



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 18 OF 2018

PROSECUTOR.....REPUBLIC

VERSUS

DENNIS OCHIENG JOHN.....ACCUSED

JUDGMENT

The accused, **DENNIS OCHIENG JOHN**, was charged with the offence of **MURDER** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

1. He was alleged to have murdered **MICHAEL OWINO ODONGO** on 25th June 2018, at Kibos area of Kisumu East Sub-County, within Kisumu County.
2. At the trial, the prosecution called 3 witnesses.
3. **PW1, EDWIN LEWIS OCHIENG ACHOLA**, testified that the accused used to be his tenant at one of his houses in Kibos.
4. On the material day, **PW1** saw both the accused and the deceased at the site, where the deceased cleared the compound and also fixed a fence for him. **PW1** said that the deceased did that work together with his brother, Clinton Oluoch.
5. Thereafter, **PW1** contracted the deceased to build a pit latrine at the site. However, after the deceased had done some work on the pit latrine, the accused advised **PW1** to carry out the task in a different manner.
6. It was the evidence of **PW1** that he assigned the further construction work to the accused.
7. Although the accused worked with the deceased for sometime, the deceased then chose to stop working with the accused, saying that he was tired.
8. **PW1** testified that the accused told him that the deceased was not happy about the fact that **PW1** had assigned the work to the accused.
9. On the material day, whilst **PW1** was traveling from Kisumu to Nairobi, he received a text message on the mobile phone, telling him that the accused had fatally stabbed the deceased.
10. According to **PW1** he had left the accused together with the deceased at a time when the 2 of them were not quarreling. He was unaware whether or not any quarrel ensued between them after he had left.
11. Therefore, **PW1** told the court that he was unable to tell if there was any reason that could warrant the accused killing the deceased.
12. **PW2, LOICE ADHIAMBO OTIENO**, was the wife to Clinton Oluoch, who is a brother to the deceased.
13. **PW2** testified that **PW1** had assigned Clinton to fence a piece of land which he had acquired within Kibos. Clinton invited the deceased to help him carry out the fencing.
14. Thereafter, Clinton worked with the deceased in building a three-roomed structure on the plot.
15. **PW2** testified that the accused rented one of the 3 rooms on the plot. When the accused moved onto the plot, there were no toilets.

16. When **PW1** learnt that the accused was a fundi, he gave him the job of putting up the toilets.
17. It was the evidence of **PW2** that the deceased was unhappy due to the fact that **PW1** had replaced him. For that reason, the deceased is said to have handed back to **PW1**, the keys of the rooms on the plot, so that the accused could become the new care-taker.
18. **PW2** testified that the deceased handed over the keys to **PW1**, inside the house of the accused.
19. After about 20 minutes, **PW2** saw the deceased coming out from the house of the accused; the deceased was holding his chest. He then fell down.
20. **PW2** saw the accused turn over the deceased, so that the deceased lay on his back.
21. **PW2** testified that Clinton ran after the accused, but the latter threatened to stab him if Clinton got near him.
22. During her evidence-in-chief **PW2** said that at the time when the deceased was stabbed, those present were Dennis and Chonjo. She also said that the next person to get to the scene was Pastor Rosemary.
23. When she was being cross-examined, **PW2** was referred to the written statement which she recorded at the time when the police were conducting investigations. She confirmed that in the said statement it was recorded that **PW2** found a female person at the scene, and that Lucas and Chonjo also arrived.
24. In the written statement, it is indicated that the person who turned the deceased around (so that he was facing upwards), was Lucas.
25. When **PW2** was asked to explain the difference between the written statement and her oral testimony in court, she tendered no explanation.
26. In the light of the evidence concerning the arrival of **PW2** at the scene, the next issue for consideration is about her exact location at the time when the incident unfolded.
27. During her evidence-in-chief, **PW2** said that she was seated “nearby”. When the advocate for the accused sought clarification about the actual distance, **PW2** said that she had been seated about 80 metres from the scene.
28. Accordingly, it is clear that **PW2** was not an eye-witness to the alleged stabbing of the deceased.
29. I also note that **PW2** testified that she had never seen the accused and the deceased quarreling.
30. In her understanding, it was Michael was unhappy with the accused, because the accused (Dennis) had taken over the work which the deceased (Michael) had been doing.
31. **PW3, PC JOYCE WAWIRA**, was the Investigating Officer.
32. She testified that **PW2** was about 100 metres away from the scene of crime when the incident happened.
33. In effect, **PW2** was not at the scene itself.
34. **PW3** testified that it was the deceased who was aggrieved because the accused had taken over the work which had earlier been given to the deceased by **PW1**.
35. None of the prosecution witnesses cited any reason that would have warranted the stabbing of the deceased, by the accused. The person who felt aggrieved was the deceased. The prosecution did not lead any evidence from which the court could discern a motive for the killing of the deceased.
36. Of course, I am alive to the fact that Malice Aforethought, as defined at **Section 206** of the Penal Code, is not synonymous with Motive. The said section stipulates as follows;

“Malice aforethought shall be deemed

to be established by evidence proving

any one or more of the following

circumstances –

(a) an intention to cause the death of

or to do grievous harm to any person,

whether that person is the person

actually killed or not;

(b) knowledge that the act or omission

causing death will probably cause

the death of or grievous harm to

some person, whether that person

is the person actually killed or not,

although such knowledge is

accompanied by indifference whether

death or grievous harm is caused or

not, or by a wish that it may not be

caused.

(c) an intent to commit a felony,

(d) An intention by the act or omission

to facilitate the flight or escape from

custody of any person who has

committed or attempted to commit a

felony.”

37. From the evidence tendered by the prosecution I find no direct evidence connecting the accused to the stabbing of the deceased.
38. In effect, the evidence provided to the court was all circumstantial.
39. In order for such circumstantial evidence to justify the inference of guilt, it is well settled that 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.
40. In his case, it is the evidence of **PW2** which purported to place the accused at the scene of crime. However, as already noted earlier herein, the witness was about 100 metres away from the scene of crime.
41. Although she testified about what had allegedly transpired immediately after the deceased stepped out of the house where he had been in, together with the accused and **PW1**, I note that **PW2** only saw the accused carrying a bunch of keys and a padlock. He had no knife.
42. The prosecution tendered no evidence about what happened to the knife which had allegedly been used to stab the deceased inside the house, but which knife was not carried away by the accused.
43. In conclusion, I find that the evidence adduced by the prosecution did not prove beyond any reasonable doubt that the accused murdered the deceased. Accordingly, I find and hold that the accused, **DENNIS OCHIENG JOHN**, is Not Guilty. He is therefore acquitted.

DATED, SIGNED and DELIVERED at KISUMU This 27th day of July 2020

FRED A. OCHIENG

JUDGE