



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 11 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN BARASA OJUMAACCUSED

JUDGMENT

1. **Stephen Barasa Ojuma** 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 11th day of April 2018, at Amoni village, Teso North Sub County of Busia County, jointly with others not before court murdered **Martin Osukuku**.
3. Martin Osukuku, the deceased herein, according to the prosecution, was called from his house to go and ferry some contraband sugar. He was in a company of his friend Kennedy Osukuku. They found the accused whom they established was the caller. The accused suggested that since it was not possible to carry the luggage and Osukuku, the latter was to be left behind. The accused therefore proceeded with the deceased. They did not return. Later the following morning the deceased was discovered dead.
4. The accused pleaded an alibi and denied any involvement in the death of the deceased.
5. The issues for determination are:
 - a. Whether the accused was with the deceased on the material night;
 - b. Whether the accused was involved in the death of the deceased; and
 - c. Whether the offence of murder was established against any of the accused.
6. Kennedy Osukuku (PW4) testified that at about 8.30 p.m. On 11th April 2018, the deceased called him and asked him to escort him. He informed him that he had been called to go and carry a luggage. The deceased was a motor cycle boda-boda operator. This was the gist of the evidence of Tamika Emase Osukuku (PW1) the widow of the deceased in this case.
7. Osukuku (PW4) testified that when they reached the home of Odijom, they found Stephen Karani whom he knew as a mason. He identified him in court as the accused.
8. In his defence the accused pleaded an alibi. The Court of Appeal in the case of **Kiarie vs. Republic [1984] KLR 739** held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.

Though the accused denied any interaction with the deceased on the material night, I find that this was not true. I have no reason on record to disbelieve the evidence of Kennedy Osukuku (PW4).

9. The evidence that linked the accused to the death of the deceased is both circumstantial and on suspicion. 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.

Earlier the Court of Appeal in the case of **Rep vs. Kipkering Arap Koskei & another 16 EACA 135**, had held:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

The circumstantial evidence in this case is not sufficient to be the basis of conviction. There could be other reasonable hypothesis to explain his conduct other than his guilt.

10. The conduct of the accused denying that he was with the deceased on the material night may have cast some suspicion on him. On suspicion the Court of Appeal in **Sawe vs. Republic [2003] KLR 354**, held as follows:

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

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

DELIVERED and SIGNED at BUSIA this 24th day of March, 2020

KIARIE WAWERU KIARIE

JUDGE