



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 3 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

CHRISPINUS BUDUMBE ALIAS SIMBA.....ACCUSED

JUDGMENT

1. **Chrispinus Budumbe alias Simba** 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 night of 24th day of January 2017, at **Namakholi** village, in **Bunyala** sub-County of **Busia** County, murdered **Michael Juma Chapurkha**.

3. The prosecution case was that on the 24th day of January 2017, Michael Budumbe was attracted to the house of the accused by some distress alarm by the children of his brother; the accused. When he entered, he found the deceased bleeding. The accused who was armed with a machete chased him away. The deceased was assisted to the hospital but he succumbed to the injuries.

4. In his defence the accused contended that when he returned to his home at about 7.30 p.m., he found the deceased who was bleeding. He found him with his brother Michael. He therefore pleaded an alibi.

5. The issues for determination are:

- a) Whether the accused was at the scene of the incident at the time the deceased was fatally injured;
- b) Whether or not his alibi is supported by the evidence on record;
- c) Whether it was proved that the accused inflicted the fatal injuries to the deceased; and
- d) Whether the offence of murder was established.

6. At about 7.30 p.m. there were some distress cries from the children of the accused. These attracted Michael Budumbe (PW4). He is a brother of the accused. He found the deceased in the house. We may not know in what position he was for this witness had two versions. In his statement to the police he recorded that that he found him lying on the floor but in his evidence in court he changed and testified that he found him seated on a chair. This discrepancy notwithstanding, it was evident that the deceased was in the house of the accused. He had been injured. This witness was declared a hostile witness. A hostile witness was described in the case of In **Coles vs. Coles, (1866) L.R. 1P. &D. 70, 71**, Sir J.P. Wilde as follows:

A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.

A hostile witness is treated with caution and the weight given to his evidence is negligible. This however will depend on the circumstances of each case. The evidence of such a witness is weighed against the evidence on record. In the case of **Alowo vs. Republic [1972] EA 324** the Court of Appeal said of a hostile witness:

The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.

Though in the instant case the prosecution counsel applied to have this witness treated as hostile, the point of departure was very negligible.

The only difference I noted was the position he said he found the deceased. I will therefore weigh his evidence with the evidence on record to establish whether he can be relied upon.

7. Dr. Allan Chawiya Rapui (PW1) testified that after he performed the post mortem on the body of the deceased, he found him with a deep cut wound at the back of the neck and a communicating fracture at the occipital-parietal junction.

8. The evidence of Corporal Paul Kamau Mwangi (PW6) was that he visited the scene of murder in company of other officers, on the same night at about 9 p.m. Outside the main house of the accused, they saw some blood stains. They entered the house of the accused and found some blood on the floor.

9. In his statement to the police, Michael Budumbe (PW4) had recorded that the accused had a machete and chased him away from the scene. Though he changed in court and said that the accused ordered him to move away from the scene, his evidence taken together with the evidence of Dr. Allan Chawiya Rapui (PW1) on the injuries the deceased sustained and that of Corporal Paul Kamau Mwangi (PW6) on the findings at the scene, makes me believe that the statement of this witness (PW4) to the police was truthful.

10. The accused pleaded an alibi. He contended that when he returned home from where he had gone to fetch his livestock, he found his children and his brother Michael Budumbe (PW4). Michael was talking with the deceased. He saw blood stains. When he asked his brother what had happened, the latter told him he did not know. When an accused person pleads an alibi, he has no onus of proving it to be true. In the case of **Uganda vs. Sebyala & Others [1969] EA 204**, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in **Criminal Appeal No. 12D 68 of 1969** where his lordship observed:

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.

Closer home the Court of appeal in the case of **Kiarie v. R. (1984) KLR 739, 740** 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.

11. Chief inspector Bernard Otieno Ongoro (PW5) testified that at the time of the incident he was in charge of Siaya Border Patrol unit. On the 25th January 2017, he was called by the OCS in-charge of Port Victoria Police Station. He wanted him to assist in the arrest of a suspect who had sought refuge in his area of jurisdiction. The OCS linked him up with a member of public who had the details of the hideout. He went and found the suspect sleeping inside a house on a mattress. He arrested him.

12. The evidence of the conduct of the accused after the deceased was injured leave no doubt in my mind that he committed the offence and that was why he went into hiding. This is in spite of lack of direct evidence. In the case of **Republic vs. Kipkering arap Koskei & Another 16 EACA 135**, the Court of Appeal 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.

In the instant case, I find that the circumstantial evidence on record, is sufficient to justify inference of guilt on the accused person. His alibi has been displaced by the evidence on record.

13. In order to establish the offence of murder, the prosecution must prove that an accused person charged with murder had malice aforethought. This is the requisite mens rea for the offence of murder. O malice aforethought Section 206 of the Penal Code provides:

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 bodily 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.

In the instant case, the prosecution did not adduce evidence to prove or infer that the accused had malice aforethought. The investigating officer failed to follow up any clues that could have either proved he had malice aforethought or what could have led him to inflict the fatal injuries to the deceased. The offence of murder has therefore not been proved. However, the evidence on record has proved the offence of manslaughter contrary to section 202 of the Penal Code. I find him guilty of this lesser offence and accordingly convict him.

DELIVERED and SIGNED at BUSIA this 30th day of April, 2019

KIARIE WAWERU KIARIE

JUDGE