



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL CASE NO.8 OF 2020**

**REPUBLIC.....PROSECUTOR**

**VS**

**VITALIS OTIENO OKUKU.....ACCUSED**

**J U D G M E N T**

[1] The accused, **Vitalis Otieno Okuku Alias Alex** faced a charge of murder, contrary to s.203 read with s.204 of the **Penal Code**.

It was alleged that on the night of the 5<sup>th</sup>/6<sup>th</sup> May 2020 at Murende village – Matayos Busia County, he murdered SAO.

[2] The case for the prosecution arose from the facts that the accused was employed by the father of the deceased, **Julius Okoth (PW 2)**. The three of them lived in one homestead with the accused being a close and intimate friend of the deceased even though she was a minor under the age of eighteen (18) years.

[3] On the 5<sup>th</sup> May 2020, father (**PW 2**) and daughter (**deceased**) were at home from about 6.00p.m in the company of the accused and others, but from 7.00 p.m onwards the accused and the deceased left and went away without returning. **Evans Otieno Josphat (PW 3)** confirmed that the two left together at that time. He (**PW 3**) was later at about 9.00p.m to see the accused in a state of panic in the house of one Tony. He again saw him at 11.00p.m. when they had separately returned home. He (**accused**) then went to sleep. This was confirmed by **Silas Owino (PW 4)**.

[4] On the following 6<sup>th</sup> May 2020, at about 7.00a.m., the assistant chief of Murende, **Antony Wanyama (PW 1)** received a report from a village elder that the deceased had been found dead along a road. He proceeded to the scene and confirmed as much before calling the police.

**Dr. Cedrick Tumbo (PW 5)** performed the necessary post mortem on the body of the deceased and prepared a report (**P.Ex 1**) showing that the deceased died from asphyxia due to strangulation.

[5] **P.C Dan Owino (PW 6)** carried out necessary investigations by first proceeding to the scene where they found a crowd of people baying for the blood of the accused. He and his colleagues took photographs of the scene and the body of the deceased (**P.Ex 3 a – d**) and recovered several exhibits including inner wear and shorts. He noted that the body of the deceased had bruises on the neck and opined that they were caused by a struggle and strangulation. On conclusion of the investigations he charged the accused with the present offence.

[6] The defence case was a denial and an indication that the accused never ever left home on the material date either alone or with the deceased. He said that the homestead belonging to the father of the deceased was frequented by partakers of illicit liquor (“**changaa**”). That, both the deceased and his father were dealers of the stuff and on the material date they disagreed over the theft of the “**changaa**” belonging to the deceased. This resulted in everybody being chased away from the scene.

[7] Thereafter, the deceased instructed the accused to take her “**changaa**” to her grandmother’s nearby hut. He did so and returned to the scene. The deceased then left the place and went away. He never saw her again but on the following day a crowd of people beat him up after it was alleged that he was with the deceased before her body was found lying down on a nearby road. The crowd of people apart from beating him also burnt his clothes leaving him with those he was wearing at the time.

[8] It is evident from all the foregoing facts that the deceased met her death on the material night as a result of being assaulted and strangled to death. The cause of death was not disputed and the circumstances in which the dead body of the deceased was found lying beside a road was suggestive of a violent death at the hands of a violent person despite resistance that may have been put by the deceased. No doubt, the assailant had clear intention of bringing to an end the short life of the deceased who was barely in her adolescence.

[9] The cause of death was undisputed and was in any event established by the evidence of the doctor (**PW 5**). The manner in which the deceased died was a pointer to the assailant’s intention to cause the death of the deceased. Malice aforethought was clearly engraved in the

mind and psyche of the assailant.

[10] However, the assailant was not seen or caught in the act of assaulting and strangling the deceased. He therefore remained an unknown person. None of the prosecution witnesses were at the scene at the material time of the offence. The investigations carried out by P.C. Owino (PW 6) and his team zeroed in on the accused as the prime suspect following his more than close relationship with the deceased, a fact not denied by the accused. He was therefore arrested and charged with the present offence.

[11] It therefore became incumbent upon the prosecution to seal the suspicion cast upon the accused by providing sufficient and credible evidence linking him to the death of the deceased either directly or indirectly. The burden to establish the guilt of the accused beyond any reasonable doubt lay primarily on the prosecution and in that regard, they relied on indirect or circumstantial evidence as they clearly did not have any direct evidence against the accused.

[12] To justify the inference of guilt on the basis of circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt (see, **Rep V. Kipkering Arap Koske & Another (1941) EACA 135**)

In **Sawe V. Rep (2003) KLR 364**, the court stated:-

**“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 innocence of the accused and incapable of explanation upon any 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”.**

[13] In this case, the inculpatory facts was that the deceased, though a minor, was a girlfriend of the accused and were together when they left the homestead of the father of the deceased (PW 2) only for the accused to be seen alone later on the same day and the deceased to be found dead on the following morning having been bruised and strangled near the home of her father.

[14] The father (PW 2) indicated that the accused was the last person to be seen with the deceased when she was alive and before her dead body was found on the side of a village road. This was the most crucial evidence from which an inference of the accused’s criminal responsibility in the death of the deceased could be drawn even through his defence was that the deceased left her father’s home and went away on her own after disagreeing with her father over the theft of her “changaa”.

[15] Evans Otieno (PW 3) also indicated that the deceased and the accused left the home together at about 7.00p.m and that he saw the accused again at 9.00p.m at a friend’s house looking panicking and at 11.00p.m when he returned home to sleep. However, his evidence was not worthy of belief inasmuch as it was discredited during cross examination. He never therefore provided evidence in support of that of the deceased’s father (PW 2).

[16] Silas Owino (PW 4) however, indicated that the accused was away from the homestead up to 11.00p.m when he returned to sleep. He (PW 4) lived in the same homestead and according to him, the accused would normally be in the house before 11.00p.m. He therefore found it unusual for the accused to be there that late.

[17] According to the deceased’s father (PW 2), it was not unusual for the deceased and the accused to leave the homestead together but they normally returned. He therefore became worried when they did not return on the material date and consoled himself by opining that they may have attended a funeral ceremony in the neighbourhood. His evidence was reasonably credible. It did indeed prove that the accused was the last person in the company of the deceased before she was found dead. This evidence strongly implied that the accused must have been the person who assaulted and strangled the deceased to death.

[18] The accused’s defence was clearly disapproved by the evidence of the father of the deceased which even though it stood on its own was credible enough in proving that the accused was the last person in the company of the deceased before she was found dead a few hours or minutes later. This inculpatory fact is clearly incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused. It justified the drawing of an inference that the accused is guilty of causing the death of the deceased to the exclusion of any other person. The prosecution case was thus proved against him beyond any reasonable doubt.

[19] The accused is therefore found guilty as charged and is convicted accordingly.

**J.R. KARANJAH**

**J U D G E**

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