



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL CASE NO. 23 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PAUL OTIENO OYUGI.....ACCUSED

JUDGMENT

1. Paul Otieno Oyugi is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 25<sup>th</sup> day of November, 2016, at Okeke village, Lower Kayambo location in Ndiwa District of Homa Bay County, murdered Brighton Ouma Ochieng.
3. The prosecution case was that the accused went and collected the deceased from the river where he was with another child and purported to take him home to have *mandazi*. He shortly hacked him to death.
4. Paul Otieno Oyugi, the accused contended that on the material day he was drunk and knew nothing about the alleged death. He further said that the rest of the family hated him for he was born before his mother was married in the home.
5. The issues for determination are:
  - a) Whether the accused was so drunk not to know what transpired;
  - b) Whether the accused was falsely implicated due to hatred; and
  - c) Whether the accused committed the offence he is charged with.

6. Section 13 (2) of the Penal Code provides:

**(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—**

**(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**

**(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**

7. Subsection 2 of the section 13 lays the burden on the accused to prove that the defence of intoxication is available to him. In the case of **Maina vs. Republic [2007] 2 EA 279 (CAK)** it was held that:

**If an accused person seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove.**

In addition, section 13 (4) of the Penal Code provides that the state of intoxication shall be taken into account in determining whether or not an accused person had the necessary mens rea in committing a crime. That section provides that:

**4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention,**

**specific or otherwise, in the absence of which he would not be guilty of the offence.**

In the instant case I will endeavor to find if the evidence on record supports the defence by the accused.

8. The evidence of Maureen Anyango (PW1) was that the accused went to her house and enquired if her husband was present. When she told him that he was not present, he removed a machete from his jacket and cut her twice. Makrin Otieno Ouma (PW2) on the other hand said that the accused went to the river and asked her where Brighton's mother was. Brighton is the deceased herein. When she told him that she had gone to look for some maize, He told Brighton to accompany him home for his mother had brought *mandazi*.

9. The evidence by these two witnesses and the evidence of the accused on what transpired on the 24<sup>th</sup> & 25<sup>th</sup> November, 2016 does not support his contention that he was drunk on the material day. In any case, intoxication if any could have been caused by his own consent. His action was carefully and thoughtfully schemed.

10. Though the accused contended that he was falsely implicated out of hatred, when Maureen Anyango (PW1), Makrin Otieno Ouma (PW2) and Benard Otieno Okango (PW3) testified, they were not questioned on this allegation Makrin Otieno Ouma (PW2) on. It featured for the first time during defence. I therefore dismiss it as an afterthought.

11. The evidence of Makrin Otieno Ouma (PW2) is that shortly after the accused had left with Brighton, she heard him (Brighton) crying. When she ran to the scene, she found him lying down dead.

12. There was no eye witness to the murder. The evidence against the accused is circumstantial. Circumstantial evidence was restated in the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** as follows:

**Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.**

The Court of Appeal in the case of **Sawe vs. Republic [2003] KLR 354**, held as follows:

**1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**

**2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**

**3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

13. In the instant case, I find that the evidence on record is be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

14. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

**The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).**

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

**Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

15. The prosecution has proved malice aforethought and consequently I find the accused guilty of the offence of murder and accordingly convict him.

**DELIVERED and SIGNED at HOMA BAY this 22<sup>nd</sup> day of July, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**