



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL CASE NO. 8 OF 2010.

REPUBLIC..... PROSECUTOR.

VERSUS

IBRAHIM ODHIAMBO..... ACCUSED.

J U D G M E N T.

The accused, **Ibrahim Odhiambo**, faces a charge of murder, contrary to section 203 read with section 204 of the penal code, in that between the 31st December, 2009 and 6th January, 2010 at Lokitaung town Turkana North district, he murdered Joseph Lopetawi Chakan. The case for the prosecution was that the deceased and the accused were friends. The deceased was employed at a bar known as members club while the accused was an administration police officer attached to Local District Commissioner's office but assigned duties at the D.C.'s residence where he lived.

On the 31st December, 2009, the deceased was at home with his mother, **Adung Chokan (PW1)** and brother, **Ejukon Chokan (PW7)**, when he was allegedly called on phone by the accused and proceeded to the accused's house. He did not return home on that date and the following day. His relatives and friends mounted a search for him. These included **Elimlim Gabriel (PW2)**, **Nachomin Kamais Kakem (PW3)**, **Philiph Lomor (PW8)** and **Michael Ekoi Ereman (PW9)**. They in the process of the search went to the D.C.'s residence where they saw a suspicious hole and called the police. The suspicion was aroused by a foul stench and flies hovering around the hole.

Police officers arrived at the scene and caused the hole to be dug by a group of volunteers. It was then that the dead body of the deceased was recovered from therein.

P.C. Elijah Kipkoech Chirchir (PW6), was among the police officers who proceeded to the scene. He saw the hole or pit and noted that it had been filled with fresh soil. He called for the accused who was the only person at the D.C.'s residence at the time. The accused told him that he was responsible for filling the hole with fresh soil as it (hole) emitted a bad smell. He (accused) was arrested after the body of the deceased was retrieved from the hole.

A shopkeeper at Lokitaung, **Aden Hassan (PW5)**, confirmed that on the 2nd January, 2010, the accused and another person called Abdul Razak borrowed from him a shovel which they said was needed to repair a sewage system at the D.C's residence. They never returned the shovel after taking it away.

Simon Lokirir (PW10), a brother to the deceased reported the matter to the police after receiving information that there were some suspicious signs at the D.C.'s residence. He accompanied the police and others to the scene and was present when the body of the deceased was discovered in the home.

Ekalale Ekeno (PW11), was on the 7th January, 2010, called to the police station at Lokitaung and

shown a mobile phone which he identified as that belonging to the deceased as he used to see the deceased with it and he (PW11) often borrowed it for his own usage.

Dr. Donald Mogoi (PW12), performed a post mortem on the body of the deceased and completed the necessary report (P. Exh. 3) showing that the cause of death was strangulation while **P.C. Dominic Kilei (PW13)**, was one of the police officers who retrieved the body of the deceased from the hole. He noted that the deceased's two hands were tied with a sisal rope and that a red sheet was covering the upper part of the body.

In his defence, the accused denied the offence and stated that he knew the deceased and that they met when he was taken for duty at Lokitaung. They met at Member's club on the material date and watched T.V. News together. Thereafter, he (accused) left for the D.C.'s residence where he worked as a cook. The deceased lived near the D.C.'s residence and his body was discovered a day after they had been together. He (accused) was suspected of having killed the deceased because he was the last person to be seen with him.

It is apparent from all the foregoing facts that the deceased went missing from the 31st December, 2009, after allegedly being called by phone by a friend who was said to be the accused. There was however, no cogent and reliable evidence proving that it was the accused who actually called the deceased. The deceased's mother (PW1) said that the deceased informed her that he had been called by an administration police (A.P.) officer but did not mention the name of the officer.

The deceased's brothers (PW7 and PW10) relied on what they were told by their mother regarding the phone call.

Ejikon (PW7) said that he saw the deceased leaving for and entering the compound of the D.C.'s residence where the accused lived. He said that the residence was about hundred (100) metres from their home. He was the only witness who alluded to the deceased being seen entering the D.C.'s residential compound and being received by the accused. The evidence was however, insufficient and unreliable to prove the fact especially when considered against the evidence by the deceased's mother (PW1) which indicated that it may not have been possible for one to see clearly the D.C.'s residential compound from the deceased's family homestead.

Be that as it may, the dead body of the deceased was discovered and retrieved from a hole near or within the D.C.'s residence after he had reportedly disappeared and gone missing. The discovery occurred on 6th January, 2010, a few days after he had gone missing on or about the 31st December, 2009. The post mortem report indicated that the body had a cut wound on the forehead probably caused by a blunt object but that the probable cause of death was strangulation. This showed that the deceased was assaulted and strangled to death. The prosecution was therefore called upon to prove beyond reasonable doubt that the accused was the person who assaulted and strangled the deceased to death and that he did so with the intention to kill the deceased (i.e. malice aforethought).

Although the investigating officer did not testify and appraise the court of the reason behind the arrangement of the accused, it was obvious from the testimonies of the other prosecution witnesses and that of the accused that the accused was arrested and charged for reason that he was the person suspected to have called the deceased by phone before his disappearance and was therefore the last person to have been with the deceased prior to his death. This was essentially circumstantial evidence which was inadequate for purposes of linking the accused to the murder of the deceased especially in the face of the evidence adduced by APC Chirchir (PW6) indicating that although the accused was permanently deployed at the D.C.'s residence, other officers were also assigned guard duties at the residence and that between the 27th December, 2009 to 2nd January, 2010, officers known as Evans Makaru and Mumo Kasile were assigned guard duties at the residence. None of these officers testified with a view to stating their whereabouts on the 31st December, 2009 when the deceased reportedly disappeared or on the 30th December, 2009, when the deceased was allegedly in the company of the accused.

It was also intriguing as to how Elimlim (PW2) and his group decided to conduct a search for the

deceased at or near the D.C.'s residence only to stumble at a hole which later turned out to be the spot where the body of the deceased was discovered and retrieved.

In essence, there were too many gaps in the prosecution case to show and establish that the accused was the person who assaulted and killed the deceased by strangulation. The evidence against him was basically circumstantial only raising suspicion but not cogent and credible facts raising an inference of guilt against the accused. The incriminating facts are not compatible and consistent with the guilt of the accused neither are they incapable of explanation upon any other reasonable hypothesis than that of guilt.

There was no doubt that the persons or person responsible for the death of the deceased did so with malice aforethought and that is why they went to a great length of concealing the deceased's dead body in a hole or pit at the D.C.'s residence. However, the evidence against the accused was insufficient to link him to the unlawful act and was largely based on mere suspicion simply because he lived in that residence and was suspected of having called the deceased on phone prior to his (deceased's) disappearance.

Consequently, the prosecution cannot be said to have discharged its obligation to the required standard.

The accused is therefore found not guilty as charged and is accordingly acquitted.

[Delivered and signed this 23rd day of December, 2014.]

J.R. KARANJA.

JUDGE.