



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
MURDER NO. 75 OF 2011
REPUBLIC.....RESPONDENT
VERSUS
KEVIN OMONDI OCHIENG.....ACCUSED
J U D G M E N T

1). The accused person herein was charged with the offence of Murder contrary to section 203 as read with section 204 of the penal code. The particulars were that on the night of 12th and 13th December, 2011 at Moro sub location Nyakach District within Nyanza Province, murdered Erick Ouma Okode. The accused denied the charge.

2). The prosecution called a total of 8 witnesses to prove its case. Briefly PW 1's case George Omolo Akal who is the assistant chief of Moro sub location was called on 13-12-2011 at around 8. a.m to a scene where a dead body was found. He went there and found several villagers. In the process of identifying the body, the accused person came. He noticed that he had some blood stains on his clothes and a wound. He inquired the source of the blood stain and he told them that he had fought in a bar the previous night. He then arrested him for questioning and handed him over to the police for further interrogation.

3). **PW2 Wycliffe Oduor Ondieki**, who was a herdsboy told the court that on 12-12-2011 at around 6 p.m while he was herding animals the accused had forcefully grabbed a panga from him. He said that the accused appeared drunk and that he did not resist him. He later informed Godwin Ochieng, his brother of what had happened.

4). **PW3 Calvin Ochieng**, was working at "Mambo Poa" bar. He said that the accused came and ordered for some alcohol worth Kshs. 105/= but he refused to pay, when he insisted the accused removed a panga and threatened the witness. Together with one Godwin they wrestled the panga from the accused and he kept it in his bedroom. Apparently the accused left without paying the money. He was to pursue it the following day. The following day the police came for the panga which he duly handed over to them.

5). On cross examination he told the court that he only saw the deceased remove the panga which was inside his clothes after he had demanded payment for the alcohol he had consumed. The deceased left at around 10.40 p.m. He further admitted that there was blood stains on the panga and he did not know the source.

6). **PW4 Godwin Ochieng**, is a labourer at a quarry. He went to the bar at around 6 p.m after leaving his job. His brother told him that the accused had snatched his panga. He asked the accused but he denied. He also confirmed that the accused came to the bar and after taking the alcohol he refused to pay for the

same. He threatened the bar attendant with a panga but he assisted the said bar attendant (Kevin) to snatch the panga from him. The following morning he heard that there was a body which had been found. The accused also came and he was arrested at the scene. He told the court on cross examination that the body smelled alcohol.

7). **Paul Waweru Kangethe PW5**, the government analyst produced the report of the analysis he had been given to analyse. He produced the results which shows that the blood stains on the clothes belonging to the accused matched with the accused's blood samples, and that the blood stains on the panga was unknown.

PW6 Josephat Ndolo was the investigating officer who narrated the steps he took in carrying out his investigation.

8). **PW7 Dr. Omwenga Peter**, produced the P3 form in respect to the accused. It showed that he had a deep cut wound on the head. **PW8 Dr. Maureen Muchela** Produced the postmortem report which had been signed by Dr. Kamau and which showed the cause of the deceased death to be severe head injury secondary to assault.

9). At the conclusion of the case the parties submitted and the accused was put on his defence. He gave unsworn evidence and called one witness. He denied killing the deceased who was his cousin and were working together till 3 p.m when he had gone to bath. The following morning he was woken up by one Joseph Juma who told him of the sad news. He went to the scene which was a boarder between Luos and Kalenjins. There were many people. He further told the court that at the scene he was called by the OCS who started beating him for no apparent reason. He told them that the blood stains on his body was as a result of a fight he had at Mambo Poa bar the previous night when he differed with Calvin Ochieng and Godwin Ochieng. He said that the two had assaulted him after failing to refund the balance out of Kshs. 200/= he had given them. The accused further denied snatching the panga from the witness. He said that the panga was at the counter.

10). **DW2 Millicent Achieng**, the accused witness told the court that the relationship between the deceased and the accused was good and that she had never seen them differing . They were cousins and lived as neighbours.

11). Having heard the parties herein as well as read their respective submissions, the questions to be asked is whether the prosecution had established their case beyond any reasonable doubt. Did the prosecution established any nexus between the deceased and the accused? Did the prosecution establish the key ingredients of murder namely mens rea and or malice aforethought?

12). What runs across the prosecution case is that there is no direct evidence which links the accused to the deceased death. Nobody saw the accused assault and injure the deceased. I have no doubt that the panga was snatched from the accused by PW3 and PW4. On cross examination by the defence witness PW3 said that **“there was stains of blood. I cannot tell where it came from”**.

13). Apparently, the investigating officer failed to dust the panga. It appears to me that the panga by the time it reached the hands of the analyst had passed through several hands. What is even more interesting is that the blood stains on the panga did not match either the deceased or the accused. Of course the samples on the clothes as explained by the analyst matches those of the accused. There was no evidence that the deceased was seen with the accused that night. It appears that the accused after the scuffle at the bar left alone.

14). From the evidence on record the only key area that would assist the prosecution is proving circumstantially that it was the accused who caused the deceased death. But the law on this area was well settled in **Republic -VS- Kipkering Koske & Another 16 EACA 135** where the court stated *inter alia* that:

“In order to justify the interference of guilt, the inculpatory fact must be in compatible with

the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”.

15). It is the duty of the prosecution to establish their case. The whereabouts of the deceased prior to 13th December were not explained. The accused apparently were in good books with his cousin the deceased. I do not find that the circumstantial evidence on record meets the legal requirement to warrant conviction of the accused. There was a strong suspicion fuelled by the blood stains found on the accused clothes as well as injuries on his body. The area assistant chief and others thought that the same was connected to the death of the deceased. The government analyst proved them wrong.

16). Was there malice aforethought? I do not think so. None of the prosecution witness was able to establish such. The accused mother testified of the good relationship between the accused and the deceased.

Consequently, and in light of the above reasons, I do not find that the prosecution proved their case beyond reasonable doubt as required. The accused is hereby acquitted under section 215 of the Criminal Procedure Code Chapter 75 Laws of Kenya unless lawfully held.

Dated, signed and delivered at Kisumu this 9th day of December, 2014.

H.K. CHEMITEI

JUDGE