



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CRIMINAL CASE NO. 33 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS OKELLO ODHIAMBO.....ACCUSED

JUDGMENT

1. Julius Okello Odhiambo 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 18th day of August, 2013, at Pala Boya sub location in Ndihiwa District of Homa Bay County, murdered Frola Odida Nyangweso.
3. Julius Okello Odhiambo, the accused was employed as a farm hand in the home of the deceased. On 16th August, 2013 he was asked to go for his money at Awendo for he had become irresponsible. He did not go for his money. When the deceased was found dead, the accused disappeared from the home. He was traced in 2015 when he was arrested and charged.
4. The accused, denied the offence. He contended that when the deceased died, he had left the home after he was stopped from working and had been paid his dues.
5. The issues for determination are:
 - a. Whether the accused was involved in the death of the deceased; and
 - b. Whether the offence of murder was established.
6. The evidence of Shadrack Ochieng Nyangweso (PW1) was that when he visited his mother the deceased herein on 16th August, 2013 he did not find the accused at home. His mother complained that he had become irresponsible. When he questioned the accused about it he appeared disinterested. He therefore terminated his services and asked him to find him at Awendo on the following day so that he could pay him his money for the work done. He did not go for his money.
7. When he learnt about the deceased's death he went home and did not find the accused. He was later traced in Gwassi in 2015. By this time he had changed his name.
8. At the time of testifying in court on 7th June, 2021 COO (PW3) said he was 12 years old. This therefore means that in 2013 at the time of the incident he was 4 years old. His recollection of the events leading to his grandmother's death is very hazy. At one point in his evidence he testified that they shared one house with the accused but later changed and said the accused lived in another house nearby.
9. According to his evidence, he said that he heard the accused telling his grandmother to look at a rat before he heard his grandmother cry that Julius had killed her. Given his tender age at the time of the incident, he cannot be blamed nor can much weight be attached to his evidence.
10. PC Peter Mbugua (PW2) did not do his work prudently. When he recovered a machete in the house which the accused occupied and which he said was blood stained, he ought to have subjected it to forensic examination. He knew he did not have any eye witnesses and probably this could have been the only link to the murder. He squandered the chance to establish if indeed the accused was the culprit or he was a victim of circumstances.

11. We are therefore left with evidence of suspicion and circumstantial evidence. The Court of Appeal in the case of **Sawe vs. Republic[2003] KLR 354**, the Court of Appeal held as follows:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

I will therefore find whether a conviction can be founded on the circumstantial evidence on record.

12. What is circumstantial evidence? In the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** Osiemo Judge explained what circumstantial evidence is, as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

13. On 16th August, 2013 the accused was put to task by Shadrack Ochieng Nyangweso (PW1) after the deceased had complained about his current attitude towards work. He was fired and asked to go for the money due to him at Awendo. This was where Shadrack operated a business. He never went for his money. Though the recollection of the events by Collins Odhiambo Ouma (PW3) was hazy, he heard his grandmother cry that Julius had killed her. The accused later went into the room Collins and his sister were in and asked them where their grandmother kept money.

14. Collins Odhiambo Ouma (PW3) testified that they were locked in in the room. They only able to get out when police officers opened for them. The accused had disappeared from the home.

15. The accused in his defence contended that after he was fired from the home of the deceased, he was paid for the days he had worked and left the deceased at her home. We however have contrary evidence of Shadrack Ochieng Nyangweso (PW1). He said the accused did not go for his dues.

16. The accused act of disappearance from the home and the events that followed the visit by Shadrack (PW1) leave no doubt in my mind that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

17. 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 grievousbodily 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).

18. 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.

19. In the instant case I am satisfied that the prosecution has proved its case against the accused to the required standards. I find him guilty for the offence of murder and accordingly convict him.

DELIVERED AND SIGNED AT HOMA BAY THIS 29TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE