



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRC NO. 23 OF 2018**

**PROSECUTOR.....REPUBLIC**

**VERSUS**

**JAMES ODHIAMBO OTIENO *Alias* CHEDA.....ACCUSED**

**JUDGMENT**

The accused, **JAMES ODHIAMBO OTIENO *Alias* “CHEDA”** was charged with the offence of **MURDER** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on the night of 13<sup>th</sup> September, 2018 at Kaila, East Seme Sub-County, the accused murdered **TOBIAS AYIEMBA ATITO**.

1. The prosecution called seven witnesses. Thereafter, when the accused was put to his defence, he gave a sworn testimony. However, the accused did not call any other witness.
2. **PW1, WALTER AGINGU ATIENO**, was a first cousin of the deceased, Tobias Ayiembo Atito.
3. On 24<sup>th</sup> September 2018 **PW1** identified the body of the deceased, at the Jaramogi Oginga Odinga Teaching and Referral Hospital, Kisumu, for the purposes of post-mortem examination.
4. **PW2, NICHOLAS OCHIENG ODONGO**, was the Assistant Chief of Kayila Sub-location in Seme. He testified that he knew the accused, who was his subject.
5. **PW2** further testified that the deceased was also his subject.
6. **PW2** said that on the morning of 14<sup>th</sup> September 2018, he received a phone-call from a Village Elder, Mathews Otieno Oola, who told him that the deceased, Tobias Ayiemba had been found dead.
7. Immediately after receipt of that information, **PW2** rushed to the scene, where he found the body of the deceased. He secured the scene.
8. While awaiting the arrival of the **OCS**, Kombewa Police Station, **PW2** heard people saying that the deceased had disagreed with the accused, on the previous night.
9. When the **OCS** arrived, **PW2** informed her about what people were saying, in respect to a disagreement between the accused and the deceased.
10. **PW2** joined the team led by the **OCS**, when they went to the home of the accused.
11. Upon arrival, they found the door to the house of the accused, open.
12. **PW2** testified that there were blood stains on the door curtain. He also saw blood stains on a jeans shirt which they found in that house.
13. However, the accused was not at home when the police and **PW2** got there.
14. According to **PW2**, the jeans shirt and the blood-stained door curtain were taken away by the **OCS**.

15. Thereafter, the **OCS** returned to the scene where the body of the deceased was, and she recovered a blood-stained stone together with a blood-stained white shirt.
16. During cross-examination **PW2** testified that the accused was arrested by Caleb Apondi Okumu, the Assistant Chief of East Othany Sub-location.
17. When he was asked about the identity of the persons who he had heard saying that the accused had disagreed with the deceased, **PW2** gave the name of Ochieng Odinga. However, the said Ochieng Odinga did not give evidence during the trial.
18. According to **PW2**, the accused lived alone in his compound, and also that on the night of 13<sup>th</sup> September 2018, the accused spent the night at his house.
19. **PW3, PAMELA ACHIENG AYIEMBA**, was the wife of the deceased. She said that the accused was well-known to her, as he was their neighbour.
20. On 13<sup>th</sup> September 2018 **PW3** got back home at about 6p.m but found that her husband was not there. She said that the deceased did not return home.
21. On the morning of 14<sup>th</sup> September 2018, whilst **PW3** was milking the cows, her first-born son, **BERNARD OMONDI**, arrived and informed her that the deceased had been found dead.
22. **PW3** rushed to the scene, where she found the body of the deceased.
23. **PW3** testified that a search within the area where the body was, yielded a shirt that belonged to the accused. She said that she used to see the accused wearing the white shirt.
24. On the material day, when the shirt was recovered, it had blood-stains.
25. During cross-examination, **PW3** confirmed that she did not see the person who killed her husband.
26. **PW3** also reiterated that the white shirt belonging to the accused, was recovered at the scene, where the body of the deceased was found.
27. She also said that the deceased used to frequently leave from home, to go and have a drink. Therefore, **PW3** said that she would not know whether or not a disagreement could have arisen at the place where the deceased was having drinks.
28. The defence counsel suggested to **PW3** that the deceased, had a disagreement with the accused, after the deceased had destroyed a bathroom belonging to the accused. However, **PW3** said that she had never heard about the alleged disagreement.
29. **PW4, BERNARD OMONDI AYIEMBA**, is a son of the deceased.
30. He testified that the accused was known to him, as the accused hailed from the same village as the family of the deceased.
31. On the morning of 14<sup>th</sup> September 2018, **PW4** set-off from home, heading towards Kisumu. Whilst on his way, **PW4** saw a crowd of people gathered near a water-source. When **PW4** reached the place where the crowd was gathered, he found the body of his father lying on the ground.
32. It is then that **PW4** rushed home, where he relayed the information to his mother (**PW3**).
33. **PW4** identified the white shirt which was recovered at the scene, as that belonging to the accused.
34. **PW4** testified that the body of his father had blood-stains, whilst the white shirt also had blood-stains.
35. According to **PW4**, the accused used to regularly wear the white shirt.
36. During cross-examination, **PW4** said that although the body of the deceased had serious injuries on the face, he was able to identify his father from his physical features.
37. **PW5, PATRICK OSEWE AYIEMBA**, was a son of the deceased.
38. He testified that the accused not only hailed from the same area as the witness, but also that **PW5** called him a “*Younger Father.*”
39. **PW5** testified that on 13<sup>th</sup> September 2018, he had met Ochieng Odinga, who asked him about an alleged disagreement between the accused and the deceased.
40. **PW5** testified that he had not known about any such alleged disagreement, especially considering that the deceased was an old man

whilst the accused was a young man.

41. **PW6, DALMAS KIBET KISANG**, was a Government Analyst, based at the Government Chemist Laboratory, Kisumu.

42. He generated **DNA** profiles from a white shirt [Item “A”]; a stone [Item “B”]; a door-curtain [Item “C”] and a Jeans shirt [Item “D”].

43. The **DNA** profile generated from the blood of the deceased matched those on the items “A”, “B”, “C” and “D”.

44. However, the **DNA** profile generated from the blood of the accused did not match any of the four Items.

45. After the Government Analyst testified, the defence did not cross-examine him.

46. **PW7, CPL DOMINIC KIMELI LIMO**, was a police officer based at the Kombewa Police Station at the material time.

47. The **OCS** informed him that the body of the deceased had been found at Kamolo Village, Kayila sub-location. The witness visited the scene, where he found the body, along a path, leading to a water well which was located on a hill.

48. About 15 metres away from where the body lay, the police recovered a white shirt which had blood stains on it.

49. Upon making inquiries, **PW7** was informed that the said shirt used to be worn by the accused.

50. During his investigations, **PW7** learnt that the accused was a relative of the deceased; and that the house in which the accused lived was about 1.5 kilometres from where the body was found.

51. **PW7** was the Investigating Officer.

52. He was accompanied to the accused’s house by **PW2**.

53. He said that the house had a single room. Although the door was not locked, the accused was not inside the house.

54. At the door, **PW7** recovered a door curtain, which had fresh blood stains on it.

55. Inside the house, **PW7** recovered a jeans shirt, which had blood stains on it.

56. On the floor, the police found a basin of water, whose contents indicated that someone could have washed blood off his hands, using the water in the said basin.

57. During cross-examination, **PW7** said that nobody in the crowd had told him that the accused was seen assaulting the deceased.

58. After the Investigating Officer testified, the prosecution closed its case.

59. When the accused gave his sworn defence, he testified that he lived at Riat Market, in Central Seme. He said that he lived with **PAMELA ATIENO OGUTU**, who was his employer.

60. The accused testified that he did not know the deceased or any of the prosecution witnesses.

61. He said that on the material date, he did not meet the deceased. He added, that he had never met the deceased.

62. As regards the shirts which the prosecution produced in court, the accused said that they did not belong to him.

63. If anything, the house from which the exhibits were recovered, did not belong to him.

64. During cross-examination, the accused said that he was arrested in one of the houses which were within the compound of his employer, Pamela.

65. He described as strangers, the Assistant Chief and all the witnesses who testified for the prosecution.

66. I have given due consideration to all the evidence on record.

67. I find that the body of the deceased, **TOBIAS AYIEMBA ATITO**, was positively identified by his cousin, (**PW1**) Walter Agingu Atieno, as well as by his son Bernard Omondi Ayiemba (**PW4**).

68. The Post Mortem Report was adduced in evidence, with the consent of the parties.

69. The post-mortem examination revealed that the deceased had the following injuries to the head;

**“- Clotted blood under the scalp.**

**- Depressed skull fracture, right**

**parietal, maxillary bone.**

**- Clotted blood in the brain.”**

70. As a result of the examination which was conducted on the body of the deceased, the doctor who carried out the said examination expressed the considered opinion that the cause of death was;

**“Severe head injury, secondary**

**blunt force trauma.”**

71. Having taken into account the fact that a blood-stained rock was at the head of the victim, who had suffered a depressed skull fracture, I hold the considered view that whoever inflicted the injuries on the head of the deceased either had the intention to cause death of or to do grievous harm to the deceased. The said person had malice aforethought, as defined at **Section 206** of the **Penal Code**.

72. The act of causing the death of the deceased, through physical assault, using a blunt object was unlawful.

73. The only remaining issue for determination is as regards the identification of the person who caused the death.

74. None of the witnesses saw the accused assaulting the deceased. Therefore, the only available evidence is circumstantial.

75. I pause to remind myself that the absence of direct eye-witness evidence is not necessarily fatal to the prosecution’s case.

76. Indeed, it is well established that circumstantial evidence may well constitute the best evidence, provided the trial court finds that the inculpatory evidence points at only the accused person as the person who committed the offence; and provided also that there were no exculpatory evidence which could give rise to any reasonable doubts concerning the guilt of the accused.

77. If there was any possibility that the offence may have been committed by a person other than the accused, the trial court must give the benefit of doubt to the accused person.

78. In this case, although the accused testified that all the prosecution witnesses were strangers to him, I find that that line of defence has no foundation upon which it can stand.

79. When the witnesses testified about;

**(a) The fact that the accused a neighbour**

**to the family of the deceased;**

**(b) The existence of a blood-relationship**

**between the deceased and the accused;**

**(c) The recovery of a blood-stained door-**

**curtain and jeans shirt from the house**

**of the accused;**

**(d) The details of the house where the accused**

**lived (including the fact that it was a single**

**room, where the kitchen was on one side;**

**(e) The arrest of the accused by the Assistant**

**Chief of East Othany Sub-location;**

80. The accused person did not challenge their evidence, when he was cross-examining them. I therefore find and hold that the jeans shirt

and a door-curtain, which were blood-stained were recovered by the Investigating Officer, from the house where the accused lived.

**81.** When the said items were analyzed by the Government Analyst, it was established that the **DNA** from the blood-stains on those items, matched the **DNA** profile of the deceased.

**82.** Notwithstanding the said incriminating evidence, the accused did not tender any explanation about how the items, which contained blood-stains whose **DNA** matched the **DNA** profile of the deceased, had found their way to his house.

**83.** I also find that as the blood-stains on the door-curtain were fresh, when the police recovered the said curtain, on the morning of 14<sup>th</sup> September 2018, the said recovery was very close in terms of proximity in matters of time, that the only rational explanation is that the accused, who lived alone in the house in question, must be the person who fatally assaulted the deceased.

**84.** In the result, I find that the evidence produced by the prosecution has proved beyond any reasonable doubt that it is the accused who murdered the deceased, **TOBIAS AYIEMBA ATIATO**.

**85.** Accordingly, I find the accused Guilty of the offence of Murder. He is thus convicted for committing the said offence.

**DATED, SIGNED and DELIVERED at KISUMU**

This 10<sup>th</sup> day of **June** 2020

**FRED A. OCHIENG**

**JUDGE**