

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT BUNGOMA

Criminal Case 33 of 2003

REPUBLIC.....PROSECUTOR

VS

JOHN PETER OMUGAKA.....ACCUSED

RULING

John Peter Omugaka, the accused herein, is before this court on information of the Attorney General facing a charge of murder. It is said that on the 11th day of June 2000 at Karira Village, Aturet Sub-Location, Amukura Location in Teso District within Western Province murdered Perepeta Atyang.

The prosecution closed its case after tendering the evidence of 7 witnesses. The learned counsels appearing for the prosecution and the defence were invited to make submissions under Section 306 of the Criminal Procedure Code. I have considered both the evidence tendered by the prosecution as well as the submissions made by the learned counsels.

The key witnesses in this case are Clistus Emai (P.W.1) and Exiditus Ojokoi Ekisa (P.W.5). According to P.W.1, he was sleeping with the deceased who was his grandmother on the night of 11th June 2000 when he heard the voice of the accused demanding for the door leading to the deceased's house to be opened. P.W.1, said P.W.5 told him to come back the next day. Shortly, P.W.1 said, the accused used a huge stone to break the door. P.W.1 said he saw the accused use a metal bar to assault the deceased. P.W.1 ran away and hid in the nearby cassava plantation while the accused fled. P.W.1 said he did not go back to the deceased's house but opted to go to his home where he informed his mother of what had happened. P.W.1 claimed he saw the accused with the assistance of moonlight.

On his part, P.W.5 said at about 7.30 p.m. he heard the accused demanding for the door to be opened. He said he peeped through a cracked wall and saw the accused outside that house. He said he told him to come the next day but instead he broke the door using a stone. He said the accused hit the deceased with a metal bar before chasing them around. P.W.5 said he managed to recognize the accused with the assistance of moonlight. He conceded that the accused was not somebody well known to him.

It is the submission of Mr. Sichangi advocate that the prosecution did not establish a prima facie case to warrant the accused being placed on his defence. The learned counsel further argued that the element of mens rea was not established in order to prove murder. He was of the view that there was no sufficient light to enable the witnesses recognise the accused. Mr. Onderi, the Learned Principal State Counsel was of the view that there was a prima facie case to warrant this court to place the accused on his defence. He argued that there was sufficient moonlight and that the accused was recognized by voice identification.

After a careful consideration, I am of the strong view that the circumstances of identification were not favourable to a positive identification free from error. The evidence of voice identification cannot be reliable in view of the fact that P.W.5 said on cross-examination that the accused was not somebody well known to him.

It was claimed that the accused used a metal bar to inflict the injuries on the deceased. The metal bar was not produced in evidence. The failure to produce this important piece of evidence is fatal in that the accused's malicious intention cannot be inferred. There was no evidence to show that the accused had malice aforethought.

In the end, I find that there is no evidence that the accused committed the offence. Consequently, a prima facie case has not been made out. The end result is that the accused is hereby acquitted of the offence. He is hereby ordered set free forthwith unless lawfully held.

Dated and delivered this 1st day of August, 2006. The assessors are hereby discharged but may be recalled to serve in another case. They should be paid for today the 1st August 2006.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Sichangi for the accused and the L.S.C.