



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL (MURDER) CASE NO. 48 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PAUL OMONDI NONDI.....ACCUSED

JUDGMENT

1. **Paul Omondi Nondi**, the accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that:

On 31st October, 2015 at Ogango area in Kisumu East District within Kisumu County murdered Phinny Atieno Oguta

2. The prosecution summoned a total of 5 (five) witnesses in support of its case while the defence called only the accused.

Prosecution Case

3. **PW1 Robert Opiyo Odhiambo**, brother to deceased's mother recalled that he visited his sister's house at Ogango area on 31.10.15 at about 2.30 pm where he found her washing clothes. He said he returned to his house which is 200 metres away shortly thereafter and that at about 6.00 pm the same day, one Dancun Yogo called and informed him that the Phinny Atieno Oguta had been murdered. He said he rushed to his sister's house where he confirmed that indeed his niece had been killed. He recalled that while at his sister's house, a young boy named Tawfiq informed him that he had seen accused and two others go into the house where deceased was murdered. He said that accused, who used to be his sister's lover was arrested the following day and charged.

4. **PW2 Beatrice Achieng Odhiambo**, deceased's mother told court that accused was his lover from 2011 to 2014 when they parted ways. She recalled that on 31.10.15, she returned home where she had left her daughter to find her missing and the house in disarray. That she reported the matter to her sister Caroline Midega and together they returned to her house where she discovered the body of her daughter in the bedroom. She later identified the body of her daughter to the doctor who conducted a postmortem. She said she suspected that accused had killed her daughter because he had used physical violence on her when they lived together and had continued to issue threats to her after they parted ways.

5. **PW3 PC Peter Owoi**, the investigating Officer saw accused on 1.11.15 after he was arrested. He said he recorded witness statements and one small boy called Tawfiq said that he had seen accused and two others near the house where the murder was committed.

6. **PW4 IP Michael Situma**, the Officer in charge of crime at Kondele Police station stated that upon receiving the murder report on 31.10.15 at about 7,00 pm, he visited the scene and removed it to the mortuary. He stated that accused was arrested and charged after a witness small boy named Tawfiq and one Robert said that they had him enter the house where deceased was killed.

7. **PW5 Dr. Eddy Odhiambo Owuor** stated that he conducted the postmortem on the body of the deceased at Jaramogi Oginga Odinga Teaching and Referral Hospital Mortuary on 5.11.15. He *produced the autopsy report (PEXH. 1) which shows that deceased had bruises on left shoulder, right chest, frontal region, orbital and cheek, clotted blood in the nose and mouth, hematoma in left parietal region with left brain oedema and massive subdural haematoma. The doctor formed an opinion that deceased died of severe head injury and haemothorax secondary to blunt force trauma.*

The Defence Case

6. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put him on his Defence. Accused conceded that he was at Ogango area on 31,10,15 but denied going to deceased's mother's house or killing the deceased.

ANALYSIS AND FINDINGS

7. 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

8. The death of the deceased has been proved by the PW1, 2 and 4 who saw her body and by the postmortem forms **PEXH. 1** which shows that she *died of severe head injury and haemothorax secondary to blunt force trauma.*

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

9. None of the prosecution witnesses saw accused commit the unlawful act that caused the death of the deceased. PW1 who was alleged by PW4 to have seen accused go to deceased's house where the murder was committed denied seeing accused commit the murder. The small boy named Tawfiq who was also alleged to have seen accused go into the house where deceased was killed did not testify allegedly because he could not be found. That leaves the Court with no option but to make reasonable deductions from the available evidence taking into consideration the fact that the accused being an interested party may have lied to save himself.

10. In order to establish the accused's culpability, the prosecution led evidence from PW1, PW3 and PW4 who stated that accused was allegedly seen by one Tawfiq entering the house where deceased was murdered.

14. As stated hereinabove, the said Tawfiq was not called as a witness. Failure by Tawfiq to testify left a gap in the prosecution case and what he might have told PW1, PW3 and PW4 amounts to hearsay. In the case of Kinyatti v Republic [1984] eKLR, the court of Appeal had this to say about hearsay evidence: -

“Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence. The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact.”

15. Accused has denied the offence and from the foregoing, I have concluded that circumstances in this case are not of a definite tendency unerringly pointing towards the guilt of the accused (See Bhatt v Republic [1957] E.A. 332). The evidence tendered against accused is discredited and it is not enough to prove his guilt. I am therefore unable to say that the Prosecution has proved 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

20. 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

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

DATED AND SIGNED AT KISUMU THIS 27th DAY OF September...2018

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistant - Felix

Accused - Present

For Accused - Mr Okorgo

For the State - Ms Barasa