



**REPUBLIC OF KENYA**

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

**(CORAM: T.W. CHERERE-J)**

**CRIMINAL CASE(MURDER) NO.15 OF 2017**

**BETWEEN**

**REPUBLIC .....PROSECUTOR**

**AND**

**HAMILTONE OKOTH SIRE Alias Ambati.....ACCUSED**

**JUDGMENT**

1. **HAMILTONE OKOTH SIRE Alias Ambati** (*hereinafter referred to as the Accused*) is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that

**On 10<sup>th</sup> June, 2017 at Kachok Lucky Bar area in Nyalenda Estate within Kisumu East Sub-County within Kisumu County murdered EVANS OCHIENG KOTUNG alias BANJE**

**PROSECUTION CASE**

2. The prosecution called seven (7) witnesses in support of the charge. **PW1 DOLROSA ADHIAMBO OMOLLO**, testified that **EVANS OCHIENG KOTUNG alias BANJE** (*hereinafter referred to as the Deceased*) was her son. She recalled that at about 9.00 pm on the material date, one Winstone, a neighbour's son informed her that he had seen the deceased and Accused fighting. That immediately thereafter, the Deceased walked into her house with an injury on his chest and informed her that he had been stabbed by the Accused. It was her evidence that she escorted the Deceased to hospital where he was declared dead and thereafter reported the matter to police who visited the scene of crime, arrested the Accused and recovered a knife on a corridor near his house.

3. **PW2 GODFREY OCHIENG KOTUNG**, deceased's brother identified his body to the doctor who conducted a post-mortem but did not know the circumstances under which the Deceased died.

4. **PW3 WINSTONE OMONDI**, a minor aged 14 years stated that on the material night about 9.00 pm to 10.00 pm, he peeped through the window of their house and saw the Deceased and the Accused who was with a knife fighting and he reported the matter to deceased's mother.

5. **PW 4 DR. ODUOR CHARLES**, of Kisumu County Hospital stated that the autopsy on the body the Deceased was conducted by his colleague Dr. Otieno on 15<sup>th</sup> June, 2017 and noted the following injuries:

- **3 cm Puncture penetrating wound on the left side of chest (mid-clavicle)**
- **2 cm Puncture wound on right side of chest**
- **1.5 cm Puncture wound on covering of the heart with massive blood clotting**

The witness stated that the doctor formed an opinion that deceased died of cardiac failure due to punctured and lacerated heart and pericardium. He produced the post-mortem form PEXH.1.

6. **PW5 APC IMBUSI LUGUSE** arrested the Accused who had an injury on his hand on the material night after it was reported that he had murdered on Evans. He stated that he visited the scene of murder from where he recovered a blood stained knife, a blood tile and a blood stained sponge.

7. **PW6 RICHARD KIMUTAI LANGAT**, a government analyst recalled that on 16<sup>th</sup> June, 2017, he received for examination the following exhibits:

- **A – Blood sample of the Deceased**
- **B – Blood sample of the Accused**
- **C – Bloodstained knife**
- **D1– Bloodstained tile**
- **D2 Bloodstained sponge**

After examination, the witness found that:

- i. C – Bloodstained knife was stained with human blood from the Deceased, the Accused and an unknown male adult**
- ii. D1– Bloodstained tile and D2 Bloodstained sponge were stained the Deceased’s blood.**

The witness tendered the exhibit memo form and his report as **PEXH. 2** and 3 respectively. In cross-examination by counsel for accused, the witness confirmed that there was evidence of injury to three different persons.

8. **PW7 PC MUTAI EMMANUEL** the investigating officer received the Accused who was alleged to have murdered one Evans, and blood stained knife, sponge and tile recovered from the scene of crime and after investigation and more particularly the statement by PW3 who said that he saw the Accused and the Deceased fighting on the material night charged the Accused. He tendered sketch map of the scene, the blood stained knife, sponge and tile as **PEXH. 4, 5, 6** and **7** respectively. He also tendered as **PEXH. 9** an extract of OB NO. 70 OF 10.06.17 where one Rolex Akinyi reported that her husband JOYTOME OTIENO had stabbed one of three thugs that had broken into their house on the material night.

#### **DEFENCE CASE**

9. In his unsworn defence, the Accused stated that on the material night at about 11,00 pm, he was in bed with his wife when some people broke into their house and injured his right hand. That he put on the lights and identified his attackers as the Deceased, Njoria and another and they threatened to kill him. It was his evidence that Njoria pulled a knife and in an attempt to stab him missed and stabbed the Deceased after which the attackers went away and he was subsequently arrested and charged with an offence that he did not commit.

#### **ANALYSIS AND FINDINGS**

10. I have considered the evidence on record. To secure a conviction on the charge of murder, the prosecution has to prove three ingredients against an Accused person. In **ANTHONY NDEGWA NGARI VS REPUBLIC [2014] eKLR**, the elements of the offence of murder were listed as follows: -

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

#### **(a) The death of the deceased**

11. The death of the deceased has been confirmed by the post-mortem form **PEXH.1** which shows that deceased had multiple bruises over the trunk, cut wound on left leg, multiple wounds on scalp, fracture of left forearm and had *died of cardiac failure due to punctured and lacerated heart and pericardium.*

#### **(b) Proof that accused committed the unlawful act which caused the death of the deceased**

12. There’s no dispute that the Accused was at the scene of the murder.

13. None of the prosecution witnesses saw accused commit the unlawful act that caused the death of the two deceased children. **PW3 WINSTONE OMONDI**, who stated that he saw the Deceased and the Accused fighting was categorical that he did not see the Accused stab the deceased. That leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence.

14. As we know from **Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20**

*“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is*

*circumstantial.”*

15. In **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 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”.*

16. In **Abanga alias Onyango v Republic CA CR. Appeal NO. 32 of 1990 (UR)**, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

*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.*

17. In order to establish the accused’s culpability, the prosecution led evidence from **PW3 WINSTONE OMONDI**, who stated that he saw the Deceased and the Accused fighting but he was categorical that he did not see the Accused stab the deceased.

18. Having said that, the court is left with the evidence of the only other person who was at the scene and that is the Accused himself. It is his evidence that the Deceased and two others broke into his house and injured him on the right hand. Evidence that the Accused was indeed injured has been corroborated by **PW6 RICHARD KIMUTAI LANGAT**, a government analyst who confirmed that the murder weapon (knife) was stained with the Accused’s blood and also by **PW7 PC MUTAI EMMANUEL**, the investigating officer who confirmed that indeed the Accused had an injured right hand at the time of his arrest on the night of the murder.

19. The Accused told court that the Deceased was stabbed by one Njoria with whom they had broken into Accused’s house and who in who in an attempt to stab the Accused missed his target and stabbed the Deceased.

20. Accused’s evidence that there were other persons at the scene of crime other than the him and the Deceased has been corroborated by **PW6 RICHARD KIMUTAI LANGAT**, a government analyst who confirmed that the murder weapon (knife) was stained with the blood from the Accused, the Deceased and another unknown male person. From the foregoing, the Accused’s explanation regarding how him and the deceased were injured has not been controverted and I find no reason to cast doubt on it.

21. I have considered **PEXH. 9**, an extract of OB NO. 70 OF 10.06.17 tendered by **PW7 PC MUTAI EMMANUEL** the investigating officer by which one Rolex Akinyi allegedly reported that her husband JOYTOME OTIENO had stabbed one of three thugs that had broken into their house on the material night and I have come up with the following findings. The first one is that accused is **HAMILTONE OKOTH SIRE Alias Ambati** and not **JOYTOME OTIENO** who allegedly stabbed one of three thugs that had broken into a house belonging to Rolex Akinyi and her husband on the material night. Secondly, Rolex Akinyi did not testify and her report was not tested on oath. The said report is consequently of no probative value for the reason that it fails to meet the threshold of Article 50 of the Constitution which underscores the right to a fair hearing which includes an accused’s right to challenge evidence against him.

22. From the foregoing, it is clear that the Prosecution has not proved beyond any reasonable doubt that it was the Accused and not the third male person that was at the scene of crime that occasioned the Deceased the injuries from which he subsequently died. The circumstances in this case do not unerringly point towards the guilt of the accused.

(c) **Proof that the said unlawful act or omission was committed with malice afterthought.**

23. The prosecution having failed to prove *actus reus*, it would be futile for this court to delve into the issue of malice aforethought.

#### **Disposition**

24. As a result, I find the Accused **NOT GUILTY** and order that he be set at liberty unless otherwise lawfully held. It is so ordered.

**DELIVERED AND SIGNED IN KISUMU THIS 25<sup>th</sup> DAY OF July 2019**

**T.W. CHERERE**

**JUDGE**

**Read in open Court in the presence of**

Court Assistant – Felix & Okodoi  
Accused – Present  
For Accused – Mr Mwesigwa/ Mr Mbeka  
For the State – Ms Gatho