



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL (MURDER) CASE NO. 04 OF 2019

BETWEEN

REPUBLIC.....PROSECUTOR

AND

ISMAEL OBASANJO ODAA.....ACCUSED

JUDGMENT

1. ISMAEL OBASANJO ODAA (the accused) herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that:

On the 01st January, 2019 at Nyangande market in Nyando Sub-County, within Kisumu County murdered David Ngeso Okello

2. The prosecution summoned a total of six (6) witnesses in support of its case while the defence called no witness.

Prosecution Case

3. **PW 1 Kennedy Ochieng Osura** stated that on the material date, he heard screams at Nyangande market and he went to the scene and found a crowd and also saw David Ngeso Okello (*deceased*) and accused who were not armed fighting.

4. **PW 3 Elijah Okoth Gogo and PW4 Joseph Otieno Osura** found the deceased injured at Nyangande market, escorted him to Nyangande health centre but before he was attended, he died and the police took away his body to Ahero Hospital Mortuary where **PW2 Janes Atieno Okello**, the deceased sister identified it to the doctor that conducted a postmortem on 10.01.2019.

5. **PW 5 Daniel Odhiambo Amollo**, accused's uncle on 07.01.2019 found accused in his sister's home in Homabay and on 08.01.2019 handed him over to the police for the reason that it was alleged that he was the one that had killed the deceased.

6. **PW6 IP Kwendo Amatsi Wycliffe**, the investigating officer upon receiving the murder report on 01.01.2019 found deceased's body outside Nyangande health centre and removed it to Ahero Hospital Mortuary. According to him, he caused to be charged for the reason that **PW2 Janes Otieno Okello, PW4 Joseph Otieno Osura and PW 5 Daniel Odhiambo Amollo** had in their statements stated that they were in company of the deceased when he was stabbed by the accused.

7. With the consent of the defence counsel, the witness produced the deceased's postmortem **PEXH. 1** form filled by Dr. Eddy Opondo on 10.01.2019. The report shows that deceased suffered a 2 cm penetrating wound in the left 5th intercostal space mid axillary line and had died out of massive hemorrhage secondary to a penetrating chest injury.

The Defence Case

8. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put him on his Defence. Accused denied that he was at the scene of crime and stated that he was in Homabay at the home of his sister from 29.12.2018 until 08.01.2019 when he was arrested and was subsequently charged with an offence that he did not commit.

ANALYSIS AND FINDINGS

9. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari v Republic [2014] eKLR**, the main elements of the offence of murder were listed as follows: -

a) **That the death of the deceased occurred;**

b) **That the accused committed the unlawful act which caused the death of the deceased; and**

c) **Malice aforethought**

(a) The death of the deceased

11. The deceased's postmortem form **PEXH. 1** indicates that the deceased suffered a 2 cm penetrating wound in the left 5th intercostal space mid axillary line and that the apparent cause of death had died out of massive hemorrhage secondary to a penetrating chest injury.

(b) Proof that accused committed the unlawful act which caused the death of the deceased

12. *The issue for determination is whether accused was responsible for the heinous crime.* **PW2 Janes Otieno Okello, PW4 Joseph Otieno Osura and PW 5 Daniel Odhiambo Amollo** who allegedly informed **PW6 IP Kwendo Amatsi Wycliffe**, the investigating officer that they saw accused stab the deceased denied that they were at the scene where deceased was stabbed.

13. *Whereas PW 1 Kennedy Ochieng Osura* stated that he saw accused and deceased fighting on the material date, he was categorical that he did not see accused stab the deceased.

14. Accused raised an alibi and stated that he was not at the scene of crime. The Court of Appeal in the case of **Kiarie v Republic [1984] KLR** held as follows: -

“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 is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

15. On alibi evidence, the Court of Appeal in the case of **Victor Mwendwa Mulinge vs Republic [2014] eKLR** held that even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with Section 309 of the Criminal Procedure Code to rebut the appellant's defence.

16. Section 309 of the Criminal Procedure Code provides: -

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

17. The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the accused especially considering that none of their witnesses saw the accused stab the deceased. This puts the case of the prosecution in doubt considering that the evidence tendered against the accused cannot be said to be overwhelming.

18. The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the appellant. This puts the case of the prosecution in doubt considering that circumstantial evidence tendered by PW1 and PW2 cannot be said to be overwhelming.

19. The contention by the state is that the accused committed the murder and escaped to Homabay from the foregoing analysis does not meet the threshold of prove that accused committed the act that caused the death of the deceased which constitutes the '*actus reus*' of the offence.

(c) Proof that the said unlawful act or omission was committed with malice afterthought

20. Having found no evidence to link the accused to the unlawful act that occasioned the death of the deceased; it would be pointless to delve into the issue of malice aforethought.

Disposition

21. Accordingly, I have come to the conclusion that the Accused is **NOT GUILTY** of the offence of murder and is accordingly acquitted. He shall be set at liberty unless otherwise lawfully held. It is so ordered.

DATED THIS 14th DAY OF April 2020

T. W. CHERERE

JUDGE

Court Assistants - Ms. Amondi/Ms. Okodoi

Accused - Present

For the State - Mr. Onanda

For Accused - Mr. Odumbe

Order

This judgment has been delivered to the parties via video conferencing (skype) due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March, 2019.