



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 4 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

KENNEDY OOKO OBONYO.....ACCUSED

JUDGMENT

1. Kennedy Ooko Obonyo 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 24th day of January, 2020, at Kobita Location, Ndhiwa Sub County of Homa Bay County, murdered Irish Alphonse Taabu Changwe.
3. While the deceased herein was attending a prayer meeting, apparently his cellphone was stolen and he discovered that it was missing while going home. He returned to the home where prayers were held and looked for it without success. He suspected the accused herein but when he (accused) was searched, he was not found to be the culprit. However, the deceased suspected him for he was allegedly seated behind him. A fight erupted between the two and they were separated.
4. On the following day the two met and the deceased apparently was still suspicious that the accused stole his phone and after an exchange of harsh words, a fight ensued. The deceased was fatally injured.
5. There was a second version by the prosecution that it was the accused who the aggressor. This was in the evidence of Grace Akeyo Otieno (PW1).
6. The accused contended that when the two met on the fateful day, the deceased pretended to be at peace with him and offered him his (accused's) phone which he had snatched from him the previous day. When he wanted to pick it, the deceased attacked him. A struggle ensued and the iron bar they were struggling over pierced him.
7. The issues for determination are:
 - a) Which of the three versions tendered herein is credible; and
 - b) Whether the accused committed the offence he is charged with.
8. Grace Akeyo Otieno (PW1) testified that the incident was near her house. Her evidence was that when she heard the deceased asking for his phone, she went out and saw the accused and the deceased talking. According to her, it was the accused who removed an iron bar from his waist and threw it at the deceased. The deceased dodged it and threw it back at the accused. The accused removed another bar from his waist and warned her not to raise an alarm or else he was going to kill her.
9. This version by this witness is doubtful for Caleb Otieno (PW2) who rushed to the scene and assisted the deceased testified that he did not see her. Whereas Grace Akeyo Otieno (PW1) testified that she was the one who went and called the parents of the deceased, Caleb Otieno (PW2) said he was the one who went to call them and that he did not see PW1 when he went to call the wife of the deceased. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**(Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

It is not therefore safe to rely on the version by PW1.

10. The second version by the prosecution was the one testified to by Elijah Omondi (PW3) and the investigating officer Corporal Samson Cheruiyot (PW4). He testified that on 23rd January, 2020 after the deceased had discovered that his phone was missing, they went back to the house where they were having prayers. They made enquiries but the phone was not found. Later the same day, they found the accused at the home of Origa. The deceased started a fight with the accused over the phone and this witness separated them.

11. Corporal Samson Cheruiyot (PW4) testified that he established that the deceased and the accused fought on 24th January 2020. The accused sustained a stab wound on the head near the right ear, an injury on the right knee and bruises on the neck.

12. In his defence the accused contended that the deceased and Elijah (PW3) found him near the home of Origa on 23rd January 2020. The deceased pounced on him and he fell down. Elijah (PW3) bit him on the neck while he was still lying down. He (PW3) took his phone and ran away.

13. On the following day, he met with the deceased who pretended that he was going to hand over the phone they had taken from him and when he stretched his hand to receive it, the deceased pierced him with an iron bar on the knee. He threw another bar at him but missed. When he threw another one, it pierced his ear. The two struggled over the iron bar and when the deceased pulled it with force, it pierced him.

14. The medical evidence indicate that the deceased sustained an open wound on the left shoulder blade. The object that caused the wound ruptured the left lung and left ventricle. This led to hypovolemic shock and the subsequent death.

15. From my analysis of the evidence on record, it is clear that the version tendered by the accused is convincing. His was supported by the medical evidence. Even if we assume that he was the one who inflicted the fatal injury, though not proved, he acted in self defence. The deceased was the aggressor.

16. I therefore find that the prosecution has failed to prove the offence of murder and I accordingly acquit him 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