



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CASE NO. 46 OF 2012

REPUBLIC-----PROSECUTOR

VERSUS

JACKTONE OLUKIRI AGAKI-----1ST ACCUSED

MAGDALINE NYANJERA ESINYENI-----2ND ACCUSED

RULING

1. Jacktone Olukiri Agaki and Magdaline Nyanjera Esinyeni herein after referred to as Accused 1 and Accused 2 are jointly charged with the ***offence of Murder Contrary to Section 203 as read with Section 204 Penal Code.***

The particulars being that on the 1st day of November 2012 at unknown time at Minihaha Village of Kipkelion District within Kericho County murdered **PETRO ANDA ODERA.**

2. The prosecution lined up a total of nine (9) witnesses, none of whom was an eye witness to the killing of the deceased.
3. **PW8 (Dr. Gilbert Langat)** who conducted the post mortem found the cause of death to be haemorrhage as evidenced by haematoma between the lungs as a result of the fractures of the 1st - 3rd ribs. The fact of death and the cause of death are not disputed. The deceased body was found in a sugarcane plantation.
4. A summary of the evidence before this Court is that the 2nd Accused was a seller of alcohol, from her house. The deceased was known to love alcohol. The 1st Accused was always seen the around 2nd Accused until some concluded that the two were lovers and/or husband and wife.
5. PW3 stated that he had gone to 2nd Accused's house on 15th November 2012 9p.m to take alcohol. He found the 1st accused there. He was requested by the 2nd Accused to assist her place a drunkard outside. He therefore assisted the 1st and 2nd Accused as requested before taking the alcohol.

When he was cross examined it was not quite clear if he ever identified who the drunkard he had assisted place outside was.

6. PW4 who came with two others to the same house on 15th November 2012 8.30p.m said they saw the deceased lying outside besides th 2nd Accused's house, as they left after their drink.

7. In cross examination he stated that as they came to 2nd Accused's house they did not see the deceased.
8. The next morning fresh blood was found outside the 2nd Accused's house and later open shoes said to belong to the deceased were also recovered.

On 17th November 2012 the deceased's body was found lying in a sugarcane plantation not far from the 2nd accused's house.

9. According to the Investigating Officer (PW9) 2nd Accused had given one Nyar Alego the deceased's phone in of payment for alcohol she had bought from her for sale. The phone was recovered.

He also found that Musyoka & Odoyo had been directed by the 2nd Accused to assist the 1st Accused carry the deceased to the sugarcane plantation claiming that he was drunk.

10. The cause of death of the deceased as stated by PW8 was haemorrhage as evidenced by haematoma between the lungs as a result of fractures of the ribs.
11. From the evidence adduced I do find that the 2nd Accused is a seller of changaa. It is also true that the 1st Accused is a close friend of hers though he does not take alcohol.
12. The deceased left his house on 15th November 2012 8p.m as stated by his son (PW1). He never returned home that night and was not seen again until 17th November 2012 when his body was found in the sugarcane plantation.
13. **PW3 (Richard Ouma)** assisted 1st Accused and 2nd Accused place outside 2nd Accused's house a drunkard. Amid his contradictory evidence its clear he did not identify this drunkard. It is however clear that the drunkard was placed outside 2nd Accused's house and not in the sugarcane plantation.
14. **PW4 (George Ouma Rowa)** only saw the deceased lying outside 2nd Accused's house. He was in the company of Titus Musyoka & Kennedy. They saw him as they left. Again this was outside the 2nd Accused's house and not the sugarcane plantation.
15. They did not bother to check on the deceased. He also mentions that as they left 2nd Accused 's house they left other customers there. So he would not confirm if the deceased was dead or alive.
16. **Titus Musyoka & Kennedy** who were with PW4 were not called as witnesses. Titus was said to have been given a torch. Whose torch was it? It was not produced.

Further Musyoka and Odoyo who were mentioned by **PW9 (C.I David Apima)** in his evidence as having been the ones who assisted 1st Accused carry the body to the sugarcane plantation were not called as witnesses.
17. It was never indicated by the State why such crucial witnesses were not called. In light of this PW9's evidence concerning Musyoka and Odoyo remains hearsay evidence which cannot be relied on.
18. **PW7 (Agnes Adongo)** also said she was with the 2nd accused when the latter gave out a black phone in lieu of payment for alcohol she had bought. The person to whom the phone was deposited was not identified by PW7.

PW9 (David Apima) in his evidence alluded to the fact that indeed the phone PW7 was talking about belonged to the deceased and was found with Nyar Alego who was holding it in lieu of payment for alcohol taken by the 2nd accused.

19. This was very important evidence if it had been supported. First of all there is no phone that was produced before this court;

(ii) There is no evidence that the deceased had a phone and/or that the phone being mentioned belonged to the deceased,

(iii) The changaa dealer "Nyar Alego" who was allegedly found with the phone was also not called as a witness.

20. Yes, **PW2 (Mary Aseyo Antonio)** said she heard noises or cries of a person she could not identify. Such cries were said to be so common from the drunkards who were 2nd Accused's customers. Her evidence is therefore of no assistance in this case.

21. The evidence availed before this Court was purely circumstantial. Circumstantial evidence must be watertight and irresistibly point to the accused as the person who committed the offence. In the case of **SAWE VS. REPUBLIC (2003) KLR 364** the Court of Appeal stated thus:

- i. *In order to justify on circumstantial evidence, the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.*
- ii. *Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.*
- iii. *The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.*

1. The prosecution may have had material to present to the Court but the shoddy investigations left several loose ends hanging, leaving this to be a case of suspicion. No evidence was presented to show why 1st Accused and 2nd Accused would have wanted to kill the deceased. Suspicion alone cannot be a basis of conviction. In the case of **SAWE VS. REPUBLIC (Supra) the Court of Appeal further said:**

"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt".

2. After evaluating the evidence on record I am unable to find sufficient evidence to enable me place any of the accused persons on their defence. In other words if the accused were to elect to remain silent in their defence, the evidence before me would not found a conviction for any of them.
3. I therefore find no prima facie proved by the prosecution as a result of which both accused persons are acquitted under **Section 306(2) Criminal Procedure Code.**
4. They shall both be released unless otherwise held under a separate warrant.

Dated and Signed this 16th day of October, 2015.

H.I. ONG'UDI

JUDGE.

Delivered in open Court this 23rd day of October, 2015.

H.I ONG'UDI

JUDGE.

In the presence of:

M/s Mwangi for state.

Mr. Mutai Joshua for both accused – absent.

Both accused – Present

Hillary -Court Assistants.

Interbrates: English/Kiswahili