



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 32 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

KEZIA ATIENO OUMA.....SUBJECT

JUDGMENT

1. Kezia Atieno Ouma (*Subject*) is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that:

On the night of 12th and 13th August, 2019, at Amilo village North East Kano in Muhoroni Sub-County, within Kisumu County murdered POJ

2. The prosecution summoned a total of 8 (eight) witnesses in support of its case. Prosecution Case

3. PW 1 Leonard Ouma Nyandiko, the subject's 'husband' and father to POJ (*deceased*) stated that from July, 2018 when he 'married' the subject, she had been taking care of the deceased who was a child from the previous married. He stated that on 12.08.19 at about 05.00 pm, he quarreled with the subject over his missing wallet and she went away. It was his evidence that he last saw the deceased in the home of his neighbour one Amos, where he was playing with other children on the same evening of 12.08.18.

4. PW 2 Gladys Akinyi Oduor and PW5 Rose Achieng Atieno, neighbours to PW1 stated they saw the subject in company of the deceased on 12.08.19 at about 07.30 pm. PW2 stated that the subject had gone to her house to buy fish in company of the deceased whereas PW5 stated that she saw deceased walking from the direction of PW1's father carrying the deceased.

5. PW2 and PW4 Lukio Nyandiko Amilo, the deceased's grandfather told court that on 13.08.19 at about 08.30 am, they received information that the deceased's body was in a nearby dam. They witnessed its removal from the dam by PW3 Erick Odhiambo Nyandiko.

6. PW6 Nancy Adhiambo Otieno had gone to fetch water from the dam when she saw a child's body in the dam. She raised an alarm and several people gathered and identified the body as that of Paul Juma. PW7 SGT Gilbert Siana upon receiving a report from PW1 that his child had been murdered visited the scene and removed the body to the mortuary. He also arrested the subject near the home of PW1.

7. PW8 PC Joseph Rono, the investigating Officer recorded statements of witnesses and caused the subject to be charged having been the last person that was seen with the deceased. With the consent of defence counsel, he produced the deceased's post mortem form PEXH.1 which shows the body had a 7x5 cm bruise on left cheek, 2x2 cm abrasion on right side of head extending to hairline, minor laceration on upper lip, 3x2 cm contusion on front of head from which the doctor formed an opinion that deceased died of closed head injury secondary to blunt force trauma.

The Defence Case

8. At the close of the Prosecution case, this Court ruled that the Subject had a case to answer and put her on his Defence.

9. The Subject Accused stated that PW1 beat her up on 12.08.19 and when he armed himself with a panga threatening to kill her, she ran away and went where she stayed until 06.00 pm when went and hid in a sugarcane plantation near PW1's house from where she was arrested from. She denied killing the deceased.

ANALYSIS AND FINDINGS

10. For Prosecution to secure a conviction on the charge of murder, it 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 established by the postmortem form PEXH. 1 produced by PW8 that shows that deceased died of closed head injury secondary to blunt force trauma.

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

12. None of the prosecution witnesses witnessed the murder. The foregoing leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence.

13. 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.”

14. In the case of **Sawe –v- Rep [2003] KLR 364** the Court of Appeal stated:

1. 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.

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

3. 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.

15. In the case of **Abanga Alias Onyango V Republic CA CR. A 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.

16. In order to establish the accused’s culpability, the prosecution led evidence from PW 2 Gladys Akinyi Oduor and PW5 Rose Achieng Atieno, who stated they saw the Subject in company of the deceased on 12.08.19 at about 07.30 pm.

17. From the foregoing evidence, the Subject was suspected of killing the deceased. It is important to state that suspicion does form a basis on which guilt can be inferred. (See **Sawe –v- Rep (above)**).

18. The Subject’s denial that ‘she murdered the deceased, in my considered view destroyed and weakened the circumstantial evidence tendered against her since the prosecution did not lead evidence to the contrary.

19. As was clearly stated in **Sawe –v- Rep (above)**,

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt.....”

20. I find that the prosecution case falls short of prove beyond any reasonable doubt. The Prosecution has failed to prove circumstances which taken cumulatively would form a chain so complete that there would be no escape from the conclusion that within all human probability, the crime was committed by the Subject and none else.

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

21. Having found no evidence to link the Subject to the unlawful act that occasioned the death of the deceased; it would be pointless to delve into the issue of malice aforethought.

Disposition

22. Accordingly, I have come to the conclusion that the Subject is NOT GUILTY of the offence of murder and is accordingly acquitted. The Subject shall be set at liberty unless otherwise lawfully held. It is so ordered.

DELIVERED AND SIGNED IN KISUMU THIS 18TH DAY OF DECEMBER 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant – Amondi

Subject - Present

For Subject - Ms Owino/Ms Onsongo

For the State – N/a