



**Republic v Onyambi alias Champee & 2 others (Criminal Case
04 of 2020) [2024] KEHC 2724 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 04 OF 2020
HI ONG'UDI, J
MARCH 13, 2024**

BETWEEN

REPUBLIC STATE

AND

SAMUEL OMAywa ONYAMBI ALIAS CHAMPEE 1ST ACCUSED

ABDI NASIR ADAN ALIAS ABDI 2ND ACCUSED

JOSEPH TARIKI ALIAS MBOO 3RD ACCUSED

RULING

1. Samuel Omaywa Onyambi alias Champee, Abdi Nasir Adan alias Abdi and Joseph Tariki referred to as the 1st, 2nd and 3rd accused respectively are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars being that on the night of 24th December, 2019 at Kapkures area of Nakuru West Sub-county within Nakuru county in the Republic of Kenya the 1st, 2nd and 3rd accused jointly murdered Alex Musyoki Mbuvi.
2. They all denied the charge and the case proceeded to hearing with the prosecution calling a total of six (6) witnesses.
3. PW2 (Edward Mutie) and PW5 (Lilian Chepkurui) deceased's wife identified the body of the deceased. PW1 (Alex Musyoka) a cousin to the deceased did not witness the post mortem but claimed to have identified the body.
4. PW4 – Lawrence Ojwang Otieno was with his wife Daisy on 24th December, 2019 when they met the deceased and two others at Kaptembwa (140). They went to Ngambo – Kapkures a bar where they met with others, and were now six (6) in number. A friend called Sang joined them. Later a friend of Sang came and bought them vodka. Thereafter some fellows (9) came to the bar and began quarrelling. He gave their names as Ose, Tarik, Oriam Champagne. The bar attendant told them to stop and they



- left. At 1.00am they left for home. Tindiko who was in his team went back to the bar to pick some items and some noise was heard and they intervened.
5. Tarik had a knife, while the deceased had an alcohol bottle only. The deceased broke it and hit one of the boys on the face. PW4's team left and he remained with his wife and Venesa. Four (4) of the nine (9) people left and did not come back. He was advised not to go via the river. As he left with the ladies they passed two (2) men on a bike. At Kaptembwa near the police post all those he had been with came save for the deceased. They called him but he did not respond.
 6. He identified the accused persons as those who attacked them. He had known them earlier as they used to meet at the river while taking a bath. He had known the deceased briefly as they used to meet where they bought wines and spirits. He said the young man who was injured by the deceased was taken to hospital by his friends. He had no idea as to how the accused were arrested. He too had been arrested.
 7. In Cross-examination by Mr. Mongeri for the defence he said the alcohol they were taking was strong and they had not eaten any food. They were however not drunk. He further explained that there was light at the bar and so they were able to see the attackers. After Hosea was hit the group took off towards the river. He was not sure if Champee was in court. He however said the 1st accused had a tumbler.
 8. PW5 (the deceased's wife) did not witness anything as far as the deceased's death was concerned.
 9. PW6 No. 91331 retired Cpl Bernard Kirui stated that on 29th December, 2019 he was in the office at Kaptembwa police station Nakuru when he was assigned a case of a missing person. A raid was conducted and friends of the deceased were arrested. Among them were Hillary and Newson Apath. The bar attendant (John) took them to Chelerwa's home and they arrested him. Chelerwa had fresh injuries. He was injured at the club and he told him the accused persons had chased the deceased towards the river.
 10. He went to the scene but did not find anything unusual there. Chelerwa had been injured by the 1st accused. The body of the deceased was recovered on 31st December, 2019 at River Njoro – Nakuru when it was already decomposing. A DNA was conducted of Chelerwa's clothes.
 11. In cross examination by Mr. Mongeri for the defence he said the deceased had a phone but his number was never taken nor any investigations conducted. He confirmed that the young people were drunk. Fingernails and cartilage were extracted for comparison with the blood of the deceased with others. Though no report was produced he told the court that it was found that the blood belonged to Hosea Kiplagat and not the accused.
 12. He said Newson and Chelerwa were eye witnesses. No weapons were recovered. Hosea was also an eye witness.
 13. Dr. Ngulungu Titus a pathologist conducted the post mortem. He found the cause of death to be asphyxia – prevention of air entering the lungs, injury to the head as a result of blunt trauma to the head and immersion in water masses (EXB1). The body was identified to him by the relatives.
 14. From the evidence adduced there is no dispute about the fact of death which has been confirmed by all the witnesses who have testified. The deceased's body was found in river Njoro – Nakuru where it was decomposing. PW3 – Dr. Ngulungu found the cause of death to be asphyxia and a blunt trauma on the head (EXB1).
 15. PW1, PW2 and PW5 were not at the scene where the deceased and his friends were drinking from. Several names have been mentioned by PW4 who was at the bar and who indeed was in one group/team with the deceased. None of these witnesses appeared in court to give their version of what they



- witnessed. These include Newson, Hillary Chelelwa, Hosea Kiplagat. Even John the bar attendant never appeared to testify.
16. Its not lost to this court's mind that PW4 who was a friend to the deceased came with him to the bar. Secondly, he was arrested as a suspect of the murder and was only released after three (3) days. PW6 never told the court why PW4 was arrested in the first place and later released.
 17. In his evidence PW4 confirmed that the deceased hit Hosea with a sharp bottle on the face after things had broken loose. It's said that Hosea Kiplangat was taken to hospital by his friends. What of the deceased, where did he go? All that PW4 says is that when they re-assembled the deceased was missing.
 18. Why then were the three accused persons arrested? Besides having been at the bar what role did they each play in the killing of the deceased? That is the evidence this court wanted to hear. PW6 testified that John (bar attendant) Hillary, Newson Chelelwa gave him some information. Its not clear if they recorded any statements and even if they did why they have never come to court to testify since the year 2020.
 19. The *Evidence Act* is clear on who in a criminal case has the burden to prove a case. Under section 107 it states:
 - i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that personSection 108 states:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109 states:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
 20. The scanty evidence presented to this court cannot be said to have established a prima facie case to make this court place any of the accused persons on their defence.
 21. The upshot is that the prosecution has failed to establish out a prima facie case as is required by the law for all the accused to be called upon to make their defence.
 22. For my part I find them not guilty and acquit all the three of them under section 306(1) of the Criminal Procedure Code. They shall be released forthwith unless otherwise lawfully held under a separate warrant.
 23. Orders accordingly

DELIVERED, DATED AND SIGNED THIS 13TH DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

