



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRC NO. 61 OF 2015 (MURDER)

(CORAM: J.A. MAKAU – J.)

REPUBLIC.....PROSECUTION

VERSUS

JEREMIAH OUGO.....1ST ACCUSED

KENNEDY OTIENO.....2ND ACCUSED

JUDGMENT

1. **JEREMIAH OUGO** (herein the 1st accused) and **KENNEDY OTIENO** (herein the 2nd accused) are charged with an offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code (Chapter 63), Laws of Kenya**. The particulars of the offence are that on the night of 16th and 17th February 2015 at Sanda Beach, Usenge in Bondo Sub-county within Siaya County, murdered **CYRUS NYANGUTE**.

2. The Prosecution was led by M/s Maurine Odumba, Learned Prosecution Counsel while Mr. Ochieng, Learned Counsel appeared for the 1st accused and Mr. Otieno for the 2nd accused. The Prosecution called a total of 7 witnesses, whereas the accused testified on oath. The 1st accused gave evidence and called one witness whereas the 2nd accused gave evidence and called no witness.

3. The Prosecution case is that on 13th February 2015 at around 12.00 noon, the deceased, a grandson to PW1, went missing. That on 14/2/2015 in the evening, the 1st accused in company of Boda boda riders came to PW1's home seeking to know whether the deceased was her grandson to which she confirmed. He then told her, her grandson had disappeared with a motorbike and if they trace him, they would kill him. That on 17/2/2017, PW1 received a report from P. Oriaro that a person had been found dead at Sanda Beach, who went to the scene and confirmed that the body was of Cyrus Nyangute, the deceased herein. The police were duly informed. PW1 later viewed the deceased's body at her gate as it was being taken to Bondo District Hospital Mortuary by police vehicle.

4. PW2, Esther Adhiambo Ochieng's evidence is that on 14/2/2015 at 0800 hours, she was at Usenge Town, when she gave her motorbike to her employee, one James Omondi, who later told her he had given the same to Cyrus on a Friday night to which PW2 told her employee to look for Cyrus and deliver her motorbike back to her. That by 1200 noon, the employee reported he had not traced Cyrus, forcing PW2 to ask him to accompany her to Usenge Police Station, where a report was made and PW2's employee put in cells. That on the same day at around 10.00 pm, PW2 got a call from her mother Benita Juma Ochieng. That she had received a call from Ken telling her he got the motorbike at Uriru and on arrival she found Ken had taken the motorbike to his home. Ken told them he had collided with the rider at around 10.00 p.m. and both of them fell down but the rider of the other motorbike disappeared. PW2 took the motorbike to Usenge Police Station. PW2 was advised to pick her motorbike the following day as James Omondi, her employee was released from cells. On 17/2/2015, PW2 was called by OCS Usenge requesting her to go to Sanda Beach, whereby on arrival, the OCS pointed to PW2 at a body of someone lying on its sides, which PW2 recognized as that of Cyrus, which had severe injuries but still in its clothes. The police collected the body and took it to Bondo Sub-District Hospital mortuary.

5. PW3, James Omondi Oyugi, a Boda boda rider at Usenge area, and an employee of PW2, confirmed that on 13/2/2015 he gave PW2's motorbike to the deceased as a squad to return the same in the evening, but did not. He later searched for Cyrus Omondi without getting him, forcing him to inform PW2 at around 11.00am the following day. That PW3 and PW2 proceeded to Usenge Police Station, made a report, after which PW3 was put in the cells as a suspected thief. That after PW2 and Ken, the 2nd accused, took the motorbike to Usenge Police Station, PW3 remained in cells upto 5.00p.m when he was released. PW3 identified the motorbike as Reg. No. KMDA 177M; *BAJAJ Boxer*, red in colour; which he identified outside the court, during the trial of this case.

6. PW4, Manas Omondi Osuru, the Assistant Chief of Usenge sub-location, testified that on 17/2/2015, he received a telephone call from a village elder, one Jared Owoko, now deceased, informing him of a body which had been found along Usenge – Sanda road in a bush. That in company of the village elder, and police, they proceeded to the scene and found the body of the deceased in a bush 200 metres from the

shore, which was decomposing with several cuts all over the body. PW4 could not identify the body. The body was collected by CID from Bondo Police Station; after photographs were taken and that later a lady came and identified the body as that of Cyrus Omondi Nyangute.

7. PW5, Penina Adhiambo Otieno, cousin to the deceased, evidence is that on 18th February 2015 in company of her Aunt Seline Achieng, she identified the deceased's body at Bondo Sub-County Hospital mortuary to the doctor for postmortem examination. She stated she had seen the body while being transported to the mortuary and noted it had several stabs wounds all over the body. She stated the body was that of Cyrus Omondi.

8. PW6, Dr. Bob Awino, a Medical Doctor produced the postmortem examination report, exhibit P1, on the deceased herein, one Cyrus Nyangute. He stated that he had performed the postmortem on 18/2/2015 at 12 noon. He observed the body had deep multiple cut wounds and fracture and as a result of his examination, he opined the cause of death was due to haemopleura from chest trauma and intracranial haemorrhage from fractured skull.

9. PW7, No. 236095 Inspector Abdirahman Mohammed, the Investigating Officer in this case, testified a report was made at Usenge Police Station of a body of a deceased person at Sanda Beach, Usenge. PW7 and other police officers and Scene of Crime personnel, proceeded to the scene; found the body of the deceased being in bad shape as the skin was peeling off and looked like it had stayed in water, as it was next to the beach. It had deep cuts which appeared to have been caused by a sharp object. That there was no evidence, the incident had occurred at the scene. That at the scene, a lady (PW2) identified the body as that of Cyrus Nyangute. That through investigation, PW2 informed them of her employee having been given her motorbike to the deceased on 13/2/2015 and disclosed she had made a report at Usenge Police Station on the matter. PW7 also got a further information from PW1 incriminating against the 1st accused and that the 2nd accused called PW2 on 14/2/2015 at around 10.00 p.m. informing her he had recovered her motorcycle from the deceased and the deceased ran away. That on 15/2/2015, the motorcycle was handed over to PW2 after it had been taken to Usenge Police Station. That after discovery of the body of the deceased and investigation, the two accused were arrested and charged with the murder of the deceased. He testified the deceased's body was collected by police and taken to Bondo Sub-County Hospital Mortuary.

10. The accused upon being called to defend themselves each opted to give sworn defence. The 1st accused opted to call 1 witness whereas the 2nd accused opted to call no witness.

11. The 1st accused's defence is that of alibi. He denied knowing the deceased and PW1, Mary Obumba Otieno and even her home place. He stated that on 14/2/2015 he attended the funeral of his late sister Cloy Juma Owino Nyagadi who had passed on on 2nd February 2015 and produced the Funeral Programme as exhibit (D1). He stated that he stayed at his sister's place of funeral at Alego after burial on 14/2/2015 for 3 days and left in the company of his mother Alice Awuor Ochieng (DW3) with whom he had attended the funeral. The 1st accused further denied being the Chairman of Boda boda operators, stating he ceased to deal with Boda boda business in 2009 and ceased being the Chairman of Usenge in 2009; when he changed his business from that of Boda boda operator to a shopkeeper. DW3, Alice Awuor Ochieng corroborated the 1st accused's evidence, stating her daughter Cloy Juma Owino Nyagadi was picked from Siaya County Referral Hospital Mortuary for burial at Alego on 14th February 2015. That she and the accused with other relatives escorted the deceased' body to Alego for funeral which took place on 14/2/2015. That after funeral, they stayed at Alego for 3 days.

12. The 2nd accused gave defence denying knowing the deceased and causing his death. He stated that in February 2015 while on his way to Usikeko to pick a customer's goods at around 9.00 p.m. at around Nyabondo School, while passing livestock, which were being driven on the road, he was hit by oncoming motorbike, both fell down, however, the other rider took off leaving the motorbike behind. That he did see his face nor spoke to the rider, before he took off. He checked and noted the motorbike was that of Esther Adhiambo Ochieng (PW2) as she had announced having lost the same and he knew it as a former employee of PW2 as he used to ride it. He took the ignition key, locked the motorbike and proceeded to inform the mother of PW2 at Usenge Market, who called PW2; who came with her husband and her brother and the 5 of them proceeded to the scene, where PW2, her husband and her brother took the motorbike to Usenge Police Station while the 2nd accused took PW2's mother back to her house. He denied the charge stating he did not know the deceased nor did he cause his death.

13. Upon closure of the defence case, Mr. R. Otieno for the 2nd accused who was holding brief for Mr. Ochieng for the 1st accused and M/s M. Odumba, Learned State Counsel relied on the evidence and made no submissions thereto.

14. The accused is facing a charge of murder. In proving a charge of murder, the Prosecution has to adduce evidence to prove that the accused caused the death of the deceased with malice aforethought. The Prosecution must establish that the accused had formed the necessary malice aforethought to either cause death or do grievous harm to the deceased. Malice aforethought is also proved if it is shown that the accused knew that his actions causing death would probably cause death or do grievous harm.

15. To prove a charge of murder, the Prosecution has a duty to establish the following ingredients: -

(i) Death of the deceased and its cause.

(ii) That the accused caused the death of the deceased through unlawful act or omission.

(iii) That the accused possessed an intention to cause harm/kill or had malice aforethought.

(a) Whether death of the deceased and cause of death was proved.

16. PW1, Mary Obumba Otieno, grandmother to the deceased herein, testified that one Paul Oriaro telephoned her on 17th February 2015 telling her the person who had been reported dead at Sanda Beach was Cyrus Nyangute. PW1 did not go to the scene, however, police vehicle stopped at her gate on their way to the mortuary, she viewed the body and proceeded to Bondo Sub-District Hospital Mortuary in the

same vehicle. PW2, Esther Adhiambo Ochieng, testified on 17/2/2015, OCS Usenge Police Station called her over her phone asking her to go to Sanda Beach; where OCS pointed at a body of a deceased person, which she identified upon looking at the face as that of Cyrus, the deceased herein. She witnessed the police collecting the deceased's body and taking it to Bondo Sub-District Hospital Mortuary. PW3 testified he went to Sanda Beach and confirmed Cyrus Omondi was deceased after seeing his body on a hill. PW4, Manas Omondi Osuru, Assistant Chief of Usenge testified that he received a call from village elder of a person's body in Usenge Area, proceeded there with police and viewed the deceased's body which he could not identify. However, PW2, identified the body as that of Cyrus Omondi Nyangute. PW5, Penina Adhiambo Otieno, cousin to the deceased, identified the deceased's body on 18th February 2015 at Bondo Sub-District Hospital Mortuary while in company of her Aunt Seline Achieng for postmortem examination. PW6, Dr. Bob Owino, who carried out the postmortem examination of the body of the deceased on 18/2/2015 at 12 noon corroborated the evidence of PW1, PW2, PW3, PW4 and PW5 as to the nature of injuries they had noted on the body of the deceased and the deceased's death. He opined the cause of death to be haemopleura from chest trauma and intracranial haemorrhage from fractured skull.

17. From the above, I am satisfied the Prosecution proved the deceased's death and the cause of death to the required standard of proof.

(b) Who caused the death of the deceased?

18. In this case, there was no eye witness. The Prosecution case is based purely on circumstantial evidence. The Prosecution witnesses stated that they do not know who caused the deceased's death.

19. PW1 in her evidence stated the 1st accused with several Boda bodas came to her home and asked her to produce the deceased and the 1st accused left with a threat that if they get him they will kill him. The 1st accused on his part denied knowing PW1 and the deceased or having met any of them as suggested by PW1, stating he had no reason to do so as he was not the Chairman of Boda boda, Usenge Area. He gave a defence of alibi.

20. The 2nd accused denied the offence and urged he only acted as a Good Samaritan after getting the motorbike of PW2, he denied having called PW2's mother, but stated he drove to PW2's house, who he met and took them to the site of the incident to collect the motorbike. He denied meeting the deceased; urging he did not know who he had collided with, as he did not see his face nor talk to him before he disappeared.

21. In **Elizabeth Gatira Gachanja and 7 others v Republic Criminal Appeal No. 51 of 2014**, the Court of Appeal set out the test to be applied in dealing with a case based on circumstantial evidence as follows: -

“(i) There had been no eye witnesses to the death of the deceased. In such a case, the test to be applied was clear: In order to draw inference of guilt from circumstantial evidence, the facts of the case must have been incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, the burden of proving facts which justify the drawing of this inference is always on the prosecution and never on the accused.

(ii) It was necessary for the court to be sure that there were no other co-existing circumstances which could have weakened or destroyed the inference of guilt.

(v) There chain of evidence from the time they were seen with the deceased to the time that he was found dead was not broken and in the absence of any other reasonable explanation as to how he had met his death. Fingers pointed to them and to no others as the perpetrators of the murder. The court was therefore satisfied that even without any other evidence; the circumstantial evidence that the appellants were the last people seen with the deceased in their vehicle was enough to point a finger at them to the exclusion of any other person.”

22. In the instant case, the facts of the case against the 1st accused and the 2nd accused are not incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Prosecution in the instant case failed to prove facts to justify the drawing of the inference of guilt against the accused persons. PW1's evidence against the 1st accused is evidence of sole witness. The accused denied being at her place as she had stated. The 1st accused gave evidence and produced his sister's funeral programme where he was with DW4. He gave a defence of alibi which the Prosecution did not disapprove. No evidence was adduced corroborating PW1's evidence placing the accused at PW1's home or at the scene of murder or on the alleged threats on the wife of the deceased by the 1st accused.

23. On 2nd accused's defence, other than having directed PW2 where to get the motorbike after the accident, there is no evidence challenging his explanation. No evidence that there was no accident or otherwise. The explanation was and is reasonable. PW7's evidence that the accused told PW2, he collided with the deceased, is not supported by PW2 as PW2 stated she got information of recovery of her motorbike from her mother and not the 2nd accused. PW7's evidence is not supported by anyone else as PW2's evidence disowns the same. PW2's mother to whom, the 2nd accused reported the incident was not called as a witness and what only PW7 was told by PW2 about the incident remains a hearsay and is of no probative value.

24. In this case there are other co-existing circumstances which could have weakened or destroyed the inference of guilt against the accused persons. There is no other evidence connecting the accused with the death of the deceased. No evidence placed them or any of them at the incident of murder. No murder weapon was recovered from any of them. There is no evidence that the two knew each other prior to the incident nor that they were together on the material date of murder.

25. There is no chain of evidence from any time connecting any of the accused with the deceased to the time he was found dead. The deceased's death could possibly have been caused by unknown people other than the accused persons. The evidence against the accused is

purely speculative and based on mere suspicion. Speculation and suspicion only without more cannot be a basis for conviction in any criminal case. I find there is no evidence pointing at the guilt of the accused persons to the exclusion of any other person. It would be against the required burden of proof in criminal cases to convict the accused on such weak evidence as adduced in this case by the Prosecution. This case was very poorly investigated and cannot sustain any conviction.

26. I have considered the defence of alibi by the 1st accused and note the same has not been challenged and the accused was not placed at the scene of incident. The defence of alibi is therefore sustainable in this case.

27. I have also considered the defence by the 2nd accused and find that the explanation he gave on how he came to collide with the rider of PW2's motorbike is reasonable and plausible explanation. There is nothing criminal in his act of notifying the mother of PW2 of how he got her daughter's motorbike. His acts are in my view not acts of a guilty person but acts of an innocent person who should not have been charged for his honesty. He was a Good Samaritan.

28. In view of the foregoing, I find the Prosecution failed to prove to the required standard of proof who caused the death of the deceased. The evidence do not connect any of the accused with the deceased's death.

(c) Whether the Prosecution proved malice aforethought?

29. PW1's evidence is that the 1st accused with other Boda boda operators went to her home looking for the deceased following his disappearance with PW2's motorbike. They were according to PW1 suspecting him to be a thief. Her evidence as to what transpired in the alleged visit by 1st accused and his team of Boda boda operators is not corroborated as PW1 was at her home alone. The 1st accused denied having gone to PW1's home on 14/2/2015 or at all and even knowing her before his arrest. He stated he had ceased to be the Chairman of Usenge Boda boda operators in 2009 and gave a defence of alibi. The 2nd accused got the motorbike of PW2 after colliding with a person who was riding it, after he abandoned it and disappeared. There is no evidence that the 1st and 2nd accused met and planned the deceased's death. There is even no evidence they caused the death of the deceased. None of the Prosecution witnesses specifically placed any of the accused persons at the scene of murder. I therefore find that the Prosecution failed to prove malice aforethought in this case.

30. The upshot is that the Prosecution failed to prove the charge of murder against the accused persons. Accordingly, I find the 1st and the 2nd accused not guilty of murder of Cyrus Nyangute. I accordingly set the 1st and the 2nd accused at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 20TH DAY OF APRIL 2018.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the Presence of:

M/s Odumba: for the State

Mr. Ochieng: for the 1st Accused

Mr. R. Otieno: for the 2nd Accused

Court Assistants:

1. Laban O. Odhiambo

2. Brenda Ochieng

J.A. MAKAU

JUDGE