



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 21 OF 2010

BETWEEN

REPUBLICPROSECUTION

AND

JACK ODHIAMBO OKUTA ACCUSED

JUDGMENT

1. The accused, **JACK ODHIAMBO OKUTA**, was charged with the murder of **Keith David Owuor** contrary to **section 203** as read with **section 204** of the *Penal Code*. The particulars are that on the 22nd May 2010 at Sondu Village, East Kadianga Sub-location, Nyakach District within Nyanza Province, he murdered the deceased. The prosecution case is that the accused gravely assaulted the deceased for stealing from him thereby occasioning his death. The prosecution called 4 witnesses while the accused elected to give sworn testimony.
2. In a murder trial the prosecution bears the onus of proving the case against the accused beyond reasonable doubt. The prosecution must prove that the deceased died; that the accused before the court is the person who caused that death and that the accused caused that death with malice aforethought.
3. The fact and cause of death was established by Dr James Juma (PW 1) who produced a post mortem report of an autopsy performed by Dr Otieno Onyango indicating that the deceased's cause of death was intra-cranial haemorrhage secondary to blunt head trauma.
4. As who caused the deceased's death, the prosecution's principal witness, Maxwell Odiyo Anangwe (PW 3), recalled that the deceased had been staying with him for about a month. He testified that on the material date he returned from work and found the deceased at home. They took supper together and the deceased left to attend a *matanga* in the neighbourhood. He later returned to the house. After some time, the accused came to the house demanding his money and phone from the deceased. The accused hit the deceased and the deceased agreed to take the accused where the money and the phone were hidden. They left the house together and PW 3 decided to go and report the matter to the police.
5. When PW 3 returned with the police to his house, they did not find the accused or the deceased. They also went to the accused house but did not find him. After some time, the accused returned with the deceased who was bleeding from the head and neck. PW 3 and other neighbours took the deceased to Mogwa Dispensary where he died while undergoing treatment.
6. The arresting officer, P.C Patrick Oluoch Otieno (PW 2), testified that on 22nd May 2010 at about 2.00am, he was on duty at Sondu Police Station. The accused came to report that the deceased had stolen

his money and phone. As he was receiving the accused's report, members of the public arrived to report that the accused had gravely assaulted the deceased. PW 2 placed the accused in the cells and it was later in the morning that he received information that the deceased had passed on while undergoing treatment. PW 2 recalled that earlier on, a report had been made at the police station that the deceased had been removed from the house by the accused and headed to an unknown place. Inspector Thomas Mondo (PW 4) recorded and produced in court the accused's statement under inquiry but the same was rejected by the court.

7. When put on his defence, the accused (DW 1) opted to give a sworn statement and denied any involvement in the deceased's death. He stated that on the material night at around 3:00am, he left a *matanga* in the neighbouring homestead. On his way home, he was accosted by some thugs who stole from him Kshs. 10,000 and a Nokia 3310 phone. He went to report the theft at Sondu Police station and that is when he was arrested and placed in the cells for allegedly assaulting the deceased. He denied that he knew the deceased or PW 2.

8. Although the accused denied knowing PW 3 and the deceased, PW 3 testified that he knew the accused. The fact that the accused knew the deceased is corroborated by the testimony of PW 2 that the accused came to report that the deceased, also known as Rasta, had stolen his phone and money. How would he name the deceased if he did not know him? I am satisfied that the accused knew the deceased and PW 3 and as such his defence is a sham.

9. PW 3's testimony that the accused came to his house, assaulted the deceased and left with him is corroborated by the testimony of PW 2 who confirmed receiving a report that the deceased had been removed from PW 3's house and taken to an unknown place. PW 3 saw the accused assault the deceased before he left the house and since the accused left with the deceased and returned with him on the brink of death, it is only him who could explain what could have happened to the deceased. **Section 111 (1)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** imposes an evidential burden on the accused, as the last person to be seen alone with the deceased when he was normal and who returned with him in a distressed state, to explain what could have happened to him. In the absence of failure to offer any plausible explanation, the court may presume certain facts in line with **section 119** of the **Act**. The two sections provide as follows:

111 (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

10. The accused merely denied beating the deceased and ever being at PW 3's house. No explanation was offered as what happened to the deceased after they left PW3's house and returned with the deceased nursing serious head injuries. His defence that he was attacked by unknown people as he was leaving a *matanga*, was disproved by the prosecution. In fact, it only confirms that he was in neighbourhood that night and was probably attending the same *matanga* that PW 3 told the court that the deceased had gone to attend. Moreover, his report to the police received by PW 2 is inconsistent with the fact that he was attacked by unknown assailants when he actually named the deceased!

11. The entirety of the evidence is that on that material night, the accused came to PW 3's house, found the deceased whom he blamed for stealing his phone and money at the *matanga*. He assaulted the deceased and left with him. In the meantime, PW 3 went to report the incident to the police as confirmed by PW 2. PW 2 and the police officers looked for the accused and deceased but could not find them. After assaulting the deceased, the accused took him back home. To cover his tracks, he went to report that the deceased has stolen his money and phone whereupon he was arrested.

12. Counsel for the accused submitted that the prosecution had failed to establish motive on the part of the accused. Motive is not essential to prove a crime as stated in **section 9 (3)** of the *Penal Code* that:

Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility.

It may however become an element to consider where the case rests purely on circumstantial evidence (see *Libambula v Republic* [2003] KLR 683). If any motive were required, it is that accused suspected the deceased of stealing his money and phone.

13. From the evidence, I am satisfied from the evidence that the prosecution proved that the accused who assaulted the deceased. On whether the death of the deceased was caused by the accused with malice aforethought, PW 3 testified that the accused started beating the deceased even before they left the house and when he returned, he was badly injured. The injuries on the head were inflicted with such viciousness as to cause a skull fracture. Such an injury could only have been inflicted with an intent to cause grievous harm or indeed death as envisaged by **section 206(a)** of the *Penal Code*. I therefore find and hold that the prosecution proved malice aforethought.

14. As I result of the finding I have made, I find the accused, **JACK ODHIAMBO OKUTA**, guilty of the murder of **KEITH DAVID OWUOR** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 17th day of May 2017.

D. S. MAJANJA

JUDGE

Mr Lore, Advocate for the accused.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.