



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 9 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

1. STEPHEN ODAWA JUMA

2. GADINA MOI.....ACCUSED

JUDGMENT

1. **Stephen Odawa Juma** and **Gadina Moi** 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 night of 14th and 15th day of March 2015, at **Segero** village, **Siekunya** sub-location District of **Busia** County, jointly murdered **Willington Juma Madagwa**.

3. The prosecution case is that on 12th March 2015, the two accused persons informed Faustina Nekesa that they were going to kill their father for he was giving them problems for refusing their mother to return to their home. When the deceased was found murdered three days later, they became the prime suspects.

4. In their defence the accused denied to have been involved in the murder. They contended that they were the ones who discovered that their father had not opened his house that morning and informed other relatives.

5. The issues for determination are:

- a) Whether the deceased was murdered or whether this was a suicide case;
- b) If he was murdered, whether the accused persons were involved; and
- c) Whether the offence of murder was proved against the accused persons.

6. For a successful prosecution, the prosecution has the onus of proving the following ingredients beyond any reasonable doubt:

- (a) the death of the deceased;
- (b) that the accused committed the unlawful act or omission which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

In the case of **Republic vs. Andrew Mueche Omwenga [2009] eKLR**, D. K. Maraga J, as he then was, spelled out the ingredients as follows:

There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.

7. The body of the deceased was found hanging on a rope in his house. His legs were touching the ground. There were blood stains two meters from where the body was hanging. Some blood drops were also seen behind the house. This was the evidence of Sergeant Guracha

Gufu (PW6). When Dr. Patson Kubuta examined the body, he found the following externally:

- a) a deep indentation on the neck;
- b) a deep penetrating injury in the mid upper abdomen;
- c) multiple bruises on the knees, elbows and the chest; and
- d) blood clots on the left chest, on the abdomen and the left lower limb.

His opinion was that the cause of death was brain death secondary to strangulation and hypovolemic shock due to bleeding.

It is therefore my considered opinion that this was not a case of suicide. The deceased must have been murdered.

8. Faustina Nekesa (PW2) described herself as the grandmother of both accused persons. She testified that on 12th March 2015 as she was going to the market, the two accused persons caught up with her. They told her how their father was giving them problems by refusing to allow their mother to return to their home. They informed her that they were going to kill him. She did not report these threats to anybody or authority. She only disclosed the same to the police after the death of the deceased.

9. Had the alleged threats been reported, there would be some weight placed on such evidence. This was a very serious claim and for it to be taken seriously, it ought to have been reported either to a relative or to a person in authority. I will therefore endeavour to find if there was evidence that corroborated the claim by Faustina Nekesa (PW2).

10. According to the evidence of Sergeant Guracha Gufu (PW6), he was informed by one of the deceased's brother that the deceased had on 14th March 2015 informed him that he was in danger from his two sons. The deceased was murdered before the meeting could be convened. The only brother of the deceased who testified, was Patrick Munyekenye (PW3). He said that he met the deceased on 14th March 2015. The evidence of this witness was that the deceased requested him to accompany him to where his daughter was married for there was a funeral. They exchanged greetings and parted ways. He never testified about any complaints against any or both accused persons herein.

11. In the house of the second accused, Sergeant Guracha Gufu (PW6) removed a pair of blue short trousers and a black tee shirt. When they were subjected to DNA test, nothing positive was noted. This is according to the evidence of Elizabeth Waithera Onyiego (PW5). She was categorical that these items were not stained with blood. Had there been a positive finding on these articles, then the evidence of Faustina Nekesa (PW2) would have been corroborated. There was therefore no evidence on record to corroborate her claim. It therefore amounted to suspicion. In the case of **Sawe vs. Republic [2003] KLR 354** the court of Appeal held:

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

12. From the foregoing analysis of the evidence on record, I find that the prosecution has not proved its case against either accused persons. I accordingly acquit each one of them of charge of murder and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 21st day of February, 2019

KIARIE WAWERU KIARIE

JUDGE