the accused had told them that he beat the deceased person and left him in a critical condition. The accused on the other hand gave testimony that he did not kill the deceased.

14. The case presented by the prosecution is that the accused killed the deceased after a deal gone sour. Pw6 who was the investigating officer testified that the accused and the deceased after selling scrap metal differed on how to share the money whereupon the deceased hit him.

15. Pw3 testified that on 30th June 2019 she saw the deceased and another boy get out of a probox and into a plantation. She testified that she only recognized the deceased but did not know the other person he was with. Her testimony does not therefore place the accused person in the plantation taking the rims.

16. Pw4 testified that after investigations they arrested Dennis Osoro who they suspected knew what had transpired. He testified that they found the said Dennis Osoro was found to have tires in his possession. They also found some rims hidden in a plantation that were to be given to Dennis Osoro. This key witness was not brought to testify and shed light on the alleged disagreement between the accused and the deceased.

17. I have carefully considered the evidence and separately examined each link in the chain to determine its strength. The evidence by the prosecution is disjointed as he was not seen by Pw3 with the deceased days before the incident. The Key prosecution witness Dennis Osoro was also never called to testify as to the alleged dispute between the accused and the deceased. In the case of *Keter V Republic [2007] 1 EA 135* the court held inter alia thus:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

In *Bukenya and Others Vs. Uganda 1972 EA 549* Lutta Ag. Vice President held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

18. Having considered the chain of evidence as a whole the only conclusion that can be drawn is that the prosecution has failed to prove their case beyond any reasonable doubt.

19. Consequently, I find the accused person **EMMANUEL ONGARE WAWUYE** not guilty of the charge of Murder and I acquit him of the offence of murder of ARON KIPNGENO CHEPKWONY and is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF FEBRUARY 2021.

R.E. OUGO

JUDGE

In the presence:

Accused In Person - Present

Mr. Kaburi For the Accused Absent

Mr. Otieno Senior State Counsel Office of the DPP

Ms.Rael Court Assistant