



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 31 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

1. DAVID IBRAHIM ODEKE

2. MARK BARASA EKISA.....ACCUSED

JUDGMENT

1. David Ibrahim Odeke and Mark Barasa Ekisa 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 28<sup>th</sup> day of November 2016, at Osasame village, Teso North Sub County of Busia County, jointly with others not before court murdered Celestine Emuria Epaa.

3. The prosecution contended that after the son of the first accused was killed by the deceased herein, the two accused persons went on a revenge mission and killed the deceased herein.

4. David Ibrahim Odeke (accused 1) denied any involvement in the offence and pleaded an alibi. The second accused also denied taking part in the killing and alleged that the brother of the deceased herein hired the killers.

5. The issues for determination are:

- a) Whether either or both accused person were in the gang that killed deceased; and
- b) Whether the offence of murder was established against any of the accused.

6. We are introduced to the ordeal by the arrival of some three men in the home of Wilson Etyang Ofadiri (PW1). These three men went to enquire the whereabouts of his son Celestine, the deceased herein. From his evidence and that of his wife (PW3), on seeing the trio, Celestine entered into their house. The deceased was forcefully removed from the house but he managed to run to the house of Amos Odeke.

7. Who, then, were the three men who went to the home of the deceased? According to the evidence of Wilson Etyang Ofadiri (PW1), he identified the second accused only. This is what he testified to:

**I saw some people coming. They passed behind the kitchen. One of them was Mark. He is that one (pointing at accused 2). A third person followed them.**

His evidence gave an impression that he did not identify any other person other than Mark. In his subsequent evidence, kept referring to the assailants in a vague manner. This is what he said:

**One of the three entered into my house. The other two joined him and removed him. One of them beat him with a stick on the back. He had a stick when they came.**

8. This narration clearly show that this witness did not know the identity of the three assailants.

9. During cross examination, Wilson Etyang Ofadiri (PW1), conceded that in his statement to the police, he had given the names of the three people who went to his home as Moses, Benard and Pius.

10. Godwin Ronald Etyang alias Romano (PW2) gave a different version from his father of how the incident occurred. His evidence was that he went to their home in company of Pius Imunya, Moses Imai Okipi and another person he did not know. Unlike his father (PW1), he said they passed behind the kitchen, his evidence was that they used the main gate.

11. Jane Asokoni Etyang (PW3) introduced another version; her evidence was that she was seated outside their house with her husband (PW1), the deceased and Ronald Etyang (PW2) when the assailants arrived.

12. These three versions are at variant and contradictory. 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 makes it unsafe to accept his evidence.**

I am persuaded to hold that these three witnesses are untrustworthy and cannot therefore be relied upon to tell the truth.

13. The killing occurred in the home of Amos. According to the evidence of Ronald Etyang (PW2), when the deceased ran into the home of Amos, he entered the house and bolted the door. The three men who were joined by others broke the door and removed the deceased from therein. He said he watched the incident from a distance of about 50 metres. He said he was on a mango tree. He said he was closer to the scene than his parents (PW1 and PW3).

14. The evidence of Wilson Etyang Ofadiri (PW1) and that of his wife, Jane Asokoni Etyang (PW3), was that the assailants removed the window of the house of Amos from where they removed the deceased and killed him. This contradicted the evidence of Ronald Etyang (PW2) who testified that the mob broke the door and removed the deceased from the house. This is another instance where these material witnesses contradicted each other.

15. When these three purport to have witnessed the killing of the deceased from their hideouts, one is left wondering whether they truly witnessed anything. Though Wilson Etyang Ofadiri (PW1) did not testify that he was in hiding, PW2 and PW3 were clearly hiding; PW2 in a mango tree and PW3 in some grasses. I make a finding that it would be unsafe to rely on their evidence.

16. David Odeke, the first accused pleaded an alibi. In the case of **Kiarie vs. Republic [1984] KLR** the Court of Appeal 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 sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.**

The prosecution did not displace this defence with evidence.

17. Though the second accused alleged that it was Godwin Ronald Etyang alias Romano (PW2) who hire the killers after he had disagreed with his brother (the deceased herein) there was no evidence that supported this contention.

18. It is apparent that the first accused was charged on suspicion of being on a revenge mission after his son was killed by the deceased herein. The Court of Appeal in the case of **Sawe vs. Republic[2003] KLR 354**, the Court of Appeal held as follows:

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

In the instant case I find that the suspicion was not supported by any evidence.

19. After analysing the entire evidence on record, I find that the prosecution has failed to prove its case against any of the accused. I accordingly acquit each one of them of the offence of murder. Each is set at liberty unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 22<sup>nd</sup> day of July, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**