



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO.E006 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL OLIWA.....ACCUSED

J U D G M E N T

[1] The accused, **Michael Oliwa**, faces a charge of murder, contrary to s.203 read with s.204 of the Penal Code, in that on the 19th December 2020, at unknown time at Kwangamor village – Teso South – Busia County, jointly with others not before court murdered one Saibu Juma Salim Alias Soja Alias Sweetie.

[2] The case for the prosecution was that on the material date at about midday a group of villagers was at a traditional brew (“**Busaa**”) club taking the brew. They went on drinking the stuff as the hours passed by. They included the accused, **Francis Oulo Wanzala (PW 1)** and **Thomas Juma Muyendo (PW 2)**. The seller of the brew or liquor (“**changaa**”) was one Benson Wesonga who was assisted by his friend, **Ferdinand Namasakwe (PW 3)**, to sell the liquor to the many revelers at the club, the deceased being one of them.

[3] In the process, the deceased fell asleep on a seat after taking too much of the alcoholic liquor. **Shamim Siama Okoiti (PW 4)**, arrived at the club to purchase the liquor at about 5.00p.m. She found the deceased sleeping on the seat with the accused drinking the “**changaa**” next to him.

Most of the revelers and the sellers of the liquor had left the scene by 6.00p.m, save the deceased who was left behind sleeping on the seat inside the club.

[4] However, at about 10.00p.m onwards, Ferdinand (**PW 3**) returned to the scene and saw the accused leaving while holding a hoe “**jembe**”. He then entered the place and found the deceased having been assaulted and fatally injured on the head and was still bleeding. He suspected the accused of having fatally assaulted the deceased as there was nobody else at the scene at that time. He (**PW 3**) alerted fellow villagers and was escorted to his home as he was shaking and in shock. He returned to the scene on the following morning only to find the body of the deceased having been removed from there and dumped in a nearby maize plantation.

[5] The matter was reported to the police and the dead body of the deceased was removed from where it was found to the mortuary where a post mortem was carried out on 22nd December 2020, by **Dr. Sande Kahindi Charo (PW 5)**, who compiled and signed the necessary post mortem report (**P.Ex 1**) indicating that the deceased died from severe head injury due to burnt trauma on the head.

[6] **Cpl Margaret Wamboi (PW 7)**, investigated the case and in the process collected soil and blood samples from the scene and forwarded them to the Government Analyst for examination along with a pair of black trousers and blood stained rubber shoes (**P.Ex 3 a – b**) found with the accused when he allegedly surrendered at the Nambale police station.

The Government Analyst, **Polycap Lutta Kweyu (PW 6)** carried out the necessary analysis and complied his report (**P Ex 2**) which indicated that the DNA profiles from the exhibit samples handed to him matched the DNA profiles of the deceased.

[7] It was after the completion of the police investigations that the accused was charged with the murder of the deceased. His defence was a denial and a contention that on the material date he had attended a fundraising meeting respecting the funeral of a fellow villager. He left the place at 5.00p.m but on his way home he fell down and saw a person lying on the ground. He rushed home and reported the matter to his father who directed him to the village elder with whom they went to the scene and confirmed it was the deceased who was lying dead on the ground with head injuries. The village elder referred him to the police and he went to Nambale police station to make a report. Instead, he was arrested and charged with the present offence which he did not commit and was surprised to hear that his clothes had some stains of blood.

[8] From all the foregoing facts, it was undisputed that the deceased met his death in a traditional liquor drinking club or “**den**” while intoxicated and after he had seemingly been left alone sleeping on a seat inside the den. Most if not all the revelers had already left but it

appeared that a person entered the place while the deceased was deeply asleep and assaulted him on the head using a blunt object. The assault was so vicious such that the deceased succumbed to the injuries inflicted upon him.

[9] The manner in which the injury was inflicted so deeply and fatally upon a helpless and harmless intoxicated deceased person left no doubt that the assailant had the necessary malice aforethought when he decided to inflict the injury. This action amounted to murder, pure and simple. The issue which therefore arose for determination was whether the accused was that person who of malice aforethought caused the death of the deceased by assaulting and inflicting a serious injury to his head.

[10] Apparently, the prosecution evidence indicated that the incident occurred without anybody being at the scene, save the deceased and assailant with the deceased being in an alcoholic or drunken stupor. The prosecution did not however, avail any or sufficient evidence of direct identification of the assailant while engaged in the material criminal transaction. The accused was suspected but there was no direct evidence of his identification as the assailant. Instead, the prosecution relied on indirect or circumstantial evidence to link him with the death of the deceased.

[11] Such evidence is evidence of facts that the court can draw conclusions from. It is proof of a fact or set of facts from which the court could infer the fact in question which herein was. **“The accused killed the deceased”**. As was stated in **Sande Vs Rep (2003)KLR 364**, suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. In the same case, which was founded on circumstantial evidence, the court said

“As we have already pointed out, the evidence in this case was entirely circumstantial. In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the accused and incapable of explanation upon other co-existing circumstances weakening the chain of circumstances relied on.

The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused”.

[12] In this case, the inculpatory facts were found in the evidence of **Ferdinand (PW 3)**, **Shamim (PW 4)**, the Government Analyst (**PW 6**) and the investigation officer (**PW 7**). PW3 and PW4 credibly indicated that the deceased and the accused were at the material club drinking alcohol (**“changaa”**). PW3 said that the two quarreled and disagreed over a cigarette stick in the process. He was later at about 10.00p.m to see the accused leaving the scene with a hoe and to immediately thereafter find the deceased bleeding from a serious head injury inside the club where he had been left sleeping.

[13] PW4, stated that she was at the club at about 5.00p.m when she saw the deceased sleeping on a seat therein. She also saw the accused at the same time drinking **“changaa”**. The evidence by both PW 3 and PW 4 strongly implied and raised high probability that the accused and the deceased were the only people or revelers left at the club when all the others had left. The fact that the accused was later seen leaving the scene holding a hoe and the deceased was found dead at the scene with a deep head injury was clear evidence that the accused was at the scene immediately before the death of the deceased and was the person who most likely caused the death of the deceased using an offensive object such as the hoe (**jembe**) he was found holding.

[14] The foregoing inculpatory facts or evidence of PW3 and PW4 were fully proved against the accused such that he could not be heard to deny the fact that he was never present at the scene of the offence with the deceased and that at one point they quarreled and disagreed. His defence that he was not at the scene but elsewhere attending a funeral fundraising event was therefore discernible. Further to the evidence of PW3 and PW4, the evidence of the investigating officer (**PW 7**) and that of the Government Analyst (**PW 6**) established that the blood stains found on the leaves and soil samples collected from the scene of crime and the accused pair of trousers and canvas shoes matched the DNA profile of the deceased.

[15] The accused did not deny the presence of the blood stains on his trousers and shoes. He merely said that he was surprised when he was informed of the fact. In any event, he did not provide any explanation as to how the blood came to be on his clothes and shoes. Under **s.111** of the **Evidence Act**, the burden of proof lay upon the accused to explain how the blood stains came to be on his trousers and shoes, particularly where such facts would well be within his knowledge.

[16] It is clear from all the foregoing that the circumstantial evidence provided herein against the accused was not only cogent but also credible enough for this court to draw an inference of guilt against the accused for the murder of the deceased. The inculpatory facts herein are clearly incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis that that of his guilt or upon any other co-existing circumstances weakening the chain of circumstances relied on by the prosecution.

[17] It would therefore follow that the prosecution has proved beyond reasonable doubt that the accused caused the death of the deceased to the exclusion of any other person or suspect. The alleged **“disappearance”** of the owner of the Busaa club, one Benson Wesonga, was insignificant as there was no evidence linking him with the death of the deceased. The fact that the incident occurred in his premises may have caused him to **“bolt”** and run away scared especially considering that the body of the deceased was moved from the premises scene of murder and dumped in a maize planation from where it was retrieved by the police.

[18] In the upshot, the accused is hereby found GUILTY as charged and is convicted accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED & SIGNED THIS 16TH DAY OF NOVEMBER 2021]