



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCR NO. 197 OF 2017**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**PIUS KIKUNGU JOHN.....RESPONDENT**

**RULING**

1. The accused was charged with the offence of **murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 of the Laws of Kenya.**

2. Particulars being that on night of **27<sup>th</sup> and 28<sup>th</sup> June 2015**, at Kikomoni market, Wautu sub location, Kilungu sub county, Makueni county, **Pius Kikungu John** with others not before court murdered **Anthony Nthia Mukavi.**

3. The accused pleaded not guilty and the matter went into trial. At the closure of the prosecution case after calling four witnesses, the court was called upon to make a ruling as to whether accused has a case to answer.

**Prosecution evidence**

4. The prosecution called a total of 4 witnesses to prove its case. Pw1(Morris Muangili Musyoka) and Pw2 (Boniface Musyoka Ntiya) are the key prosecution witnesses who found the deceased at the scene and while still alive.

5. Their evidence and that of Pw4 CPL Rimba Kitsao confirm that the deceased was found while still alive in the morning of 28<sup>th</sup> June, 2015.

6. He was bleeding with serious head injuries and he succumbed to the injuries on 07/05/2015 while undergoing treatment at Kenyatta Hospital. The three witnesses also confirmed that the accused was arrested by the crowd at the scene who saw him pass near and shouted that he was among the people who assaulted the deceased.

7. PW1 equally mentioned other people at the scene who include Zawadi, Ndinda Munyaka, Kiteng'e and Musyoki. PW2 also confirmed that there were two girls who came at the scene and handled a metal bar to the police officers and that he stayed with the deceased at the hospital until he succumbed.

8. PW4 who is the investigation officer gave evidence which was to the effect that the accused and the deceased were drinking together at Katikamu bar the fateful night (the night of 27 – 28<sup>th</sup> June, 2015) whereby the accused assaulted the deceased and the deceased chased the accused outside the bar and continued drinking. This information had been given by one Brenda Adambwa Phoebe who was a bar attendant at the said bar.

9. **Dr. Edwin W. Loiposha** produced the Post Mortem Report as an exhibit. He confirmed among others that the deceased suffered head injury on the back of the brain.

10. He had a swollen brain. That the cause of death was due to hematoma caused by severe head injury as a result of blunt head trauma. On cross examination, he opined that the same might have been caused by a fall.

11. The prosecution through the witnesses had the onus to prove that it was the accused person who caused the death of the deceased by an unlawful act or omission and that he had malice aforethought to do so.

12. From the above summarized evidence, the accused counsel highlights the following: -

- *It cannot be ascertained as to the exact time when the accused was assaulted.*
- *No one testified that he saw the accused with the deceased in the previous night or in that morning.*
- *No one saw the accused attack the deceased.*
- *There is no evidence to place the accused person at the scene before the alleged crime, during the crime and after the crime.*
- *The accused was arrested by the crowd when he passed near the scene.*
- *The deceased was drunk in the previous night.*
- *The deceased died 10 days after the alleged assault but he did not confess to anyone as to who had assaulted him and/ or his probable cause of death.*

13. None of the said witnesses gave direct evidence to link the accused persons to the alleged crime. It therefore follows that there were no eye witnesses to the offence.

14. PW4, the investigation officer source of the information as to accused being seen fighting with deceased was from one **Brenda Adambwa Phoebe** who was a bar attendant at the material night.

15. It was also the prosecution evidence that the deceased was found besides the road in the morning of 28<sup>th</sup> June, 2015 and that the accused was arrested by the crowd at the scene who saw him pass near and shouted that he was among the people who assaulted the deceased.

16. PW2 also confirmed that there were two girls who came at the scene and handed a metal bar to the police officers. The above raises questions as to why the following persons were not called as prosecution witnesses.

*i. Brenda Adambwa Phoebe – Katikomu Bar attendant.*

*ii. Two girls – who came at the scene and handled a metal bar to the police officers.*

*iii. Zawadi Ndinda Munyaka, Kiteng'e and Musyoki who are among people at the scene according to PW1's evidence.*

*iv. The first people to find the deceased at the scene.*

*v. The person and/ or people while at the scene shouted that the accused was among the people who assaulted the deceased.*

17. In finding that the prosecution had not established a prima facie case to warrant the accused to be placed on his defence, court in the case of **Republic –vs- Morris Karani Alando** (supra) noted *inter alia* that: -

*“Applying the above principles to the instant case, I find and hold that the prosecution has not established a prima facie case to warrant the accused person being put on his defence. There was either poor investigation of the case or some lethargy on the part of the prosecution to call relevant witnesses to support its claims against the accused person. .... The only inference that this court can draw is that the prosecution failed to call those witnesses because*

*they were likely to give evidence that was adverse to the prosecution.*

18. It is also worth noting that no assault weapon was produced as an exhibit including the metal bar that as allegedly handed to the police by the two girls

## **Conclusion**

19. Conviction on circumstantial evidence can only be made when it excludes all hypothesis of the innocence of the accused. *In the case of SAWE –V- REP [2003] KLR 364 the Court of Appeal held.*

*“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”*

20. Also in the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction.

These are:

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

21. The prosecution has the legal obligation to prove the critical ingredients of the offence of murder, namely;

***a) Proof of the fact and the cause of death of the deceased.***

***b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the “actus reus” of the offence and***

***c) Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the “men’s rea” of the offence.***

***See Rep –Vs- Nicholas Onyango Nyolo (2014) ekr***

22. From the evidence on the record and matters raised herein, the prosecution has failed to meet threshold of the circumstantial evidence in the present case as it does not irresistibly point to the accused to the exclusion of all others so as to justify a conviction. There are other existing circumstances weakening the chain of circumstances relied on.

23. Further, what is on record here is mere concurrence of circumstances and pieces of disjointed evidence which adds no value to prosecution case. The court should be on its guard against the possibility of being misled into false inferences. Suspicions however strong cannot provide a basis for inferring guilt which must be proved by evidence beyond any reasonable doubt.

24. The court therefore finds that the prosecution has failed to establish a prima facie case to warrant putting of the accused person on his defence.

25. Thus the court makes the following orders;

**a. -The accused is acquitted**

**b. -The accused shall be set at liberty forthwith unless otherwise lawfully held.**

**SIGNED, DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF MAY 2019, IN OPEN COURT.**

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**C. KARIUKI**

**JUDGE**