



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 71 OF 2013

BETWEEN

REPUBLIC.....PROSECUTOR

AND

BENARD OTIENO OBONYO alias JOJI.....ACCUSED

JUDGMENT

1. **BENARD OTIENO OBONYO ALIAS JOJI** (“the accused”) is charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information are that on 1st November 203 at Koredoo Village, Kokot Kataa Location in Rachuonyo North District of Homa Bay County, he murdered **DUNCAN OSURI AWINO** (“the deceased”).
2. The prosecution case is that on 1st November 2013, the accused and the deceased were last seen at the home of Everlyne Atieno together where they consumed a glass of *changaa*. The accused was later found with the body of the deceased. The prosecution claims that he is the one who murdered the deceased and it line up 7 witnesses to prove its case.
3. PW 1, Evelyne Atieno Ondino, testified that she used to sell milk and *chang’aa* for a living in Koredoo Village, Kokot Kataa Location of Rachuonyo North District, Homa Bay County. She recalled that on 1st November 2013 at about 4 pm, the accused and the deceased came to her home where the deceased bought a glass of *changaa* which they both shared. She said they were not talking and they left immediately. She knew the accused as Joji. She did not see them thereafter and only heard that of the death of the deceased the next day.
4. PW 2, Harrison Onan, a resident of Koredoo Village testified that he knew the deceased who was his cousin. He had also known the accused as Joji since childhood as they resided in the same neighbourhood. He recalled that on the evening of 1st November 2013, he was sent to go to the SDA church and on the way back he saw somebody dragging someone towards the bush. As it was dark, he could not identify the person so he rushed home to collect his spotlight. The person who dragging the person ran leaving the other person behind. When he shone the torch, he saw that it was Otieno who was running. He chased him and caught up with him. They turned him back to where this person was lying. When they reached the body, he saw another person John Orimba passing by and so he called him. John Orimba came and assisted him to tie the accused with a rope. He also identified that body as that of the deceased whom he knew as they were

cousins. He was not talking and his neck was swollen.

5. PW 3, John Malela Orimba, testified that on the material day he was coming from his farm at about 7. 00 pm going home when he saw PW 2 running towards his home. He asked him why he was running. PW 2 called and when he moved near him he saw a person staggering. He said that PW 2 told me him that the person was escaping and that he should assist him to hold the person. They held the person. As that point he saw another person lying down on his back. He did not have a shirt and was wearing a black trouser. Blood was coming from his mouth. As he had the torch on, he identified him as the deceased whom he knew. He also knew the person they had caught as a village mate. After confirming the person was dead he called the Chief and the Assistant Chief. The Assistant chief came and thereafter many people came and gathered there. He also reported the matter to the police and officer from Kendu Bay came to collect the body. He confirmed that the scene of the incident was behind PW 2's home and the body was lying next to the fence.
6. When cross-examined by learned counsel, Mr Osoro, stated that he saw the accused was seriously assaulted by the villagers and that he was drunk to the extent that he could not even talk. That when they captured him with PW 2, he staggering to the extent that he carried him to the place where the deceased was.
7. PW 4, Sergeant Philip Kiptma, a police officer attached to Kendu Bay Police Station recalled that on 1st November 2013 at about 9.00 pm he was on duty when he received a report from the chief of Kokot Kataa Location that someone had been killed. In the company of other officers, he proceeded to Koredoo Village and upon arrival, they found the deceased. The Assistant Chief was present as were many villagers. He observed that the body had a swollen forehead and face with several bruises on the head and he was lying in a pool of blood. He testified that about 30 meters from where the deceased was lying was another person. The accused had injuries from the left eye and blood was oozing from the injured part. They took the accused and placed him in the vehicle together with the deceased. The accused was admitted to Kendu Bay District Hospital where he stayed until 4th November 2013. The deceased's body was taken to Simbiri Hospital Mortuary.
8. When cross-examined PW 4 testified that the upper part of the deceased body, the chest upwards, was covered with blood with injuries on the forehead. It was swollen and blood was oozing from the mouth and the nose. He opined that the bruises on the head must have been caused by a blunt object. He also stated that there was a lot of tension in the area as members of the public wanted to lynch the accused so they had to move fast as we were only four officers. He added that when they came to the scene the accused was wailing. He was being guarded by the chief and other members of the public. His body was swelling. There were about 100 people. We asked those who heard the commotion to volunteer.
9. PW 5, Dr Francis Ochieng, the medical superintendent of Homa Bay District Hospital was called upon by CID Kendu Bay to examine the mental status Benard Otieno Obonyo. He did so on 27th June 2014 and concluded that he was of sound mental status.
10. PW 6, Corporal Joseph Keter, a CID Officer at Rachuonyo, was the Investigating officer the murder of the deceased. He stated that the accused was arrested on the same day of the alleged murder by members of the public and admitted to Gendia Mission Hospital and discharged on 4th November 2013. He requisitioned a post mortem conducted to be conducted by Dr. Njuma. After finalizing investigations he concluded that the accused was liable to be charged.
11. PW 7, Dr. Wisdom Jumwa, a medical doctor at Gendia Mission Hospital carried out a postmortem on 4th November 2013 at Gendia Mission Hospital. He noted that the deceased did not have a prior medical history and that the body was dressed without shoes. He observed multiple bruises on the forehead, deep cut wound on the scalp was about 5cm in length and 1cm in depth; a fractured cervical bone, multiple bruises on chest and abdomen. The internal examination showed

significant findings on the head, chest and abdomen. The head had a lot of clotted blood between head and skull and a lot of bleeding. The lungs were filled with blood. The spleen was lacerated and had caused bleeding in the abdominal cavity. The nerve at the cervical area had been served. He concluded that the deceased died of severe anemia which is secondary to severe bleeding in the brain, chest cavity and abdomen which was as a result of assault of the deceased by a blunt and sharp object.

12. The accused elected give sworn testimony. He testified that he was a peasant farmer from Kokoth Kataa in Karachuonyo. He recalled that on 1st November 2013, he was drinking *chang'aa* with a lot of people at the home of PW 1. He stated that he knew the deceased but he did not see him on that day and he did not drink with him on that day. After drinking on that day, I left for his home and on the way, he met other people he did not know and they started beating him resulting in cuts on his face and head. On the next day he was taken to hospital and later arraigned in court for an offence he did commit. The accused produced a statement recorded under caution at recorded at while he was at the police station. In the statement, he reiterated what he stated in his sworn testimony.
13. At the close of the defence case, Mr Osoro, counsel for the accused, submitted that the prosecution failed to prove its case as none of the witnesses saw accused beat the deceased. He further stated that the accused has a plausible defence that he was attacked by unknown persons and that he did not know what happened.
14. On the part of the State, Ms Ongeti, learned Prosecution Counsel, submitted that the accused was the last to be seen with accused and was later seen dragging the deceased. In the circumstances, what happened to the deceased was a matter within his knowledge and he was the only one who could explain what happened to the deceased. Counsel cited the provisions of **section 119** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* and the case of **James Mugambo Muchene v Republic NYR CA Criminal Appeal No. 29 of 2012 (unreported)**. Counsel further submitted that the conduct of the accused after commission of offence amounted to corroboration.
15. In order to prove the offence of murder under the provisions of **section 203 and 204** of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients;
 - a. Proof of the fact and the cause of death of the deceased.
 - b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission which is the *actus reus* of the offence.
 - c. Proof that the unlawful act or omission was committed with malice aforethought as defined in **section 206** of the *Penal Code*.
16. From the testimony of the witnesses I have outlined, the fact of death and cause of the death of the deceased are not really in dispute and were established by the prosecution. PW 2 identified the deceased as his cousin while PW 3 knew his as a fellow villager. The cause of death was established by PW 7 who confirmed that deceased died severe bleeding as a result of multiple bruises inflicted on the forehead, scalp, neck, chest and abdomen cause by a blunt and sharp object. These injuries were consistent with the injuries seen and described by PW 2, PW 3 and PW 5
17. The central issue is whether the accused caused the deceased's death. The evidence against him is basically circumstantial as no one saw his cause the multiple injuries that led to his death. In the case of **James Mugambo Muchene v Republic (Supra)**, the Court of Appeal Stated that;

It is trite law that where, as here, the conviction is based on [circumstantial] evidence it can only be properly upheld if, as was authoritatively stated by the Court of Appeal for Eastern Africa, in the case of Simon Musoke v R [1958] EA 715, the Court is satisfied that the inculpatory facts are not only consistent with the innocence of the appellant but also that there exists no co-existing circumstances which would weaken or destroy such inference. It

is also settled law that the burden of proving facts which justify the drawing of this inference to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains on the prosecution. It is a burden which never shifts on the prosecution.

18. Under **Section 111(1)** of the **Evidence Act**, a person accused of an offence has the burden of proving the existence of circumstances bringing the case within any exception or exemption from or qualification to the operation of the law creating the offence with which the person is charged and the burden of proving any fact especially within the knowledge of such person is upon him. The burden is discharged if the court is satisfied by evidence tendered by the prosecution or in cross examination. Where the facts peculiarly within the accused's knowledge under **section 111(1)** of the **Evidence Act** a rebuttable presumption arises that he knows the circumstances under which the deceased met his death. This is a presumption of fact which this court makes under **Section 119** of the **Evidence Act** which provides that, "*The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*"
19. In this case, the prosecution relies on two pieces of evidence to implicate the accused. First, that the accused was found with the body of the deceased. Second, that when he was found he attempted to run away thereby confirming his guilt. In this case, the accused was found with the lifeless body of the deceased who had sustained serious injuries. PW 1 had seen the accused with the deceased him at her home at 4.00 pm and about 3 hours later, at about 7.00 pm, PW 1 and PW 2 found the accused.
20. I have considered the testimony of PW 1, in which testified that the accused was dragging the deceased. This testimony is not supported by the other testimony. The injuries sustained as evidence by the autopsy done by PW 7 does not disclose any evidence of the deceased body being dragged. Secondly, the manner which the deceased was being dragged was not clear, PW 1 stated that the deceased was being dragged by his collar but that when he came back he had no shirt and there was no shirt in the vicinity. PW 2 testified that he did not see the deceased with a shirt. I find that it is more likely that the accused was found the deceased's body but that the PW 1's testimony alleging that the body was being dragged was to say the least, an exaggeration because the accused would have had to undress and disposed the deceased for the short period when PW 2 went to collect his torch.
21. The feat of undressing the deceased could only be accomplished if the accused was not drunk. PW 3 was clear that the accused was drunk. He stated, under cross-examination, that, "*Bernard was drunk to the extent that he could not even talk. The accused was even staggering to the extent that we carried him to the place where the deceased was He was very drunk.*"
22. If indeed, as the evidence shows that the accused was so drunk, would it be possible that he was running away from the scene of the murder? On the one hand he could have been running away or on the other hand he could just have been staggering at the scene.
23. The accused explanation that he was beaten by unknown people on 1st November 2014 after drinking at PW 1's was not disproved by the prosecution. PW 1 and PW 2, who were the first two persons to see the accused, did not testify as to whether the accused had been injured before he was assaulted by the villagers before his arrest by the police that night.
24. The accused's defence that he was attacked by people he could not recall is not unreasonable in the circumstances. Something happened between the accused and the deceased that evening. Did they fight as was suggested by PW 5 that from members of the public did the accused intentionally inflict the injury that caused the deceased's death or was the deceased part of the group that was beaten by unknown people. Whereas there is strong suspicion that he may have something to do with the death of the deceased, I find that the prosecution had not proved that the accused murdered the deceased beyond reasonable doubt.

25.As a result I have no option but to find **BERNARD OTIENO OBONYO** not guilty of the murder of **DUNCAN OSURI OWINO**. He is therefore acquitted and he is set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 18th day of December 2014

D.S. MAJANJA

JUDGE

Mr Osoro instructed by Osoro and Company Advocates for the accused.

Ms Ongeti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.