



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE NO. 63 OF 2011

CORAM: MAJANJA J.

BETWEEN

REPUBLIC PROSECUTOR

AND

FRANCIS OUKO GUDA ACCUSED

RULING

1. **FRANCIS OUKO** (“the accused”) is charged with the murder of **LABAN MUGA NYIGAR** contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The incident took place on 29th March 2017 between 7.30am and 10.00am at Magina Sub-location, Nyando Sub-county of Kisumu County. The accused pleaded not guilty and the prosecution marshalled 9 witnesses to prove its case. The prosecution case was as follows.

2. The deceased’s wife, Farian Pendo Nyingar (PW 1) told the court that on the morning of 29th March 2017, the deceased woke up as usual and went to tether his goats in the nearby field. He did not come back but after a while, she saw the goats stray back home. Roselyne Akinyi Adoda (PW 2), who had passed by PW 1’s home, also noticed that the goats had gone astray so she decided to go with PW 1 to check where the deceased was. They found the deceased’s body lying under some shrubs. PW 1 was distraught so she went to inform her brother in law, Wilson Ochieng Muga (PW 5). Likewise, Nicholas Ouma Obonyo (PW 6), the deceased’s employee testified that when he arrived at the homestead that morning he noticed that the goats had strayed into a neighbour’s farm.

3. PW 5 recalled that on 29th March 2017 at about 8.00am, he saw the deceased as he was tethering his goats. They greeted each other and agreed to meet later. He went home and after a short while PW 1 came to see and inform him that she had not seen the deceased. As he proceeded to the scene, he heard some *boda boda* riders saying that PW 1 has gone to Ahero Police Station to report that the deceased was dead. He called PW 1 who confirmed to him that the deceased had indeed died. He went to the scene on the incident and found the deceased’s body in a bush with a cut on the head.

4. After PW 1 reported the matter at Ahero Police Station, Sgt David Kiriinya Mugambi (PW 9) was assigned to investigate the matter. PW 1 told him that the deceased had gone to graze the goats in the morning but he did not return and that she found the deceased’s lifeless body was found in a bush with cut wounds on the head. Together with other officers, he went to the scene where they found the deceased’s body in a thicket. From the blood stains at the scene, it appeared that the body had been dragged into the bush. The Scenes of Crime officer, Inspector John Sonya (PW 8) came and took photographs of the scene. PW 9 collected soil samples and plant material stained with blood and forwarded them to the Government Chemist. When the results from the Government Chemist were returned, the Government Analyst confirmed that the blood in the soil and plants material was that of the deceased.

5. When PW 9 investigated the matter, he found that the accused had been charged with assaulting the deceased at Nyando Law Courts in Criminal Case No. 1221 of 2016. The case was later withdrawn as the parties reconciled. PW 1 confirmed that the accused had been her boyfriend but they had since parted but he kept threatening her and the deceased. After the incident, the accused disappeared from the village and was only arrested on 20th July 2017 when he was cited at Katito market by PC Miles Karimi (PW 7).

6. The fact and cause of death is not disputed. The witnesses who saw the deceased’s body observed that he had sustained severe head injuries. These observations were consistent with the finding of Dr Dixon Mchana who conducted the post-mortem on the deceased’s body after it was identified by Wilson Ochieng Muga (PW 3). The autopsy was done on 6th April 2017 at Ahero Sub-County Hospital Mortuary. Dr Mchana certified that the deceased died as a result of severe head and neck injuries due to sharp force trauma.

7. The issue in this case is whether, after hearing the prosecution case, I should put the accused on his defence. The case against the accused is circumstantial in nature as no one saw the accused kill the deceased. What is there is grave suspicion confirmed by PW 1 and PW 9 that the accused had previously assaulted the deceased following an affair the accused had with PW 1. That the accused was a suspect was a

matter of common knowledge in the village. PW 9 recalled that he was visiting the scene on 29th March 2017, villagers proceeded to burn the accused's grandmother's house on the basis of this suspicion.

8. Motive and suspicion alone are not enough to make a case. There must be evidence pointing to the accused which he should be able to answer. According to **Ramanlal Trambaklal Bhatt v Republic [1957]EA 332**, a *prima facie* case is one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no evidence in rebuttal is called by the defence.

9. The totality of the evidence is that the prosecution did not establish where the accused was at the time of the deceased's death, his presence or proximity to the *locus in quo* and whether he was the only one who could have murdered the deceased at the place and time. The only witness who would probably have shed some light is Quinter Anyango Guda, the accused's niece, who, according to PW 9, would have placed the accused at the scene of the offence with a weapon. PW 9 told the court that every effort had been made to locate the witness who moved first to Siaya then to Bomet where she disappeared. I did issue summons to secure her attendance and then issued warrants of arrest for her but they were not enforced. Since she was not called, what she could have said remains hearsay.

10. Since the evidence implicating the accused is threadbare and consists entirely of well-founded suspicion, I cannot put the accused on his defence. I have no option but to enter a not guilty verdict against the accused under **section 306(1)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**. I therefore acquit the accused, **FRANCIS OUKO GUDA**. He is set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 20th day April of 2018.

D.S. MAJANJA

JUDGE

Mr Bagada, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.