



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 31 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL ALIWA SIMBA..... ACCUSED

JUDGMENT

1. **Michael Aliwa 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 9th and 10th day of December 2016, at **Ndekwe** area in **Bunyala** Sub County of **Busia** County, jointly murdered **Everlyne Nelima Ofunyo**.
3. The prosecution case was that after the body of the deceased was found in her house, the accused was suspected for he was missing from his place of work.
4. The accused contended that he left his place of work after getting a better paying employer. He denied any involvement in the murder.
5. The issues for determination are:
 - a) Whether there was other evidence against the accused other than that of suspicion; and
 - b) Whether the offence of murder was established against the accused.
6. After the close of business by the fishermen at Ndekwe beach on 9th December 2016 the fifty employees of David Barasa Majanja (PW1) retired. Twelve of the fifty eight remained at the camp while the rest went to their respective homes. The accused and the deceased were among the twelve who remained at the camp.
7. It would appear that none of the people who were at the camp heard any commotion for the body of the deceased was found in her house the following morning. The accused was also missing and one of the boats of David Barasa Majanja (PW1) was also missing. This therefore led to the conclusion that the accused must have been the killer.
8. The evidence of David Barasa Majanja (PW1) was that the items of the deceased were scattered all over her house and that her body was on the floor next to the bed. This was an indication of a struggle. He said he suspected the accused for he was missing that morning when he was expected to be present. Also missing was one of his boats but he testified that the watchman saw a man going away in it but did not identify him. The evidence of Odoyo Sumba Obiba (PW3) just like that of David Barasa Majanja (PW1), was that the accused was the suspect.
9. P.C Solomon Wasilwa (PW5) the investigating officer in this case went by the version presented to him without doing any investigations. The accused was therefore charged on the basis of circumstantial evidence and suspicion.
10. Circumstantial evidence was defined in the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

In the case of **Mwangi & Another vs. Republic [2004]2 KLR 32** the Court of Appeal held:

In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypotheses except the hypothesis that the accused is guilty of the charge.

11. The Court of appeal in the case of **Sawe vs. Republic [2003] KLR 354** held:

a) 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.

b) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

c) 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.

12. The accused explained the circumstances under which he left the employment of David Barasa Majanja (PW1). His explanation need only be plausible. He said he hitched a hike in boat and denied to have used his employer's boat. He did not have a burden of proving his innocence. The burden was on the prosecution to prove his guilt but P.C Solomon Wasilwa (PW5) the investigating officer failed to investigate the case but opted to rely solely on evidence of suspicion. The circumstantial evidence is very weak for it is capable of being explained upon other reasonable hypothesis than that of his guilt. The evidence on record does not rule out any other person committing the offence.

13. Suspicion however strong without any other evidence to buttress it is worthless. This is what the Court of Appeal in the case of **Sawe vs. Republic [2003] KLR 354** held. The Court said:

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

14. In the instant case, I find that the prosecution case has not proved that the accused was involved in the murder of the deceased herein. I accordingly acquit him of the charge of murder and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 26th day of November, 2019

KIARIE WAWERU KIARIE

JUDGE