



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NO. 16 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FREDRICK OYARO ELPHAS.....ACCUSED**

**J U D G M E N T**

**Introduction**

1. The accused before me, Frederick Oyaro Elphas is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 of the Laws of Kenya. The particulars of the offence are that on the 14<sup>th</sup> day of April, 2012 at Mwichekhe village, Emukola Sub-Location in West Bunyore Location in Emuhaya District within the County of Vihiga, jointly with others not before court, murdered NEHEMIAH ACHOKA OMULEMA.
2. The accused denied the charge. The prosecution called six witnesses in an effort to prove their case against the accused. One other witness who had been sworn to testify as PW5 was stood down pending availability of an interpreter, but for reasons only known to the prosecution, the said witness was never recalled to testify.

**The Prosecution Case**

3. In spite of the many gaps in the case, the prosecution put forward the following facts: on 12<sup>th</sup> April, 2012 at about 5.00am, Julius Achoka Omulema was at his house when his two sons, the deceased and Elijah arrived at the house. The deceased had two cuts on the head and when Julius Achoka Omulema, PW4 (Julius) sought to know from Elijah what had befallen the deceased, Elijah told him (Julius) that it was Fred (the accused herein) who had inflicted the injuries on the deceased. Thereafter, arrangements were made to take the deceased to hospital but on the following day, the deceased died. Julius conceded he did not witness the incident, but he is the one who made arrangements to take the deceased to hospital and also reported the incident to Luanda Police Station.
4. The report to the police was received by Number 53069 PC Maurice Kituyi, PW6, who was also the Investigating Officer in the case. According to PC Kituyi, the report was made at 3.00pm by Julius on 12<sup>th</sup> April, 2012. PC Kituyi together with his OCS went to the hospital where the deceased had been admitted. The deceased could not talk and PC Kituyi testified that when he observed the deceased, he noticed some brutal cuts on the head as well as on the hands. PC Kituyi also testified that through his further investigations into the matter, he established that the cause of the attack upon the deceased by the accused was a woman whom the accused claimed was his wife and whom the deceased had flirted with during the period the accused had been away in prison.
5. Other witnesses who gave evidence for the prosecution were Samwel Nambwenya Peter, PW2 ( Samwel) and Hezekiah Aywa Achoka, PW3 (Hezekiah). Both Samwel and Hezekiah testified that at around 6.00am on 14<sup>th</sup> April, 2012, they heard screams coming from the direction of the deceased's home and on rushing to the scene, they found the deceased bleeding from the head. Both witnesses also testified that they saw the accused who was armed with an axe walking while holding the hand of his "wife" who was screaming. Neither Samwel nor Hezekiah witnessed the incident.
6. It was Patrick Kabale Musumba PW1 (Patrick) who testified that on the morning of the incident he was a sleep in the house with his father, the deceased, when attackers struck. Patrick also testified that his mother- the screaming woman- was also in the house. The accused, according to Patrick was armed with an axe and made an attempt to cut the deceased, but the deceased ran out of the house in an attempt to escape. In the process, the deceased fell down into a ditch with the accused following him. The accused then struck the deceased on both sides of the head with the axe before walking away. Patrick gave the name of the attacker as Fred and that he knew him well, but during the hearing, Patrick was asked if Fred was in the courtroom, but after surveying the faces several times, he told the court that Fred was not one of the people inside the courtroom.

7. Dr. Philip Athero conducted the post mortem examination on the body of the deceased on the 16<sup>th</sup> April, 2012. The examination revealed deep cut wounds with fractures on both sides of the head, with the only other injury being oedema of the penile and scrotal regions.

8. The prosecution then closed its case after which the accused was placed on his defence.

### **The Defence Case**

9. The accused gave sworn evidence and denied committing the offence. He testified that on 12<sup>th</sup> April, 2012 at about 11.00am he was informed the deceased had been stabbed by unknown people. He was arrested on 14<sup>th</sup> April, 2012. The accused did not call any witnesses. He recanted his statement to the police to the effect that it was him together with one Chapchap who killed the deceased using an axe.

### **Submissions**

10. At the close of the hearing, Mr. Shifwoka, counsel for the accused submitted the prosecution had completely failed to prove the case against the accused beyond any reasonable doubt and urged the court to make a finding of not guilty. The state through prosecution counsel Mr. Juma submitted the prosecution had discharged the burden of proving the charges against the accused. Counsel termed the accused as an unreliable and untruthful person.

### **Issues for Determination**

11. For the prosecution case to succeed, the prosecution must prove both the actus reus and the mens rea on the part of the accused as set out under sections 203 and 206 of the Penal Code respectively. Section 206 only requires that one of the circumstances set out thereunder is proved by the prosecution. See **Nyabuto & Another – Vs – Republic [2009] KLR 409 and Republic – VS – Ndalama & Others [2003]KLR 638.**

### **Analysis**

12. But first; does the evidence on record point to the accused as the one who caused the death of the deceased and whether he did so with malice aforethought? Although I have this gut feeling that the accused committed the offence, the evidence falls far short of proving the same. Patrick who was the eye witness, and whose stated age left much to be desired, was unable to identify Fred inside the courtroom yet he had told the court he knew Fred and saw him hack the deceased on the head with an axe. It was also not clear from Patrick's testimony how he was able to identify, by recognition, the accused since it was night and no indication was given as to whether there was any light, and how strong that light was, at the scene to enable Patrick see what he purported to describe to the court.

13. In **Odhiambo – vs – Republic [2002] KLR 241**, the court held that the “*court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification.*” In my considered view, the allegation by Patrick that he saw the accused cut the deceased with an axe cannot be said to be accurate evidence under such difficult circumstances.

14. As I make the above findings, I also wish to point out that the investigation into this case was one of the worst and most wanting. There was no explanation why the person named Elijah, a brother to the deceased who took him to Hezekiah was not called as a witness. Further PC Kituyi admitted that the information in the investigation diary did not contain names of the deceased's assailants, nor was there a description of such assailants.

15. With the gaps highlighted above, the prosecution counsel also found it very difficult presenting the evidence in this case hence the conclusions I have made hereinabove.

### **Conclusion**

16. For the reasons given above I find and hold that the prosecution has not proved its case against the accused beyond any reasonable doubt. It was not the duty of the accused to exonerate himself from the allegations. Accordingly I find the accused not guilty of the murder of NEHEMIAH ACHOKA OMULEMA and acquit him of the same under Section 322(1) of the Criminal Procedure Code. Unless he is otherwise lawfully held, the accused shall be released from prison custody forthwith.

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 19<sup>th</sup> day of April 2018

**RUTH N. SITATI**

**JUDGE**

**In the presence of:-**

**Mr. Ngetich (present).....for State**

**M/S Andia holding brief for Mr. Shifwoka.....for Accused**

