



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL CASE NO.9 OF 2003

STATE PROSECUTOR

VERSUS

1. THOMAS MOGAKA ONCHWATI)

2. SAMWEL OMBONGI NYAMBANE) ACCUSED

RULING

The two accused THOMAS MOGAKA ONCHWATI and SAMUEL OMBONGI NYAMBANE are charged with the offence of murder contrary to S.203 as read with S.204 of the Penal Code.

The Particulars are that on the night of 15th and 16th December 1999 at Rigena Sub Location Nyamira District they murdered THOMAS OMWENGA.

The prosecution called five witnesses. SAMSON MOMANYI MOSE (PW1) a cousin of the deceased said he identified the body to the doctor who performed Post Mortem.

PW2 NAOMI KERUMA MOTANYA was the wife of the deceased. She said that the deceased left home on 15/12/99 at 11 a.m. to attend a funeral. He did not return that day. Next day she was informed by one Douglas Osiemo her brother-in-law that deceased was found in a pit latrine at the home of accused 1. She went to the scene. Deceased had been removed to a road side. By the time she reached there he was already dead.

PW3 IBRAHIM OMWONGA told court that on the fateful morning he was told that the deceased had been found in the pit latrine of accused 1. He went there and found that he had already been removed from the latrine. His brother was there and so was accused 1. They washed the body and changed his clothes. He was still alive but not talking. He had an injury on the right ear and back. He was carried to the road to look for a vehicle to take him to hospital. He passed away as they were waiting for a vehicle. Report was made to Ass. Chief. PW3 also went and reported to Keroka Police Station. He went to the scene with police. They went to house of Accused 1 Police searched the house. There were bloodstains on the door and a mattress in the house. Also some clothes had blood. They also found slippers they suspected belonged to the deceased.

PW4 ABRAHAM ONSONGO was the area Ass. Chief. He went to the scene when he got the report. He went to home of accused 1. He found him locked in the house. Accused gave him keys to open the house. He arrested him. There were bloodstains in the house and walls.

PW5 JOSEPH ONGANGI MAINA accompanied PW4 the chief to accused 1's house but he did not witness his arrest.

I have carefully considered all the evidence and find it is not sufficient to implicate the two with the murder of the deceased. At best the evidence only raised suspicions that accused especially accused 1 was involved in the murder. However suspicion no matter how strong they are cannot be a basis to prove murder. Nobody testified that he saw any of the accused kill the deceased.

The deceased was not said to have been even seen with any of the accused before his death. The suspicion arose because he was found in a pit latrine belonging to accused 1. Nobody said how he ended up there. Was he thrown in there by the accused? That question was not answered.

PW3 AND 4 said that there were clothes and a mattress in accused 1's house with bloodstains. However these clothes and the mattress were not produced in court as evidence. They were not even brought for identification. If indeed these items were there they should have been produced. I also would have expected the Investigating Officers to take a sample of the deceased's blood for comparison with the bloodstains said to have been found in accused 1's house. This would have confirmed if the blood in the house was his. This was apparently not done and if it was the court was not told the results.

PW3 said they found a pair of slippers in the house of accused 1 which they suspected belonged to the deceased. If this was so I believe the deceased wife would have identified them. She did not in her evidence talk about them and neither were they produced in court either for identification or evidence.

As for accused 2 PW3 the ass. Chief said he was implicated by accused 1. He did not explain how. No evidence was called to link him to the death of the deceased. Lastly and perhaps the most fatal thing to the prosecution case was failure to call medical evidence as to the cause of death of the deceased. Even after numerous adjournments the prosecution failed to call the doctor who performed post mortem. He is the only person who would have authoritatively told the court the actual cause of the deceased's death. In absence of such evidence the court cannot know with certainty what caused the death. The prosecution can't expect the court to speculate on such an important issue. Even the investigating officer was never called to testify. All in all I find it would be futile to call the accused to tender their defence as the evidence on record is insufficient.

Even if they chose to remain silent the court cannot convict on the evidence. I therefore find both not guilty and acquit them under S.306 (1) CPC. They be set at liberty forthwith unless otherwise lawfully held.

Dated at Kisii this 29th April 2005

KABURU BAUNI

JUDGE

c.c. Mobisa

Mr. Kemo for state.

Mr. Kaburi for Accused.

KABURU BAUNI

JUDGE