



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 19 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

JAMES OCHIENG OGONDI.....ACCUSED

JUDGMENT

Prosecution case

1. On 22.04.19, the body of **THOMAS ODIWOUR OMOLLO(deceased)** was discovered in a bush beside the road to his home near Sigoti Market.
2. **PW1 IRENE LAVINE MANYALA** who stated that at about 09.00 pm on the 21.04.19, he was with the deceased and another lady at Sigoti Market when the accused asked deceased to accompany him home. That when the deceased resisted, accused started pushing the deceased and the two who were drunk walked away from the market together. It was her evidence that accused returned to the market alone at about 09.05 pm and informed her that the deceased had gone home in the company of two other people. It was also her evidence that the deceased's body was discovered the following day beside the road that leads to his home.
3. **PW2 CAROLINE AKINYI**, the deceased's wife was 22.04.19 informed that her husband's body was lying beside the road that leads to their home. She saw deceased's body and later on 02.05.19 identified his body to the doctor that conducted a postmortem at Nyabondo Hospital Mortuary. And just like deceased's mother **PW3 ROSE ANYANGO OMOLLO** though stating that the deceased and the accused who were drunk had quarreled over 100/- given to them by her son in law on 24.12.18 stated that she did not know how the deceased met his death.
4. **PW4 ERICK OCHIENG NYANGWE** stated that he was at Sigoti Market at about 09.00 pm on 21.04.19 and that he saw accused and the deceased who were drunk quarreling. The following morning, he saw deceased's body in a bush beside the road that leads to his home but did not know how he met his death.
5. **PW5 PAMELA ATIENO**, deceased's sister in law stated that accused had sometimes in August, 2018 threatened to beat the deceased who he alleged had stolen from him.
6. **PW8 DR. SEREM KIPTUM** stated that he conducted an autopsy on the deceased's body at Nyabondo Hospital Mortuary on 02.05.19. He reproduced the deceased's post mortem form **PEXH.1** which shows the body had internal and external bleeding on the left side of the head from which he formed an opinion that deceased died of *cardiorespiratory failure due to brain injury caused by a blunt object*.
7. **PW6 PAUL PC KANYEKI** the investigating officer on 24.04.19 removed deceased's body to Nyabondo Hospital Mortuary and later arrested the accused who was alleged to have assaulted the deceased leading to his death and caused him to be charged.

The Defence Case

8. At the close of the Prosecution case, this Court ruled that the Accused had a case to answer and put her on his Defence. In his sworn defence, he stated that on 21.04.19 on his way to Sigoti Market, he found the deceased who was drunk lying beside the road on mud since it had been raining. He stated that he removed him from the scene and asked him to go home and when he refused took him outside the shop where PW1 was making chips and where there was a crowd of people sheltering from the rain and he left him there and returned home. He denied assaulting the deceased or walking home with him on the night of 21.04.19.

ANALYSIS AND FINDINGS

9. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.

(a) The death of the deceased

10. The death of the deceased has been established by the postmortem form **PEXH. 1** produced by PW8 that shows that deceased *died of cardiorespiratory failure due to brain injury caused by a blunt object.*

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

11. None of the prosecution witnesses witnessed the murder. The foregoing leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence.

12. As we know from **Republic –Vs- Taylor Weaver and Donovan (1928) 21 CR. APP. R. 20**

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

13. In the case of **Sawe –v- Rep[2003] KLR 364** the Court of Appeal stated:

1. 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.

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

3. 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.

14. In the case of **Abanga Alias Onyango V Republic CA CR.A No. 32 of 1990 (UR)**, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

15. In order to establish the accused's culpability, the prosecution led evidence from **PW1 IRENE LAVINE MANYALA** who stated that that accused and deceased quarreled on the material night and later walked home together; **PW3 ROSE ANYANGO OMOLLO** who stated that the accused who were drunk had quarreled over 100/- given to them by her son in law on 24.12.18 and **PW4 ERICK OCHIENG NYANGWE** who stated that he saw accused and the deceased who were drunk quarreling at Sigoti Market at about 09.00 pm on 21.04.19.

16. From the foregoing evidence, it is apparent that none of the prosecution witnesses saw the Accused murder the deceased and that Accused was only suspected of killing the deceased. It is important to state that suspicion does form a basis on which guilt can be inferred. (See **Sawe –v- Rep**(above).

17. Accused's denial that he murdered the deceased, in my considered view destroyed and weakened the circumstantial evidence tendered against him since the prosecution did not lead evidence to the contrary.

18. As was clearly stated in **Sawe –v- Rep**(above),

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt.....”

19. I find that the prosecution case falls short of prove beyond any reasonable doubt. The Prosecution has failed to prove circumstances which taken cumulatively would form a chain so complete that there would be no escape from the conclusion that within all human probability, the crime was committed by the Accused and none else.

(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. The Accused 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 hb for Mr. Bagada

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.