



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 32 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JOHN ABRAHAM ODAK.....ACCUSED

JUDGMENT

1. John Abraham Odak 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 16th day of December 2017, at Bumala location in Butula sub County of Busia County, murdered Daniel Omondi.
3. The prosecution contended that the accused went and demanded some money the deceased owed him and when it was not forthcoming, he pelted stones that fatally injured the deceased.
4. John Abraham Odak (accused) in his defence denied any involvement in the murder.
5. The issues for determination are:
 - a) Whether the accused was involved in the murder of the deceased; and
 - b) Whether the offence of murder was established.
6. The only eye witness the prosecution called was Joseph Omondi (PW1), a boy aged ten at the time of testifying on 23rd May 2019. He said that at the time of the incident, he was with his mother, his siblings and two neighbours namely Jaja and Musa. Curiously, none of these adult witnesses were called to testify. No explanation was tendered for failure to call these material witnesses.
7. The version of Joseph Omondi (PW1) was that the accused hit the deceased twice with a stone; on the head and on the cheek. This version contradicts the medical evidence where the doctor who performed post mortem recorded the following injuries:
 - a) Bleeding from the ears;
 - b) Bruise on the chin;
 - c) Cut wounds on the left maxillary and left frontal region;
 - d) Depressed fracture of the right occipital area; and
 - e) Haemothorax and multiple hematomas in the thoracic cavity.

The other injuries noted were not explained in the evidence of Joseph Omondi (PW1).

8. Where the prosecution fails to call witnesses and where the evidence on record is barely adequate to establish an issue, the court may make an adverse inference for such a failure.

In **Bukenya vs. Uganda [1972] EA 549**, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

In the instant case, is there a possibility that the incident did not take place the way PW1 explained? Had the other eye witnesses been called, then we could have been in a position to get a clear picture of what transpired. We may infer therefore that had they been called, their evidence could not have supported the prosecution case.

9. Pascalia Atieno Barasa (PW3) introduced another angle to the evidence. She testified that when she returned home at about 3 p.m., she greeted the deceased who was seated at his door and enquired if he was unwell. He just shook his head and from a distance she heard him utter the name Odak. This may mean that the incident may have been earlier than testified to. It may also suggest that it had not taken place, for she did not see any injuries on the deceased person.

10. I, therefore, find that the prosecution has not proved the offence of murder against the accused. I accordingly acquit the accused of the charge of murder and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 8th day of April, 2020

KIARIE WAWERU KIARIE

JUDGE