



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 25 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES OTIENO ONYANGO.....ACCUSED

JUDGMENT

1. Charles Otieno Onyango 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 27th day of June, 2018 at Ndhiwa Township, Lower Kayambo sub location in Ndhiwa Sub County of Homa Bay County, jointly with others not before court murdered Joseph Okoth Ongoro.
3. The prosecution contended that the accused and the deceased were drinking together on the night prior to his body's recovery. After he was found dead, a pair of trousers allegedly that of the deceased was recovered in the house of the accused.
4. In his defence, the accused denied any involvement in the death of the deceased.
5. The issues for determination are:
 - a) Whether the accused killed the deceased.; and
 - b) Whether the offence of murder was established.
6. The accused was linked to the offence by circumstantial evidence. In the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** Osiemo Judge explained what circumstantial evidence is, 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 evidence that was adduced was that on the night of 27th June, 2018 at about 5.30 p.m. the deceased was at Joint Pub up to 8.30 p.m. when he left. According to the evidence of Kennedy Ochieng (PW1) who was serving in the said pub, the deceased was drinking with the accused and with whom they left. The other evidence that linked the accused to the offence is the recovery of a pair of trousers allegedly worn by the deceased on that day.

7. Kennedy Ochieng (PW1) testified that the deceased and the accused did not enter the pub together however, when they were leaving, they left together with other people.
8. PC Shadrack Kipkurui Meli (PW3) is that the body of the deceased was found lying at Ndhiwa Primary School field. It was clad in a shirt and an inner pant only. When the accused was said to have been with him, he proceeded to the home of the accused where he recovered a pair of brown trousers with side pockets. The wife of the deceased identified it as that of her husband.
9. Violet Ochieng Ongoro (PW2) testified that she identified the pair of trousers as that of the deceased for she was the one who made the button-hole. She conceded that these kind of trousers come without button holes. She did not testify to have sewn around the button-hole as testified to by PC Shadrack Kipkurui Meli (PW3).

In the case of **Republic vs. Kipkering Arap Koskei & another 16 EACA 135**, had held:

In order to justify the inference of guilt, 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.

10. The fact that the accused was in the same pub with the deceased and left together does not make him a suspect without any further evidence. Every person who was in the pub that night ought to have been treated as a suspect and investigated. According to the prosecution, the other evidence was the recovery of the pair of trousers allegedly belonging to the deceased.

11. The prosecution however relied on colour, button-holes and the side pockets. This was not sufficient for it was conceded that these kind of trousers came without button holes which the wearer must incise. There was therefore nothing peculiar in the button-hole PW2 said made her to recognize the pair of trousers. There was need to adduce more evidence such as size the deceased used to wear and demonstrate by bringing other trousers to show the same. Equally, the prosecution ought to have disproved the contention by the accused by bringing evidence of the size he wears. This was not done. In the case of **Sawe vs. Republic [2003] KLR 354**, held as follows:

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.

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

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.

12. The prosecution did not therefore discharge its burden and what was left was mere suspicion. Suspicion however strong without any other evidence to bolster it is worthless. I therefore acquit the accused of the charge of murder and set him free unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 2ND DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE