



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MURDER NO.17 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

EDWARD INDAKWA AMWAIACCUSED

J U D G M E N T

1. The accused herein was charged with the offence of murder contrary Section 203 as read together with Section 204 of the Penal Code. The particulars of the charge are that on the 18th and 19th day of April, 2010 at Murumba 'A' village in Ugenya District within Nyanza Province, unlawfully murdered **Maloba Ambule**.

The prosecution called a total of 5 witnesses to establish its cause

2. **PW1 TERESA ODERA OWINO** is the deceased's wife. They were sleeping together in one house when at around midnight the deceased according to her left the room for a short-call. Shortly he heard deceased quarreling with someone whom she did not see. Then suddenly she heard the deceased screaming and running towards the door and had a cut on the head.

3. The said witness then screamed and the neighbours came to their rescue. The deceased who was then injured was taken to hospital but succumbed to his injuries a week later. According to the said witness she did not see the assailant.

4. **PW2 WYCLIFF NASHUTAKHA** was awoken by the screaming of PW1. He rushed to the deceased's homestead and found him injured. He and others struggled to carry the deceased to St. Marys Hospital. He did not see the attacker also.

5. **PW3 JOSEPH KWEYU MUNYENDO** witnessed the post-mortem being undertaken at St. Marys Mumias Hospital.

6. **PW4** was the investigating officer. According to the evidence gathered the accused was having an illicit affair with PW1 the deceased's wife. He found that on the material night the accused had come visiting but he did not know that the deceased was present. Consequently a fight ensued and the deceased was killed. From his evidence he found the evidence of PW1 inconsistent and infact according to his findings the deceased was assaulted inside the house and not outside as alleged by PW1.

7. **PW5 DR. AINEA ONYANGO ODERA** did conduct postmortem on the body of the deceased. He formed the opinion that the cause of death was due to severe head injury secondary to assault.

8. In his unsworn evidence, the accused denied the charge. He said that on the material night he was at home with his wife and that he never left his bedroom till the following morning.

9. DW2 SARAH AKUMU INDAKWA, the accused's wife testified in favour of her husband whom they have been together for the last 25 years. She said that her husband was at home the all of that night and that infact she was the first to get out of the house in the that morning.

10. I have perused the proceedings as well as the submissions by both counsels herein. From the facts and evidence on record, it appears that there was no direct eye witness to the incident. The deceased's wife who was the key witness apparently did not witness the attacker as it was night and neither did she recognise his voice while they were quarreling with the deceased.

11. Apparently all the other witnesses came after the fact and none of them was able to see the assailant. The only evidence that appears to have some lead was that by the investigating officer PW4. However based on the evidence gathered from PW1. I find it worrying and disturbing why PW1 did not first of all write the same in her statement and further why did she not testify of the same while at the dock. Did she have illicit affair with the accused and therefore an accomplice in the whole crime? That seemed to be the position of the investigating officer. If so then she ought to have been charged jointly with the accused. The accused evidence was based on his own alibi which was supported by his wife. The same in my finding is believable as there was no evidence to suggest even circumstantially that he was at the crime scene that night.

12. Again the evidence of PW1 needs to be tested with greater care. The time was around midnight and as expected it was dark and therefore identification was not possible. See **KIILU VRS REPUBLIC (2005) HCCR 174**

C. A.

13. Consequently and in light of the above findings I find that the prosecution did not establish its case beyond reasonably doubt. There was no sufficient evidence linking the deceased to the crime. The star witness PW1 failed to link the accused to the crime. Perhaps, based on the evidence of the investigating officer, she was an accomplice. That conclusion is however left to her own conscience. The accused is hereby acquitted under the provisions of Section 215 of the Criminal Procedure Code.

Dated, signed and delivered this 16th September, 2015

H. K. CHEMITEI

J U D G E