



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 17 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS ONYANGO OGEDI.....ACCUSED

JUDGMENT

1. **Thomas Onyango Ogedi** 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 between the night of 16th & 17th day of June 2016, at **Namasango** village in Samia Sub County of **Busia** County, murdered **Felicia Omollo Keya**.
3. When the wife of the accused refused to return to him, he sent to her several messages threatening to hire thugs to go and kill her mother. When his estranged wife's mother was killed, he was suspected and arrested.
4. The accused in his defence denied the offence and pleaded an alibi.
5. The issues for determination are:
 - a) Whether the suspicion against the accused was founded on evidence;
 - b) Whether the prosecution proved its case against the accused person.

6. Jessica Anunda Keya (PW1) is the estranged wife of the accused. She testified that the accused was her husband until 2016 when they separated. Their separation, according to her evidence, led to the death of her mother at the hands of the accused person. She testified that the accused wanted her to go back to him but when she became adamant, he sent to her messages threatening to hire men to go and kill her mother. None of these alleged incriminating messages was exhibited from her phone nor was the same obtained from the service provider. The much the prosecution did was to obtain call logs which was produced by Vincent Mambu (PW6). This witness testified that it was possible to retrieve text communications. There was no explanation as to why the prosecution did not obtain the same. Failure to adduce such crucial evidence may only lead to an inference that had it been adduced, it could have been adverse to the prosecution case. In the case of **Bukenya vs Uganda [1972] EA 549**, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

I must add that this authority applies to evidence as well, like in the instant case.

7. The call log data that PW6 produced established that there was communication between the accused and PW1 but whose nature we do not know. The prosecution did not discharge its burden on what it alleged the accused told PW1 in those messages.
8. We were therefore left with evidence of suspicion. It is trite law that however strong a suspicion may be, unless it is buttressed by some material evidence, is worthless. The Court of appeal in the Case of **Sawe vs. Republic [2003] KLR 354** stated:

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

doubt.

9. The evidence of the parked bicycle at the house of the accused as adduced by Corporal Pius Rono (PW7) has no probative value in this case. People are always on the move and there was nothing on it to indicate that the accused had committed the offence of murder.

10. I therefore find that the prosecution has failed to prove the offence of murder against the accused who I acquit and set him free unless if otherwise lawfully held.

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

KIARIE WAWERU KIARIE

JUDGE