



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Criminal Appeal 47 of 2004

REPUBLIC PROSECUTOR

VERSUS

ANDREW OKOTH SIMBA ACCUSED

JUDGMENT

The accused was charged with murder contrary to section 203 and 204 of the Penal Code. The particulars of the offence were that on the 15th day of April, 2004 at Kokech location in Rachuonyo District, the accused murdered George Otieno Simba, hereinafter referred to as “*the deceased*”)

This case was fully heard by the late Justice Kaburu Bauni but he passed away before he delivered the judgment.

The evidence that was adduced by the prosecution witnesses can be summarized as hereunder:

John Ouma Mboga, PW1, is a stepbrother of the accused and the deceased was their cousin. On 15th April, 2004 at about 3.00 p.m, PW1 was burning charcoal with the deceased and the accused. The accused was grazing cattle and the deceased had come from their home. The deceased went to untie their cattle from a place where they had been tethered. PW1 saw the accused following the deceased and after about ten minutes the accused returned to the place where PW1 was burning charcoal. By that time, the cattle which were being grazed by the accused had gone to a shamba and the accused sent PW1 to drive them back. As he was going back, PW1 spotted the body of the deceased lying somewhere in the bush. The head had been chopped off completely. The body had been put in a sack but the upper side was protruding out. The accused told PW1 to go and get another sack. PW1 asked the accused if he was the one who had killed the deceased but the accused did not answer. At that time the accused was armed with a panga. PW1 had earlier seen the accused holding the same panga when he was following up the deceased. The panga had bloodstains. PW1 added that there had been no quarrel between the accused and the deceased. PW1 was convinced that it was the accused who had killed the deceased but he could not tell why he had done it.

Evans Onditi Mboga, PW3, the accused’s brother, corroborated the evidence of PW1. He stated that on the material day at about 3.00 p.m. he was going home and when he was just about to get there, PW1 called him. He showed him the deceased’s body whose head had been chopped off. PW3 screamed in shock at seeing the deceased’s body and many people rushed to the scene. Thereafter the accused disappeared from their home for two days.

One of the people who responded to the screams by PW3 was the accused's grandfather, **John Wagunche Onditi, PW4**.

When he arrived at the scene he saw the deceased's headless body. He was told that the accused had killed the deceased but by that time the accused had taken off.

The accused's father, **Erick Onditi Ogoche, PW5**, confirmed that the accused disappeared from his home immediately after the death of the deceased. He resurfaced on 17th April, 2004 and was in possession of a panga. The accused was asked to surrender the panga and he agreed.

Thereafter he was taken to Oyugis police station as was confirmed by corporal **Daniel Osano, PW6**.

In his defence, the accused said that on 16th April, 2004 he left their home at 3 p.m. He wanted to go to Homa Bay. A short distance from home he met PW1 and the deceased. The accused said that he found his mother in a hospital and he returned to their home on the following day. He was then accused of having killed the deceased and taken to a police station. He denied having committed the offence.

From the above evidence, it is clear that on the material day the deceased was with PW1 and the accused. PW1 saw the accused following the deceased as he held a panga. About ten minutes thereafter PW1 saw the deceased's headless body in a sack. The accused asked PW1 to go and bring another sack. When PW1 asked the accused whether he was the one who had murdered the deceased, the accused did not respond. However, the accused was holding the same panga that he had earlier, only that it was now blood stained.

Immediately after the said incident the accused disappeared for two days. Taking all the above evidence into consideration, there is overwhelming circumstantial evidence that the accused was the only person who could have murdered the deceased. In the well known decision of **R V KIPKERING ARAP KOSKE & ANOTHER** (1949) 16 EACA 135, it was held that in order to justify a conviction based wholly on circumstantial evidence, the inculpatory facts must not only be incompatible with the innocence of the accused, and be incapable of explanation upon any other reasonable hypothesis than that of his guilt, but also the facts must exclude co-existing circumstances which may tend to weaken or destroy the inference of guilt.

In this case, although the accused was not seen killing the deceased, all the available evidence point to an irresistible conclusion that he must have been the killer. His defence is untenable. In any event, he avoided any mention of his whereabouts on 15th April, 2004. Consequently, I find the accused guilty of murder as charged and convict him accordingly.

DATED, SIGNED and DELIVERED at KISII this 10th day of November, 2008.

D. MUSINGA.

JUDGE.

Accused: I have nothing to say.

D. K. MUSINGA.

JUDGE

SENTENCE: The accused is sentenced to death as by law prescribed.

D. K. MUSINGA

JUDGE

Judgment delivered in open court in the presence of:

1. The accused.
2. Mr. Okenye HB for Mr. Mogire for the accused.
3. Mr. Kemo, Senior Principal State Counsel for the State.

D. MUSINGA.

JUDGE