



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 15 OF 2012**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**TIMOTHY KAUNDA NYABUTO ..... ACCUSED**

**JUDGMENT**

1. The accused, **TIMOTHY KAUNDA NYABUTO**, is charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information are that on 22<sup>nd</sup> February 2012 at Wayside Guest House, Kisumu East District within Nyanza Province he murdered **CALVIN OSIMBO ODHIAMBO** (“the deceased”). The prosecution was founded on circumstantial evidence and was supported by 4 witnesses.

2. Rose Akinyi Odeny (PW 3) had employed the deceased to run her M-Pesa shop at Wayside Guest House. She recalled that on the material day, at about 9.30pm, she received a call from her customer, Karanja, who informed her that no one was attending to her shop. When she went there, she did not find anyone. She testified that the accused who had been working there as a security guard for the last 20 days was not present and had left his baton and the gate keys. She went to look for the deceased in the room where he normally slept. She was shocked to find him lying dead on his bed with a rope around his neck and hands. PW 3 immediately called her husband who informed the police of the incident.

3. A manager at Pride Kings Security Consultants, Daniel Osala Odero (PW 1), testified that the accused had been employed to guard PW 3’s shop at Wayside. He recalled that on 22<sup>nd</sup> February 2012, he was informed that the accused had not been to his place of duty and that the shop attendant had been found dead. PW 1 and his team immediately started looking for the accused. They went to his home in Migosi Estate in Kisumu on 23<sup>rd</sup> February 2012 where they met the accused’s mother. She informed them that the accused had not been home for some time. PW 1 sought the help of the police officers and they were able to track him through his mobile phone. PW 1 located the accused and handed him over to the police.

4. The Investigating Officer, Corporal John Nyamweya (PW 4), told the court that he was on duty that night when PW 3’s husband reported the incident. He visited the scene and later called officers from scenes of crime who came and took photographs. PW 4 further testified that the deceased had an injury on his forehead which indicated he had been hit and his hands were tied with a rope. PW 4 produced the photographs, baton and the rope found at the crime scene as exhibits. He also produced a post mortem report of an autopsy done on the deceased’s body by Dr. Muturi who indicated that the cause of death was severe head injury secondary to blunt force trauma.

5. In his sworn testimony, the accused denied any involvement in the deceased's death. He testified that he did not know the deceased and had never been employed by Pride King Securities to guard PW 3's shop. He told the court that he worked a matatu tout and on the material date he was at his home in Migosi with his sisters Ebisiba Bosibori (DW 2) and Lydia Kaunda. He recalled that PW 1 had a grudge against him due to a misunderstanding they had over change when he boarded a matatu he was tending to. DW 2 confirmed the accused's testimony that he was home that night. She testified that the accused was a matatu tout and had never engaged in any other form of employment. She told the court that on the night of 22<sup>nd</sup> February 2012, the accused came home at around 6:30pm in the evening and they stayed up till late in the night. On the next day they woke up together and he went off to work.

6. To prove murder, the prosecution must establish three key ingredients beyond reasonable doubt: first, the *death* of the deceased and the *cause* of that 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*.

7. There is no doubt that the deceased died and that he died as a result of a severe head injury following blunt force trauma. In order to establish the accused's culpability, the prosecution relied on circumstantial evidence. It has been held in several cases, among them ***R. v Kipkering Arap Koske & Another*, 16 EACA 135** and ***Sawe v R [2003] 364***, that in order to establish the accused's guilt the circumstantial evidence, the prosecution must satisfy the following requirements:

- 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.

8. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, it was stated in ***Musoke v R [1958] EA 715*** citing with approval ***Teper v R [1952] AL 480***, that;

*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.*

9. The evidence connecting the accused to the murder is that of PW 1 and PW3 who testified that he was a guard at the Shop and that he was supposed to be on duty that day but he was nowhere to be found after the deceased was found dead. From this evidence, can the chain of circumstantial evidence be so tight as to exclude the possibility that someone else murdered the deceased?

10. Although PW 1 told the court that the accused was an employee of Pride Kings Security Consultants, he was not there at any time of the day to confirm that the accused reported to work on the material evening. Likewise, PW 3 had been away from the Shop the whole day and only learnt of the deceased's death that night. This evidence alone leaves the possibility that the deceased could have been murdered by any person. Further, the fact that the Wayside Guest House was a public place does not also exclude the possibility that anyone would have committed the act. These possibilities were not foreclosed by the prosecution.

11. The accused denied that he was an employee of Pride King Securities Consultants and raised the defence of alibi. In ***Kiarie v Republic [1984] KLR 739***, the Court of Appeal held that;

*An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to*

*a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.*

12. When weighed against the prosecution case, the accused's defence raised reasonable doubt as the prosecution did not adduce any evidence to show that the accused reported to work on the material day. Such doubt operates in favour of the accused.

13. Although there is suspicion pointing to the accused, the totality of the evidence does not outweigh such suspicion. I therefore find the accused, **TIMOTHY KAUNDA NYABUTO**, not guilty of the murder of **CALVIN OSIMBO ODHIAMBO**. He is acquitted and set free unless otherwise lawfully held.

**DATED and DELIVERED at KISUMU this 25<sup>th</sup> day of July 2017**

**D.S. MAJANJA**

**JUDGE**

Mr M. M. Omondi, Advocate for the accused.

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