



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL CASE (MURDER) NO. 17 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

FREDRICK OKOTH KISERO..... 1ST ACCUSED

BONFACE ODHIAMBO OCHIENG.....2ND ACCUSED

WICLIFF OMONDI ADEMBA..... 3RD ACCUSED

JUDGMENT

1. Accused persons herein were jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that:

On 21st June, 2017 at Kachan village, Nyakach Sub-County within Kisumu County, jointly with others not before the court murdered Stephen Mboya Omollo.

PROSECUTION CASE

2. The prosecution called 10 witnesses. **PW1 Miriam Njambi Mboya**, deceased's husband told court that deceased went out of the house at about 7.00 pm after one Dianga went to the house and asked to speak to him outside the house. She said she went out after them and saw accused 1 join Dianga at the deceased. That shortly thereafter, accused 1 went to the fence where there were other people that she did not identify and was followed by the deceased. That shortly thereafter, deceased screamed and called out to his brother Caleb. That immediately thereafter, her brother in law's daughter one Brenda Akinyi arrived at the scene and she heard her husband scream that he had been stabbed. That she later saw her husband lying dead with cuts all over his body including a severe one on the stomach that exposed his internal organs. She confirmed that she did not see accused persons or anyone of them attack her husband and that accused 2 and 3 were unknown to her.

3. **PW2 Brenda Akinyi**, stated that deceased was her uncle. She recalled that on 21.6.17 at about 7.00 pm, she rushed out after she heard her late uncle screaming. That she saw people she did not identify running away from the scene her uncle was lying. That her uncle had an open cut in the stomach that exposed his internal organs as a result of which he died. That PW1 arrived at the scene and screamed attracting some big crowd. That police later arrived at the scene and took away her uncle's body to the morgue. In cross-examination by Mr. Maua, counsel for accused persons, the witness conceded that she was the first person to arrive at the scene of crime and did not identify her uncle's attackers.

4. **PW3 Caled Agudha Omollo**, deceased's brother stated that on 21.6.17 at about 7.00 pm, he rushed out with PW2 after he heard someone screaming. That PW2 ran ahead and when he arrived at the scene, he saw people he did not identify running away. That he found his brother with an open cut in the stomach that exposed his internal organs and he said he had been stabbed after which he collapsed and died.

5. **PW4 Salim Mohamed**, deceased's brother arrived at the scene after deceased was long dead. He said that accused 1 was implicated by PW1 and while accused 2 and 3 were implicated by accused 1. **PW5 Chris Hamisi** identified the body of the deceased to the doctor that performed the autopsy on 28.6.17.

6. **PW6 Ogada Collins Owili** stated that on 21.6.17 at about 8.00 pm, he was sitting outside his house with his cousin Stephen Mboya (deceased) and another person that he did not know. That while there, some other people he did not identify arrived in his compound and stood at a distance. That deceased who was a changaa brewer said that he suspected the people to be police officers and he went to talk to them. That suddenly, deceased ran calling his brother Caleb, with two people in hot pursuit. That he went to the direction Stephen had run to and he found him lying dead with injuries on his body. That PW1 arrived at the scene shortly after and found her husband dead.

PW7 George Ochieng, assistant chief Olembo sub-location and **PW8 CPL Amos Orod**i stated that they were informed by PW4 that it was accused 1 that killed the deceased. **PW9 CIP Raphael Mulwa** recorded a statement under caution from accused 1 on 28.6.17 in which he stated that, in company of others, he went to arrest deceased for having an affair with his wife but realized that he had been stabbed and he ran away.

7. **PW10 PC Mwangi**, the investigating officer stated that accused 1 was implicated by PW1 and accused 1 in turn implicated accused 2 and 3 and he jointly charged them with the offence of murder. He produced the autopsy report which shows that deceased died of severe respiratory distress due to hemothorax due to penetrating chest injury as PEXH. 2.

DEFENCE CASE

8. After the close of the prosecution case, I acquitted accused 2 and 3 since there was no evidence connecting them to the death of the deceased.

9. 1st accused made a sworn statement. He stated that on 21.6.17, he went to Sondu to visit his sick brother and it was while there that PW8 called him inquiring where he was and accused him of killing the deceased which he denied. That he travelled back to his place of work in Nairobi and was arrested from his house on the night of 22.6.17 and charged with an offence he did not commit. He denied recording any statement under inquiry or implicating accused 2 and 3.

ANALYSIS AND FINDINGS

10. I have considered the evidence on record. 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 confirmed by the PW1, 2, 3, 4, 5, 6, 7, 8 and 10 who saw deceased's body and by the postmortem form PEXH. 2 produced by PW10 that shows that deceased died of severe respiratory distress due to hemothorax due to penetrating chest injury.

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

12. None of the prosecution witnesses saw accused 1 commit the unlawful act that caused the death of the deceased. Contrary to PW1 that he identified accused 1 among the persons that attacked the deceased, **PW2 Brenda Akinyi** and **PW3 Caled Agudha Omollo** who arrived at the scene of the murder before PW1 stated that they saw people they did not identify running away from the scene. Similarly, **PW6 Ogada Collins Owili** who was sitting with the deceased when he was called by the people who later attacked him said he did not identify the said attackers. He additionally stated that he arrived at the scene that deceased was murdered with PW1 and did not see the persons that killed the deceased. From the foregoing and in view of overwhelming evidence by PW2, PW2 and PW6, I am inclined to reject PW1's evidence that she was able to identify accused 1 as the one that attacked the deceased. In any case, the incident occurred at night. The position relating to identification at night was restated in the case of *John Muriithi Nyagah v Republic [2014] eKLR*, where the Court of Appeal held: -

“in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”

13. The state did not lead evidence relating to the nature of the light, the strength of the light, its size, its position relative to the accused that may have sufficiently enabled PW1 to identify accused 1 when the other 3 witnesses at the scene did not identify him.

14. Having said that, this court has a duty to consider the weight of the only evidence left which is statement under caution recorded by PW9 CIP Raphael Mulwa. Accused denied recording the cautionary statement thereby shifting the burden to prove that he recorded that statement to the prosecution. Prosecution did not lead further evidence to counter accused's denial which raised a reasonable doubt. Further to the foregoing, the totality of the said statement is that accused denied any involvement in the crime.

15. Consequently; I am satisfied that the Prosecution failed to prove beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which constitutes the 'actus reus' of the offence.

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

16. Having found no evidence to connect accused to the unlawful act that resulted in deceased's death, it would be futile to delve into the issue of malice aforethought.

Disposition

17. Consequently, I have come to the conclusion that the state has failed to prove its case beyond reasonable doubt. Accused 1 is found **NOT GUILTY** of the offence of murder and he is accordingly acquitted. Accused 1 shall be set at liberty unless otherwise lawfully held. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 26th DAY OF July, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Accused 1 - Present

For Accused - Mr. Awele

For the State - Ms. Barasa