



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL CASE NO. 22 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

1. HEZRON ODONDI OLOO

ALIAS JACKOTIENO

2. PHILIP OKINDO ODUMO.....ACCUSED

JUDGMENT

1. Hezron Odondi Oloo alias Jackotieno and Philip Okindo Odumo 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 14th day of February, 2010, at Kotieno village, Kowidi Location in Rachuonyo South sub county of Homa Bay County, jointly murdered Caleb Oketch Abongo.

3. The prosecution case was that after the deceased was killed by a gang that attacked his home, the second accused was connected to the murder by a cell phone that he allegedly sold to Nancy Anyango Odanga (PW15). The first accused was allegedly implicated by his co-accused as the person who took the phone to him and which he subsequently sold.

4. Both accused persons denied any involvement in the death of the deceased. They also denied to have sold the implicating cell phone.

5. The issues for determination are:

a) Whether the alleged implicating evidence against accused one by his co-accused is admissible;

b) Whether the prosecution proved that the second accused sold the implicating cell phone to Nancy Anyango Odanga (PW15); and

c) Whether the offence of murder has been proved against them.

6. The evidence on record by various witnesses namely Richard Okoth Otieno (PW2), Timothy Otieno Abongo (PW3), Beatrice Akoth Magak (PW6), Ruth Anyango Okech (PW7) and Wilkista Akumu Okech (PW8) was that the deceased had received threats from people whom they named in their evidence. None of the accused person was named to have issued the threats to the deceased.

7. At the time of the robbery and the killing of the deceased, only the widow (PW8) was present.

Her evidence is that they attackers viciously beat her husband and took away his cell phone among other items. She described the cell phone as grey in colour and gave the IMEI as 358074/01/093211/20. Her evidence was that her husband had bought it. She did not identify any of the assailants. She read the IMEI number on the card (P. Exhibit 2) as 35807410932112

8. What is IMEI? IMEI (International Mobile Equipment Identity) is a unique number for identifying a device on a mobile network. This is a distinct number that identifies each device and no two devices can have the same IMEI. Equally, on device can only have one IMEI number.

9. In the instant case it is not possible that the mobile phone of the deceased was the same one recovered from Nancy Anyango Odanga

(PW15). According to her, the phone's IMEI was 35807410932112 and was blue and white in colour. However according to the widow of the deceased, her husband's phone IMEI number was 358074/01/093211/20. It was grey in colour.

10. The investigating officer failed to investigate the authenticity of the receipt purportedly issued by the second accused to Nancy Anyango Odanga (PW15). The receipt was taken to her after she was in cells for three days. She testified that she directed her mother where to look for it. Her father was released from the cells after the receipt was produced. When he therefore recorded that he was the one who looked for it, it ought to have raised a red flag to the investigating officer and subject it to the handwriting expert to establish who wrote it. This was not done and we may not tell if the second accused sold the said phone to Nancy Anyango Odanga (PW15).

11. It is worth noting that PW15 testified that after purchasing the phone, she discarded its box. One is left wondering therefore where the piece of box with the IMEI number 35807410932112 was recovered. No evidence was adduced as to where it was recovered. This creates an issue of credibility of the case against accused persons.

12. PC Nancy Koskei (PW17) testified that the first accused implicated the first accused as the seller of the phone to him. She did not however testify as to how the evidence was obtained. Article 50(4) of the Constitution provides as follows:

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

The evidence attributed to the second accused against accused one is therefore inadmissible.

13. From the foregoing analysis of the evidence on record, I find that the prosecution has not proved the offence of murder against each accused person. I accordingly acquit each of the offence and set him free unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 26TH DAY OF OCTOBER, 2021

KIARIE WAWERU KIARIE

JUDGE