



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CRIMINAL CASE NO. 36 OF 2014

BETWEEN

REPUBLIC.....PROSECUTOR

AND

MUSA ABOK.....ACCUSED

JUDGMENT

1. On 25th April 2014, this court was informed that **MUSA ABOK** (“the accused”) had, with others not before the court, murdered **KENNETH JARED ODHIAMBO ABUTO** (“the deceased”) on 27th March 2014 at Kochieng Village in Kisumu District within Kisumu County contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The prosecution case was that the accused together with other people assaulted the deceased and left him for dead. He pleaded not guilty and the prosecution called 9 witnesses while the accused gave an unsworn statement.

2. Rose Anyango Awino (PW 2) testified that on 27th March 2014, she went to buy bananas at the accused’s home. She testified that she found the accused fighting with the deceased. The deceased had been locked in a kitchen and when the door was opened she found the deceased on the floor. Although the deceased saw her, he did not talk to her. She nevertheless proceeded to buy the bananas and when she passed by the kitchen again, she did not see the deceased. She later heard that the deceased had passed away.

3. The deceased’s mother, Ruth Auma Omondi (PW 3), recalled that earlier that evening, at about 7.00pm, she had sent the deceased to buy paraffin. After a while, her mother-in-law, PW 2, came and asked her whether she had seen deceased. She then went out looking for the deceased with her co-wife, Joyce Auma Omondi (PW 1). As they were looking for him, they heard people screaming. PW 3 told the court that when she went where people were, she found the deceased was lying on the ground bleeding. She asked him what had happened and the deceased responded that the accused had killed him.

4. PW 1 recalled that at about 7.00pm, PW 2 came see her co-wife, PW 3. In the course of the conversation, she was asked whether she knew about what happened to the deceased. She was told that he had been assaulted whereupon she went to the scene where she saw him lying on the ground with cut injuries on the head, forehead and neck. PW 1 testified that the deceased told those present that if he died they should know that it is Musa who killed him.

5. Kennedy Odhiambo Omondi (PW 5) was at home when PW 2 came to see his mother, PW 3, to inform

her that the deceased had been attacked by the accused. He went out and heard his cousin, Evans Omondi, calling him. They proceeded where people had surrounded the deceased who had injuries on his forehead. At first, PW 5 thought the deceased was drunk but when he inquired from the deceased what happened, the deceased told him that “*Musa has killed me.*”

6. David Ojwang Okumu (PW 6) recalled that on 27th March 2014 at about 8.00 p.m, he was called from his cousin who told to go to the deceased’s place. As he was going, he found the deceased lying under a tree surrounded by villagers including PW 3. He spoke to the deceased, who was lying face up with mud on the face, and asked who had beaten him and he responded, “*Akina Musa*”. Together with PW 5 and others, they carried the deceased to his house but before they could arrange for means to take him to hospital, he passed away.

7. Fred Ouma Onyango (PW 7) testified that on the material evening, he met the deceased being carried home. He noticed that the deceased had a cut wound on the forehead. He passed them and later heard the deceased had passed away. Geoffrey Okoth Abuto (PW 8) was also alerted of the incident. When he went to the scene, he did not find the deceased so he rushed to the deceased home and found him lying on the floor with injuries on his forehead. Those who were present informed him that he had been assaulted. While there, the Assistant Chief and police arrived and they proceeded to the home of the accused where they were shown the kitchen where the deceased was beaten by the accused where he noticed blood.

8. PC Peter Ooyi (PW 9) told the court that he took over the investigation from PC Kwambai who had investigated the matter and organized for the post mortem. The autopsy was conducted by Dr. Dixon Mchana (PW 4) on 11th April, 2014 at Jaramogi Oginga Odinga Teaching and Referral Hospital after the body was identified by PW 8. PW 4 observed that the deceased had wounds on the scalp particularly the right and left forehead, back of the head and below the back of the head. He also had a cut wound below the knee, injuries on the left elbows. Internal examination showed that there were three depressed skull fractures, two on the forehead and one on the back and the brain was swollen. The deceased also had a fracture of the femur bone. As a result of the observation, PW 4 concluded that the cause of death was raised intracranial pressure secondary to penetrating blunt force trauma to the head.

9. In his unsworn statement, the accused denied that he had murdered the deceased. He told the court that on 27th March 2014, after coming home from work in Kisumu, he left home at about 5.00 pm and proceeded to Nambokana Centre. It started raining at about 6.00pm and as he could not go back home immediately, he stayed there until 8.00 pm. When he returned home, he heard that the deceased had been beaten and left under a tree. He went home, slept and went to work in the morning where he left for Embu on a company vehicle. As they were returning to Nairobi, he was arrested and brought back to Kisumu on charges of having murdered the deceased.

10. In order to prove murder, the prosecution must establish three key ingredients beyond reasonable doubt: first, the fact and cause of *death*; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

11. As to the fact and cause of death, the testimony of PW 4 established that the deceased died as a result of a head injury caused by penetrating blunt force trauma. These findings are consistent with the observation of the witnesses who saw the deceased before his death. They all stated that the deceased had visible head injuries. I therefore find and hold that the deceased died as a result of a head injury inflicted on him.

12. As to who caused the unlawful act that led to the deceased’s death, the prosecution case was based on direct testimony of PW 2 who told the court that she saw the accused assault the deceased and that he had been locked in a kitchen. That the deceased was assaulted a kitchen is corroborated by the testimony of PW 8 who went to the accused’s home and noted that there was blood in the kitchen.

13. Apart from the direct evidence, the prosecution relied on the deceased statements implicating the accused as the person who assaulted him. These statements, made by the deceased to witnesses, are dying declarations and are admissible under the provisions of **Section 33(a)** of the *Evidence Act (Chapter 80 of*

the Laws of Kenya). The statements must be received with the necessary caution and circumspection although it is not a requirement of law that they must be corroborated to support the conviction (see *Choge v Republic* [1985] KLR 1 and *Pius Jasunga s/o Akumu v R* [1954] 21 EACA 331).

14. The deceased named the accused to various people particularly PW 1, PW 3, PW 5 and PW 6 and he was consistent that he was assaulted by the accused and other people. He gave these statements to people he knew and named the accused, who was not a stranger in that village and was a person well known to them. There was no suggestion either directly or through cross-examination that there was any grudge or ill-will between the accused and deceased or the accused and the witnesses that would undermine the deceased's declarations and testimony of the witnesses. Since there was also direct evidence of the assault, I am satisfied that the declarations by the deceased implicating the accused were credible and can be relied on.

15. The accused raised an alibi defence. The burden of proving a case against an accused person beyond reasonable doubt always rests with the prosecution and never shifts to the accused even in cases of an alibi defence. In *Uganda v Sebyala & Others* [1969] EA 204, the court stated thus:

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.

16. Furthermore, in *Karanja v Republic* [1983] KLR 501, the Court of Appeal held that in a proper case, the court may, in testing a defence of alibi and weigh it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt. The court may take into account the fact that he had not put forward his defence of alibi at an early stage so that it can be tested by those responsible for investigation and in order to prevent any suggestion that the defence was an afterthought.

17. The accused was person well known in the village, nothing was suggested to the witnesses in cross-examination that the accused was not at the scene or could have been elsewhere at the time the assault took place. In any case, his defence put him in the locality of the offence.

18. The totality of the prosecution evidence proved through the direct testimony of PW 2, who had seen the accused assault the deceased, and the dying declarations implicated the accused and other people he did not name. All in all, the prosecution evidence is overwhelming and I have no option but to reject the accused defence. I therefore find and hold that the accused was amongst the persons who assaulted the deceased.

19. In determining whether there was malice aforethought, the court is entitled to look at the circumstances surrounding the assault (*Rex v Tubere s/o Ochen* [1945] 12 EACA 63). The injuries inflicted on the accused were aimed not only aimed at the deceased's head but also other parts of the body as evidenced by the post mortem report. They were so vicious and were clearly intended to cause grievous harm or death. The assault and the injuries are consistent with the unlawful killing of the deceased actuated by malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

20. I therefore find **MUSA ABOK** guilty of the murder of **KENNETH JARED ODHIAMBO ABUTO** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 26th day of July 2017.

D.S. MAJANJA

JUDGE

Mr Onsongo, Advocate for the accused.

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

State.