



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE NO. 24 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

JOHANNES AMADI.....1ST ACCUSED

NICHOLAS OYOMBE OGAI (DECEASED).....2ND ACCUSED

J U D G M E N T

Introduction

The accused **Johannes Amadi** with the late **Nicholas Oyombe Ogai** were charged with the offence of murder contrary to section 203 and 204 of the Penal Code.

The particulars are that on the night of 20th and 21st day of July 2004 at Mathiyo sub location in Siaya District within Nyanza province jointly murdered John Magambo.

Prosecution's Case

The state called six witnesses in favour of their case. None of these witnesses actually witnessed the accused killing deceased.

PW1, Shadrack Orido Otieno told the court that he met the deceased on 20-7-2004 at a funeral ceremony of a relative one Jacob Omware and they sat together. In the course of time the accused came and told the deceased “**that he would be like Omware in a coffin**”. He was shocked to hear this. He left the funeral at around 10.30 a.m and learnt the following day the deceased had been killed.

PW2, Fredrick Otieno Orido on his part told the court that he met the deceased on the road at around 7.30 p.m. He was with his brother Michael Gilo. The deceased was drunk and he told them that he was going to buy alcohol for them. The accused and the late Oyombe joined them and the deceased asked them “**you have followed me again**”.

A struggled ensued and the lady who was selling alcohol told PW2 and his brother to take the deceased away. They took him outside to rest under a tree. When they came out the deceased had left.

At around 9 p.m PW2 while heading to Omware's home for the funeral met the accused with two policemen. He the accused pointed at PW2 and said “**this is the man whose father we have killed**”. They then went with the police and picked the assistant chief. They thereafter went to the accused home

where they found the deceased body lying behind the accused home. The accused told them that he had killed the deceased in conjunction with Oyombe.

PW3, Rafael Okumu Adet is a neighbour to accused. He told the court that he heard the accused asking **“who are you”** and the deceased answered and asked the accused why he was beating him. Accused then shouted **“I am killing you, I have found you”**.

He went on to testify that he recognised the accused voice as he knew him since they were young. He rushed to the scene and found the deceased dead near Johannes's kitchen. He also saw an axe and a rungu which were the weapons used.

PW4, Sergeant Thomas Sambili the investigating officer received a call that Magambo had been killed in the accused homestead. He said that the accused told him that his daughter was going to the kitchen when she found Magambo by the cows boma. She was scared and consequently the accused raised alarm and the villagers came and attacked the deceased.

PW5, Joseph Chekon an administration police officer received information from two people, who had gone to Sagam in Siaya concerning the incident. He went with them to the scene where they found the dead man.

PW6, Samuel Ochieng produced Dr. Ochieng's postmortem report which confirmed that the cause of death was as a result of blood in the chest cavity due to bodily injuries as well as the injury on the head.

Defence Case

The accused person did give unsworn testimony and he did not call any witnesses. He maintained that he did not kill the deceased but he was killed by a mob who arrested him as he tried to escape with his two cows from the boma. He said that his pleas to the mob were fruitless.

Analysis and Determination

As earlier alluded there is no direct eye witness to this incident. What

is available therefore is a case whose evidence is circumstantial. It has been held in the celebrated case of **Dhalay -VS- Republic [1995-1998] IE A 29** that:

“In order for circumstantial evidence to justify the inference of guilt two tests had to be satisfied. Firstly, the exculpatory facts had to be in compatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis but that of guilt and, secondly, it was necessary that there be no other co-existing circumstances which would weaken or destroy the inference of guilt”.

The prosecution evidence was that PW1 heard the accused threaten the deceased with death at Mware's funeral which were further repeated at the drinking den in the presence of PW2 and his brother. There was also information where the deceased was taken outside to rest under a tree.

At 9 p.m that night PW2 met with the accused and he pointed at PW2 and said: “this is the man whose father we have killed. PW3 confirmed that he heard the accused shouting to the deceased. Both PW3 and the accused were close neighbours and that they knew each other for many years.

The accused alleged that the deceased was killed by a mob but in his evidence he did not mention any person who was in the mob. He neither called any of them as a witness.

Equally, none of the person he sent to the police station reported that a mob had killed the deceased.

Equally, puzzling is why did PW3 the neighbour fail to hear any commotion caused by the mob or the crowd as alleged by the accused? Why was he the only one who witnessed the mob and nobody else.

Conclusion

I do conclude that the prosecution has proved their case against the accused for PW1 and PW2 heard the accused threatening the deceased; there was a fight in the drinking den which shows that there was a grudge between the accused and the deceased; PW2 heard the accused beat up the deceased and even shouting that he would kill him and on going there he found the deceased dead, a fact not controverted by the defence and finally, nobody heard screams from the alleged mob or the accused raising any alarm.

The accused is therefore convicted as charged.

Dated, signed and delivered at Kisumu this 22nd day of January, 2014.

**H.K.
JDUGE**

CHEMITEI