



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL (MURDER) CASE NO 46 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

VINCENT OTENO OUMA.....ACCUSED

JUDGMENT

1. **Vincent Oteno Ouma** 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 are that:

On the 8th October, 2015 at Korando B Sub-location, Kisumu West Sub-County, within Kisumu County murdered Christine Atieno Otieno

2. The prosecution summoned a total of 4 (four) witnesses in support of its case while the defence called only the accused.

Prosecution Case

3. **PW 1 Joab Omondi Ago**, a village elder at Korando B village recalled that on 9.10.15 at about 9.00 am, he heard passersby say that accused had killed his wife and kept her body under the bed. He said that he went to the home where accused lived with his mother and found a crowd and upon enquiring from accused's mother learnt that accused's wife had been taken to St. Florence Hospital the previous day. He stated that he went to the hospital mortuary and saw body of Atieno (hereinafter referred to as the deceased) which had swellings on the head and both hands. It was his evidence that he and the area assistant chief later escorted accused to Maseno Police Station. In cross-examination by Mr. Bagada for accused, the witness stated that the deceased was a drunkard and that she left behind a three month baby.

4. **PW 2 Kennedy Odhiambo Ogondo**, assistant chief **Korando B**, sub-location stated that upon receiving a murder report from PW1, he went to the home of the suspect, accused herein who told him that he had taken deceased's body to Florence Mortuary and he escorted accused to Maseno Police Station for investigations.

5. **PW 3 Jane Odoyo Ouma**, accused's mother recalled that on 8.10.15 at about at about 6.30 pm, accused called her to his house where she found their baby crying on the coach. That accused summoned her to his bedroom where he found the deceased lying dead. In cross-examination by Mr. Bagada for accused, the witness stated that the deceased was a drunkard.

6. **PW4 PC Havercome Dominic Onyango** the investigating Officer stated he took over the matter after the initial investigating officer was transferred. With the consent of defence counsel, he produced the deceased's post mortem form **PEXH.1** which shows the body had the following injuries:-

- i. Contusion on the right preorbital region measuring 3 cm**
- ii. Contusion on the left preauricular region measuring 4cm by 4cm**
- iii. Contusion and subcutaneous hematoma posteriorly on left shoulder measuring 10cm by 7 cm**
- iv. Defence injuries on right arm and elbow regions**

The doctor formed an opinion that deceased died of *severe head injury secondary to blunt force trauma*.

The Defence Case

7. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put her on his Defence. Accused stated that he did not know how his wife was injured and that he only took her to hospital where she was confirmed dead.

ANALYSIS AND FINDINGS

8. 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

9. The death of the deceased has been proved by the accused, PW1, 2 and 3 who saw deceased's body and by the postmortem form **PEXH. 1** produced by PW4 that confirms that deceased *died of severe head injury secondary to blunt force trauma.*

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

10. As earlier stated herein above, none of the prosecution witnesses witnessed the murder. The foregoing leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence taking into consideration the fact that the accused persons being interested parties may have lied to save themselves.

11. As we know from REPUBLIC –VS- TAYLOR WEAVER AND DONOVAN (1928) 21 CR. APP. R. 20

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

12. In the case of SAWE –V- REP [2003] KLR 364 the Court of Appeal held:

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

13. In the case of ABANGA ALIAS ONYANGO V REPUBLIC CA CR. A NO. 32 of 1990 (UR), cited by accused, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

14. In order to establish the accused's culpability, the prosecution led evidence from PW1 to PW4 all of whom stated that they did not see the accused cause the injuries from which deceased died.

15. There is evidence that accused was suspected of killing his wife for having been her husband and for having taken her to the mortuary without reporting the death to the police. It is important to state that suspicion cannot suffice to infer guilt. The Court of Appeal in the case JOAN CHEBICHII SAWE V REPUBLIC CRIM. APP. NO. 2 of 2002 had this say about suspicion in a criminal case:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs

Republic (Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

16. Accused’s denial that he murdered the deceased in my considered view destroyed and weakened the circumstantial evidence tendered against him since the prosecution did not lead evidence to the contrary.

17. Consequently, I find that Prosecution has failed to prove circumstances which taken cumulatively would form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person and none else. In the end, I find that the unlawful act which caused the death of the deceased which constitutes the ‘*actus reus*’ of the offence has not been proved as against the accused person.

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

18. Having found no evidence to link accused person to the unlawful act that occasioned the death of the deceased; it would be pointless to delve into the issue of malice aforethought.

Disposition

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

DELIVERED AND SIGNED IN KISUMU THIS 20th DAY OF December 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Accused - Present

For Accused - Mr Bagadi

For the State - Mr Muia