



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 124 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

EVANS CHARLES MEKENYE.....ACCUSED

JUDGMENT

1. On 14th November 2018, this court was informed that Evans Charles Mekenye, the accused, had committed the offence of murder contrary to **Section 203** as read with **Section 204** of the *Penal Code*. It was alleged that on 12th November 2013, at Muniaku sub location in Gucha South District within Kisii County, the accused murdered **Kezia Monchari Okengo**, the deceased.

2. The prosecution marshalled 4 witnesses, Nelson Okengo (Pw1), Zedekiah Okengo (Pw2), Dr David Okenye (Pw3) and James Ombasa Orenge (Pw4) to prove its case while the accused gave unsworn testimony.

3. Pw1 recalled that on 12th November 2013, he was at home when the deceased left at about 8.00p.m. He told court that the deceased was mentally sick and was always roaming about. He testified that the deceased did not return home. He later received information that a body of a woman had been found nearby whereupon he proceeded to the scene and found that it was the deceased who had been killed in a very gruesome manner. He told court that the accused was later arrested as a suspect and Pw1 later learnt that that the deceased was killed for being a witch. Pw1 testified that he did not witness the murder of the deceased.

4. Pw2 testified that on the morning of 12th November 2013, at 6.00a.m he received a call from his brother Isaac and was informed that the deceased had been killed. Pw2 proceeded to the scene which was the home of the accused and called the area chief. The police arrived at the scene and questioned the accused his presence. The accused informed the police that he heard his dogs barking, on checking he found a person in the compound, the accused begun screaming “Witch! Witch!” and the villagers set upon the deceased killing her.

5. Pw4 recalled that on 2:00 a.m. on the 12th November 2013 at 2.00a.m. he was in his house asleep when he heard screams and soon discovered it was from mzee Mokaya home. He heard the words “Witch! Witch!” and he proceeded to the home where he found the deceased had died on the hill side next to the trees. He testified that there were many people at the home, he saw Mzee Otieno, Mzee Clement and Charles. He testified that he went to the police and made a report. Pw1 and Pw2 arrived in the morning.

6. The court after considering the prosecution case found that the accused had a case to answer and the accused was therefore put on his defence. The accused told court that he could not testify as to the events that occurred on the night of 12th November 2013. He testified that he had gone to weed maize at 8:00 am on the material day when he saw a government vehicle came near his compound in pursuit of his neighbor. He testified that he was then arrested after the police failed to secure the arrest of his neighbor and charged with murder. He told court he did not commit murder. That he cannot talk of the events of 12th night. He did not raise any alarm.

7. In any murder trial the prosecution bears the burden of proving the case against the accused beyond reasonable doubt. The offence of murder is defined in **section 203** of the **Penal Code** as follows, “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The prosecution must prove that the deceased died; that the accused before the court is the person who unlawfully caused that death and that the accused caused that death with malice aforethought.

8. It is not in dispute that the deceased died. The post mortem on the deceased body was conducted by Pw3 on the 14th November 2013 in Nyamache District Hospital. The deceased was identified by Pw1. Pw3 testified that there was rigamotis the hardening, swelling in the abdomen. He told court that on the external appearance there were 3 cuts on the scalp, on the left side of the head, each averaging 8cms. The cuts on the face were also 3 in number measuring about 2 cms each. He testified that the deceased suffered a closed fracture on the right forearm. He told court that upon opening up the body, the respiratory system on the left lung had cuts and on the left chest the 4th rib was fractured both on the front and back. He also testified that the 10th rib was fractured at the back. He told court that the spleen was ruptured and the liver had several tears. The abdominal cavity had blood and the head had a blood clot on the left side. Dr. David Okenye concluded that the cause of death was a cardio respiratory arrest due to internal bleedings after a murder or assault with a blunt and sharp object.

9. I now turn to whether it was the accused who committed the unlawful act that led to the deceased's death, the key prosecution witness were Pw1, Pw2 and Pw4. I note that the prosecution did not call the investigating officer.

10. Pw1 gave testified that the deceased left at about 8.00p.m., went to unknown place and did not return home. On cross examination he testified that he did not witness the murder of the deceased and it was alleged by the villagers that the deceased had been killed for being a witch. Pw2 upon receiving information that the deceased had been killed proceeded to the scene and found the deceased dead but did not witness the accused assault or kill the deceased. Pw4 testified that on the morning of 12th November 2013 he heard people shout "Witch! Witch!" and the noise was coming from Mzee Mokaya's place where he proceeded to. He told court he found the deceased had died but did not know who murdered her. The only evidence the prosecution has adduced to link the murder of the deceased to the accused was that the deceased was found in the home of the deceased. Therefore the prosecution's case entirely relies on circumstantial evidence as no witness saw the deceased being murdered.

11. The law concerning circumstantial evidence was stated by the Court of Appeal in **Sawe v Republic Criminal Appeal No 2 of 2002 (2003) eKLR** where the Court restated the principles which ought to be applied when dealing with circumstantial evidence in the following terms:

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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.

12. The facts proved by the prosecution are that the deceased went roaming about, did not return home and was later found dead in the homestead of the accused. Pw4 testified that the accused was present at the time the deceased was found dead. The question is whether the prosecution has built a case against the accused for the court to arrive at the conclusion that there can be no other explanation other than guilt of the accused. The answer is no, why do I say so? The totality of the prosecution evidence is not sufficient to complete the chain of circumstantial evidence as it did not prove that it is only the accused who could have murdered the deceased. The accused merely discovered that the deceased had died on his property but no evidence was furnished before the court to indicate that he killed the deceased.

13. With no evidence led by the prosecution that the accused committed the unlawful act that led to the deceased's death, I accordingly, I enter find the accused of not guilty and do hereby resolve the benefit of doubt in favour of the accused EVANS CHARLES MEKENYE and acquit him of murder of KEZIA MONCHARI OKENGO, the deceased. He is set free unless otherwise lawfully held. Any surety held shall be returned to

Dated, signed and delivered at Kisii this 19th day of June 2019.

R.E. OUGO

JUDGE

In the presence of;

Accused In Person

Mr Otieno Senior Prosecution Counsel office of DPP

Rael Court clerk