



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL CASE NO. 11 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

WALTER OTIENO OKELLO.....ACCUSED

JUDGMENT

1. Walter Otieno Okello 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 night of 23rd & 24th day of April, 2019 at Wagwe sub location, Kobiero location in Rachuonyo North sub county of Homa Bay County, jointly with others not before court murdered George Otieno Ogindo.
3. According to the prosecution, the deceased was partaking alcohol in the home of the accused from 8 a.m. on the material day. At about 9 p.m., the accused enlisted the help of some young men and removed the deceased from the home. They left him at a field called Sare where he was found dead on the following day. He had injuries.
4. Walter Otieno Okello the accused, contended that he was requested by some young men to assist in taking the deceased to his home for he was very drunk. When they reached near a mosque, the deceased said he could be able to go home from there. They left him there while he was alive.
5. The issues for determination are:
 - a) Whether the deceased was partaking alcohol in the home of the accused on the material day;
 - b) Whether the deceased was removed from the home of the accused or from the road;
 - c) Whether the accused was involved in the death of the deceased; and if so
 - d) Whether the offence of murder was established.
6. The prosecution tendered two versions as to where the deceased was before he ended up at the Sare field. One version was testified to by James Okumu (PW6). He said that when the accused who is his father heard some people talking near their home, he went to find out what was the issue. This is when he found Edwin, Dennis and Ariwo. The three asked the accused to assist the deceased who was lying down to his home. This is the version the accused also gave in his defence.
7. The version by Elly Ariwo (PW2), Dennis Ochieng (PW3) and Edwin Onyango (PW4) was that it was the accused who went to their home at about 9 p.m. and requested them to help him carry a drunk man from his home and they accepted to assist.
8. I am persuaded to believe the version that the deceased was in the home of the accused taking alcohol for the evidence of Joshua Philip Osuo (PW1) was that the better part of the material day he was with the deceased in the home of the accused imbibing Simba Waragi.
9. The deceased was therefore removed from the home of the accused to Sare field.
10. Certainly the evidence by the prosecution was contradictory as where the deceased was before he was abandoned at the Sare field. However, even with the two versions it is evident that when he was taken from the home of the accused he had no injuries up to the point when he was left at the field.

11. Though the evidence by the prosecution witnesses Elly Ariwo (PW2), Dennis Ochieng (PW3) and Edwin Onyango (PW4) tend to show that the accused was left with the deceased, one has to be cautious with such evidence for they may want to shift the blame having been part of the people who took him where he was found dead. What their evidence succeed in doing is to create suspicion.

12. PC Ejikon Nicodemus (PW7) and who was the investigating officer testified that James Okumu (PW6) had said that he saw the accused fighting with the deceased. However, (PW6) did not testify to this effect.

13. We are left with nothing but evidence based on suspicion. The Court of Appeal in the case of **Sawe vs. Republic [2003] KLR 354** said:

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

In the instant case, I find that the prosecution has failed to prove its case against the accused to the required standards. I accordingly acquit him of the offence of murder and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at HOMA BAY this 27th Day of July, 2021

KIARIE WAWERU KIARIE

JUDGE