



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL CASE NO. E025 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE OKEYO BONDO.....ACCUSED

JUDGMENT

1. George Okeyo Bondo 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 night of 27th and 28th day of April 2021 at Andigo Korwa village, Kamenya sub location in Ndhiwa District of Homa Bay County, murdered Hezron Ochieng Onyango.
3. The prosecution case was that the accused on the material night went to the house of Musa Omune and informed him to go out and eat his dog which he had taken to him. When he went out, he found the deceased at the door unconscious and saw the accused before he fled away. Later when the deceased became conscious, he implicated the accused.
4. In his defence the accused, denied the offence. He said he did not know the deceased and pleaded an alibi.
5. The issues for determination are:
 - a. Whether the accused and the deceased came from the same area;
 - a. Whether the alibi defence of the accused is credible;
 - b. Whether the accused was recognized at the home of Omune;
 - c. Whether the purported implication by the deceased is credible;
 - d. Whether the accused was involved in the death of the deceased; and
 - e. Whether the offence of murder was established.
6. In his defence, the accused contended that he did not know the accused person as well as PW1, PW2 & PW3. These three witnesses testified that they came from the same area with the accused person. Pamela Awino Ongéle (PW1) testified that the accused and Musa Omune (PW3) were Neighbours. PW3 in his evidence testified that the home of the accused is about 150 metres from his. I therefore find that though the accused denied that he knew these witnesses, they actually came from the same area.
7. Having found that the accused and PW1, PW2 and PW3 came from the same area, it is logical to conclude that he must have known the deceased.
8. When an accused has pleaded an alibi, the onus is on the prosecution to prove that the alibi is not true. In the case of **Kiarie vs. Republic [1984] KLR** the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

This burden does not leave the prosecution even when it is raised for the first time during defence. In the case of **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** the Court of Appeal rendered itself as follows on the issue of alibi:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

I will therefore endeavour to find if the prosecution discharged this burden.

9. George Okeyo Bondo, the accused contended that on 24th April 2021 he left for fishing at 2 p.m. and remained in the lake until the following day at 10 a.m. He was with Fredrick Ochieng Gwaro (DW2) who was the coxswain. Their boat was **Jaber Pok Nokwamo**. The owner of the boat was Felix Ochieng. He said that when they landed, he was the one who was selling the fish while Gwaro (DW2) received the cash.

10. The evidence of with Fredrick Ochieng Gwaro (DW2) on the other hand was their boat was called **Owuor Oula**. He said he was the one weighing the fish while the accused was the one receiving cash.

11. It is evidently clear that the alibi cannot possibly be true; there are far too many contradictions. I therefore dismiss it.

12. The incident took place at night. When purported recognition is made when the obtaining circumstances are not favourable for positive identification or recognition, care must be taken to establish how such a recognition or identification came to be made. In the case of **R. vs. Turnbull and Others [1976] 3 All ER 549** Lord Widgery CJ stated as follows:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

...

Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

In the instant case, I will try to establish whether the purported recognition was free from error.

13. Moses Owino Omune a.k.a Musa (PW2) testified that when he was called out to go and "eat his dog", he recognized the voice of the person calling him out as that of Jossy. He said that the accused is known as Jossy locally. The Court of Appeal in the case of **Simeon Mbelle vs. Republic [1982] IKAR 578**. The Court said:

In relation to the identification by voice, one it would obviously be necessary to ensure: -

(a) That it was the accused person's voice;

(b) That the witness was familiar with it and they recognized it and

(c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

This witness testified that he had known the accused for a period of between 20 and 22 years; they came from the same area. He further testified that when he went out, he was able to see the accused with the help of a spotlight he went out with and there was bright moonlight as well. The two also talked while he was outside.

14. I therefore make a finding that the recognition of the accused by this witness was free from error. It was from visual and by way of voice recognition.

15. Pamela Awino Ong'ele (PW1) the mother of deceased testified that when her son gained consciousness, he implicated the accused. This is what Kenneth Omondi Otieno (PW3) testified to. I have nothing on record to make me doubt this evidence.

16. The accused was known to the deceased and the witnesses as Jossy and they came from the same area. There is no logic as to why a total stranger will be implicated in such a serious offence as the accused would want the court to believe. The evidence on record proves beyond reasonable doubts that he caused the death of the deceased.

17. 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 grievousbodily 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.**

18. When the accused kicked the door of Moses Owino Omune a.k.a Musa (PW2), he asked him to go out and collect his "dog" and eat it, referring to the deceased. He opened the door and when he saw the state the deceased was in, he asked the accused what he had done. He testified that the accused told him that he was not better than Otieno who was found "half". He explained that Otieno was found dead and only the torso was recovered. This in my opinion, proved malice aforethought.

19. I therefore find that the prosecution has proved the offence of murder beyond any reasonable doubt. I find him guilty and accordingly convict him of the said offence.

DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE