



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
MURDER CASE NO. 53 OF 2012

REPUBLIC.....RESPONDENT

VERSUS

SAMSON OTIENO ANDIKA.....ACCUSED

J U D G M E N T

- 1). The accused person is charged with the offence of Murder contrary to section 203 as read with section 204 of the penal code. The particulars are that on the 3rd day of August, 2012 at Ugunja sub location, Ugenya District in Siaya County murdered one John Oduor Onyango.
- 2). The prosecution called a total number of 5 witnesses to establish their cases. Briefly, PW1 Lucas Nyagor told the court that on the material night at around 10.30 p.m on 2-8-2012 he was heading home after closing his business. On the way he came across a group of people who were assembled and on the ground was laying a person who had been injured. Using a spotlight he saw that it was Lucas the deceased. Two boda bodas pursued the assailant and managed to apprehend him. They also recovered a blood stained knife. On cross examination he admitted that he did not witness the incident.
- 3). PW2 Stephen Okoth Otieno, was heading home also on the material night around 11 p.m. At the stage he found about 3 people and one was lying on the ground injured. He knew Lucas the injured person. He inquired from a watchman who told him what had happened and the direction the assailant had taken. They followed him and after a short distance they found the same person fighting a watchman. They arrested him and recovered a blood stained knife. They then took him back to the scene
- 4). PW3 Kevin Odhiambo Otieno was also heading home that night. He met PW2 who informed him of what had happened. They gave chase and managed to apprehend the accused and recovered a blood stained knife.
- 5). PW4 Corporal Julius Kilonzi was on patrol that night with his colleagues. Several members of the public handed over the accused person to them together with the blood stained knife. He took the photographs which were produced and he equally sent the blood samples and the knife to the government analyst which showed that the blood stain on the knife did match that of the deceased.
- 6). PW5 Dr. Bob Owino produced the postmortem report which concluded that the cause of deceased death was cardiac arrest due to bleeding from the stab wound.

7). The accused was then put on his defence when in his unsworn evidence he told the court that on the material day he was heading home from his place of work. Along the way he was accosted by a group of people who said that he had killed the deceased. He denied the charge.

8). From the facts and evidence adduced herein it is clear that the prosecution case is based purely on circumstantial evidence. There is no direct eye witness to the incident. This court must as the case is, establish that there was malice aforethought on the part of the accused.

9). The only persons who may have been close to the incident is PW2 and PW3. PW2 told the court:

“I inquired from the watchman, he told me what had happened. The watchman showed me the direction taken by the assailants. I picked Lucas and we went in pursuit”.

He went on to say:

“we found the same person fighting another watchman. We found a knife in his possession. The knife had fresh blood. Before we ask him he told us that he had not killed anybody”.

They then took him back to the scene where the same watchman confirmed that he was the one.

10). Further PW3 told the court that: **“we found two people fighting one of them had a mental problem. The person I was carrying on the bike told me the person I was looking for was one of them who was fighting before. It was dark I was not able to recognise him”.**

11). Two issues arises in the above piece of evidence. First of all the watchman who spoke to PW2 did not come to testify. He did not even describe to the witness what happened and how the accused was involved. He simply indicated the direction which was taken by the assailant when fleeing. He ought to have been called or at least described to the witness how the accused attacked the deceased.

12). Equally, the prosecution ought to have called the second watchman who was being attacked by the assailant. Infact he told the court that one of them had mental problem. That was a huge statement. Who among the two fighting had mental problem. Is it possible that the person who had assaulted the deceased was the same guy with mental condition? In any case what criteria did he use to determine that he had a mental condition.

13). I do find that failure by the prosecution to call the two watchmen was fatal to their case. It is infact difficult not to believe that the knife had been recovered from another source. The court equally takes note of the fact that the incident happened at around 11 p.m in the night. None of the witnesses was able to explain whether or not there was any sufficient light. PW1 said that he only recognised the deceased by use of a spotlight. How then did the watchmen and in particular PW2 and PW3 conclude that it was the appellat who had the knife and had indeed assaulted the deceased.

14). As stated above the prosecution case heavy relied on circumstantial evidence. But as the court found in **Sawe -VS- Republic (2003) 2 KLR 357**, suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.

15). Consequently, and based on the above analysis I do not find any sufficient evidence to link the accused with the deceased death. Although the analyst found for a fact that the DNA blood sample matched those of the deceased the source of the knife was not clear and categorical. It would be unjust to convict the accused however strong the suspicion is on the evidence adduced herein. Neither do I find any proof of malice aforethought on the part of the accused. In the premises I do disallow the prosecution case and dismiss the case under section 215 of the Criminal Procedure Code. The accused be and is hereby released unless lawfully held.

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

H.K. CHEMITEI

JUDGE