



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NUMBER 103 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

ELIJAH OMARI ONDERI.....ACCUSED

JUDGMENT

Elijah Omari Onderi, hereinafter “the accused”, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the night of 19th and 20th October 2014 at Mihango Area within Kayole in Nairobi County, with others not before the court, murdered Gabriel Oseko Mukaya. The accused pleaded not guilty to the charge. He is represented by Mr. Masara, advocate.

Gabriel Oseko Mokaya, the “deceased” was found injured beside the road in Mihango Area within Kayole in Nairobi at about 6.00am on 20th October 2014. Momanyi William Moseti (PW3) was informed by his wife (name not given) about an injured man as the wife was going to church. Momanyi lived about 100-150 metres from the scene where the deceased was found. He went to the scene and confirmed that indeed the person lying on the side of the road was the deceased who was known to him. The deceased was naked under the sheet covering him. He was not dead but was breathing with difficulty and could not talk. Momanyi informed Kinara Alex Migosi (PW1) who lived nearby. Both witnesses went to a nearby shed where blood stains could be seen. They entered inside and found the accused sleeping. They asked him about the deceased and he told them to ask one Okemwa who might have information as to what had happened to the deceased. Both witnesses noticed that the jean trousers worn by the accused had blood stains on it. The accused was taken to the nearby Chief’s Camp to prevent the hostile crowd from attacking him. They sought to know from the accused where to find Okemwa and they were directed to a school where he was said to work as a watchman but they did not find him.

CPL David Kibet from Kayole DCI Office visited the scene and found the deceased lying beside the road covered with a sheet. He went to a house nearby. He saw a two roomed house with two doors. The 1st door housed the suspect at large and the 2nd door housed the accused. Inside the house where the accused lived, items had been scattered. A piece of timber with blood stains was collected outside near the 2nd door. CPL Kibet went to the AP Camp and collected the accused. He noted that the pair of trousers he was wearing was blood stained. He took him to the Police Station and recovered the pair of trousers.

The other witnesses who testified are Evans Mokaya Aguta (PW2) the deceased’s father. He attended the examination of the body of the deceased at the City Mortuary on 24th October 2014. Dr. Oduor Johansen examined the body of the deceased on 24th October 2014. He found multiple lacerations along the left

arm; fracture of the left proximal humerus; facial and scalp bruises; laceration above the left eyelid 2cm long; bruises along both arm, on the chest and on the thighs and multiple scalp lacerations. There was haematoma on the chest muscles; extensive haematoma on the scalp and acute subarachnoid haematoma. The cause of death was due to head injury caused by a blunt trauma. The last witness is Henry Kiptoo Sang, a Government Analyst who examined the exhibits. He examined blood samples drawn from the accused and the deceased, piece of wood and green long trousers identified as of suspect (accused).

This court placed the accused on his defense. He testified without taking oath. He told the court that he spent 19th October 2014 working. That he went home and slept. That he was woken up at 6.00am on 20th October 2014 and informed that someone was lying beside the road; that he went to the place and found a naked man; that he went back to his house and picked a sheet and covered the man with it; that they reported the matter to the police and tried to assist the man but he died before police came. He testified that police held him in custody when he informed them that he knew the person. He told the court that he did not know what happened to the man.

The offence of murder is created by section 203 of the Penal Code. It is committed when any person who of malice aforethought causes death of another person by an unlawful act or omission. The burden lies with the prosecution to prove that death of a human being has occurred; that the death was caused by an unlawful act or omission on the part of the accused before the court and that in causing that death, the accused acted with malice aforethought and omitted to act. Malice aforethought is defined by Section 206 of the Penal Code and includes intention to cause the death or grievous harm to the person killed.

The case is based on circumstantial evidence. There is no direct evidence against the accused. The law on circumstantial evidence is clear that before an accused can be convicted basing the case on circumstantial evidence, the following principles must be met:

- 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 the 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.***
- iv. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.***

(See **Musili Tulo v Republic [2014] eKLR; GMI v Republic [2013] eKLR; R. v. Kipkering Arap Koske & Another, 16 EACA 135 and Musoke v. R [1958] EA 715**)

I have examined the evidence in this case. There is evidence that death of the deceased Gabriel Oseko Mukaya occurred on 20th October 2014. The death was a result of head injuries due to blunt trauma. This is an unlawful act. The accused is alleged to have caused that death. The accused was found inside his house sleeping. He was asked whether he knew the deceased and he said he did. He was asked whether he knew what had happened and he said one Okemwa should be asked about what had happened. The said Okemwa was missing. It is not clear from the evidence by the prosecution whether the said Okemwa is the suspect referred to as being at large. Evidence shows that outside the house where accused was found sleeping were blood stained clothes and broken sticks also with blood stains. Court was told that inside accused's house items were scattered and that he was found with blood stains pair of trousers.

Evidence on the pair of trousers is contradictory. Kinara Alex (PW1) said that the accused was wearing a pair of blue jeans which had blood stains on them. Momanyi (PW3) said that the accused was wearing a pair of blue jeans that were blood stained at the knee. When CPL Kibet arrived at the scene the accused

was not there. He had been taken to the AP Camp. When he finally saw him, CPL Kibet said that the accused was wearing bloodstained pair of trousers. He did not describe it to the court but he exhibited it and identified it as the one he had recovered from the accused. What he exhibited and produced in evidence as exhibit 1 was a pair of greenish corduroy trousers! This definitely is not a pair of blue jeans.

The evidence is complicated further by the evidence of Henry Kiptoo Sang, PW6. He received blood sample from the deceased. He could not profile DNA from it because it had become putrid. He received blood samples from the accused but there is no mention as to whether he examined it. He received a piece of timber with blood stains on it suspected to be the murder weapon and a pair of trousers also with stains of blood. He examined them and confirmed they contained human blood. He profiled for DNA from both pair of trousers and piece of wood. Both profiles matched and originated from an unknown male person. This evidence does not help the prosecution. These profiles did not belong to the accused. If they belonged to the deceased, this court will never know since his blood was not capable of generating any DNA profiles. The trouser then did not belong to the accused.

It is not lost to this court that there is evidence that there were some clothes and pieces of stick found outside the house and these were blood stained. Could these clothes have belonged to the deceased? After all this court was told that he was naked when he was found lying beside the road.

This evidence is weak. Although the accused was found sleeping in a house near the scene of murder, the circumstantial evidence available does not point to him to the exclusion of all others as the perpetrator. There is the suspect at large and maybe others who could have committed this offence. I find no connection between the accused and the deceased and it would be a miscarriage of justice in my view if this court were to find him guilty basing on the available evidence.

In conclusion, while I find that the unlawful death of the deceased has been proved beyond reasonable doubt, this is only one of the ingredients of murder. The identity of the person who committed this offence has not been proved beyond reasonable doubt and malice aforethought has not been proved at all. The existing doubts shall be applied to the benefit of the accused. Consequent to my finding that there is no evidence proving that the accused is the person who killed the deceased and malice aforethought on his part, I find that the accused is not guilty. I hereby acquit him of the offence of murder. Unless the accused is held in custody for any other lawful cause, I order that he shall immediately be released from custody. Orders shall issue accordingly.

Dated, signed and delivered this 21st day of June 2017.

S. N. MUTUKU

JUDGE