



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE MURDER NO. 8 OF 2011

BETWEEN

REPUBLIC..... PROSECUTOR

AND

PHILIP OSINGO alias CHURCHIL ACCUSED

JUDGMENT

BACKGROUND /INTRODUCTION

1. The accused **PHILIP OSINGO** alias **CHURCHIL** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code the particulars of which were that on the 2nd day of January 2011 at Kogelo village Homabay County in the Republic of Kenya he murdered **BENJAMIN OSINGO ALELE**.

2. On 28/1/2011 the accused pleaded not guilty to the charge before Hon Justice A. Makhadia as he then was and on 6/6/2012 his trial commenced before Justice Lagat Korir who heard the prosecution witnesses and placed the accused on his defence.

3. On 24.4.2015 the accused gave his unsworn defence before me. I must therefore for record purposes state that I did not have the advantage of hearing and seeing the prosecution witnesses but only read the recorded proceedings before Justice Korir for the purposes of this judgment. I must also state that all preliminary steps before setting down the case for hearing must have been taken by Justice Korir.

PROSECUTION CASE

4. Pw1 Judith Osingo testified that she received the information of the murder of the deceased, she went to the scene and confirmed the death before calling the OCS who came with officers and took away the body. She further stated that the deceased had reported to her as the area chief that the accused had threatened him.

5. Pw2 Morris Ondiek the area assistant chief and the son in law of the deceased testified on oath that he heard commotion from the deceased compound and when he went to check he was told by one Linet that the deceased had fallen down on a table. When he asked her of the whereabouts of the accused she said that she did not know where he was. In cross examination he stated that at the scene he only found Linet and the deceased.

6. Pw3 **LEOTINA AUGU**'s evidence was that on 2/1/2011 she had left home to go look after cattle upto 4PM when somebody reported to her that the deceased had died. She further stated that the deceased had

been epileptic for around four (4) years. She further stated that she had left the accused to take care of the deceased but further stated that he was not there when she left to graze the cattle. It was her further evidence that there was a time when the deceased had reported to her that the accused would demand food and money from him. Under cross examination she stated that the accused was an habitual drunkard and that when she got to the house the body of the deceased was lying on the bed.

7. Pw4 **TITUS OSINGO** confirmed having witnessed the post mortem examination on the body of the deceased and testified that the relationship between the accused and the deceased was very friendly, the deceased loved and consulted the accused on almost everything through the accused did not love him as much as would demand food without working.

8. Pw5 Dr. Emmanuel Oyier conducted post mortem examination on the body of the deceased confirmed that the cause of death was cardiac arrest due to injury caused by severe head injury as a result of assault. Under cross examination he stated that there was an injury on the head of the deceased and confirmed that one can sustain an injury if they fell and hit their head on the ground.

9. Pw6 **LINET GRACE OTIENO's** evidence was that on 2/1/2011 of 4.00p.m. She was in the house with the deceased who was her uncle when the accused came and demanded for food. When the deceased asked him why he was demanding for food yet he had not worked for it, he told the deceased that he was already upset with him and ordered the witness to leave the house with her baby and closed the door. She heard the deceased screaming asking the accused why he was killing him. She then saw the accused come out and escape through the back door. She further testified that when she went into the house she found a broken radio and table with the deceased on the bed.

10. She further testified that whenever the accused came home, he would come while drunk and used to quarrel with the deceased who was a cripple walking with the aid of crutches. She stated that when she entered the house after the accused had left she found the deceased dead and while coming out of the house she met with Judith Awino the deceased daughter in law. In cross examination she stated that the relationship between the deceased and the accused was not cordial and that she did not see the accused assaulting the deceased.

11. Pw7 PC **MULON THARU** a scene of crime officer produced photos taken at the scene. Pw8 PC **PATRICK MWANGI** attended the post mortem while Pw9 Inspector **JACKSON MATHENGE** upon receiving report from the area chief went to the scene and found the body placed on the bed. He stated that the person who had committed the offence escaped through the window. The accused was arrested after two (2) days at Sofia village in Homabay. He further stated that the accused was bitter because the deceased had promised him some money from the sale of two cows which he did not give him. He further stated that the relationship was not quite good.

DEFENCE CASE

12. When put on his defence the accused gave unsworn evidence and stated that on 31/1/2011 he was at his place in Sofia in Homabay County when he was arrested by two police officers and charged with the current offence. It was his evidence that when his father died he was in Muhuru Bay where he had taken fish for a client when he was called by his sister Florence Achieng Osingo and informed of the death. When he got home he found his fathers body being taken to the mortuary and he accompanied the body.

13. He further testified that there is no time he had a fight with the deceased and that his father loved him as the last born, he even gave him Power of Attorney over his property which did not please his brothers.

SUBMISSIONS

14. Miss Boyon for the state submitted that the proof of death of the deceased was not disputed as the same was confirmed by the evidence of Pw5 she submitted that Pw1 testified that she heard the deceased person pleading with the accused not to kill him and that all witnesses testified that the accused had unsettled dispute with the deceased and that the evidence on record link the accused with the death of the

deceased.

15. Mr. Ondari for the accused person submitted that Pw5 confirmed that the deceased could have died out of a fall. He further submitted that the prosecution witnesses contradicted each other since Pw1 told Pw2 who was the first witnesses to have arrived at the scene that the deceased had fallen down and knocked himself on the table. He submitted that the accused is linked to the offence merely on suspicion for which he submitted the Court of Appeal case of **MARY WANJIKU GICHIRA V R. CRIMINAL APPEAL NO. 17 OF 1998 NAIROBI.**

16. He submitted that the prosecution did not discharge the burden of proof as there are other circumstances which could have killed the deceased for which reliance was placed in the case of **KIPKERING ARAP KOSKE & OTHERS v R. EAST AFRICA COURT OF APPEAL CR. APPEAL Nos. 41 & 42 OF 1994.**

DETERMINATION

17. The fact of death of the deceased is not in dispute. Pw1 testified that she went into the house and found the deceased lying down dead. Pw5 Dr. Emmanuel Oyier conducted post mortem on the deceased and confirmed that the same died as a result of cardiac arrest due to severe head injury.

18. The only issue in dispute is whether the said death was caused by the accused with malice aforethought. Pw6 who was the only material witness testified that she was in the house with the deceased when the accused came into the house and demanded for food before chasing her out of the house. She therefore did not see anything which happened thereafter and only heard the deceased pleading with the accused not to kill him and that thereafter she saw the accused came out through the back door. Pw2's evidence is that when he responded to the commotion from the compound of the deceased, he met the Pw6 who told him that the deceased had fallen down on the table and died. When he asked her where the accused was she told him that she did not know where he was.

19. The question therefore which the court has to answer is whether the accused person was at the scene at the time of death of the deceased. Pw3 who is the mother of the deceased testified that when she left home to go look after the cattle, the accused who was the one who was looking after the deceased was not at home. The accused in his alibi defence stated that he was at Muhuru Bay on the material day and therefore save for Pw6's evidence, no other witnesses placed the accused at the scene of the crime. There is further contradictions in the evidence of the prosecution as whether if the accused was at home, the same left the house through the back door or window.

20. It is therefore the finding of this court that the prosecution failed to disprove the accused person's alibi defence as there is material contradiction in the evidence of Pw2, Pw6 and Pw8 thereby rising doubt on the prosecution case.

21. On whether the accused person had any malice aforethought and or intention to kill the deceased, the evidence tendered by Pw2, Pw6 and Pw8 is that the accused would always demand for food and money from the deceased this evidence is contradicted by the evidence of Pw4 who testified that the relationship between the deceased and the accused was very cordial with the deceased consulting the accused on almost everything and that the only issue between them is that the accused used to demand for food without working for it.

22. The evidence of Pw8 that the accused had been bitter with the deceased who had promised to give him money from the sale of two cows which he did not is not supported by the evidence of any of the witness including Pw2 who is the wife of the deceased person and the mother of the accused. I therefore find that the prosecution has failed to prove any malice aforethought on the part of the accused.

23. Though there is a strong suspicion of the accused killing the deceased who was his father, there is no evidence to prove that it is the accused who caused the death of the deceased and as submitted by Mr. Ondari mere suspicion however strong cannot be a basis for convict in a criminal trial. I do therefore find

that the prosecution has not proved their case beyond reasonable doubt as is in law required.

24. The accused person is hereby acquitted under Section 215 of criminal procedure code and shall be released forthwith for custody unless otherwise lawfully held.

Delivered, signed and dated at Kisii this 23rd day of July 2015.

J. WAKIAGA

JUDGE

In the presence of:

Miss. Boyon for the state.

Mr. Ondari for the accused.