



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 9 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

AUSTIN ODUORI EGESA.....ACCUSED

JUDGMENT

1. Austin Oduori Egesa 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 1st and 2nd day of April 2018, at Mavoko area in Bunyala sub County of Busia County, jointly with others not before court murdered Amos Ojiambo Ogombo.
3. The deceased herein was found lying by the road dead and the accused was found near him. Since he had complained that his motor cycle's key had been stolen, it was concluded that he was the one who fatally injured the deceased.
4. Austin Oduori Egesa denied any involvement in the offence and explained why he was found at the scene.
5. The issues for determination are:
 - a) Whether the accused participated in beating the deceased; and
 - b) Whether the offence of murder was established.
6. The evidence of Michael Ochieno (PW4) and that of Emmanuel Opondo Sirinda PW5) was that when they were going home, they found the accused near where the deceased was lying in a trench and was looking for his shoe. He had only one shoe on. The two, however, differed as to the response of the accused when they enquired from him what the matter was.
7. According to the evidence of Michael Ochieno (PW4) the accused did not tell them anything. His statement to the police indicate that the accused told them that the deceased had been beaten by a group of people. He attributed this difference to the police who forced him to record a similar statement to that of Emmanuel Opondo (PW5).
8. Emmanuel Opondo Sirinda PW5) on the other hand, said that the accused told them that the deceased had stolen the key to his motor cycle.
9. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283, (Madan, Miller and Potter JJA)** held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates makes it unsafe to accept his evidence.

These two witnesses have painted a picture of untrustworthy and unreliable witnesses.

10. Even if these two had not contradicted each other, at most their evidence could only amount to circumstantial evidence. What is circumstantial evidence? In the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** Osiemo Judge explained what circumstantial evidence is, as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive

nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

11. In order for any court to make inference of guilt from circumstantial evidence, such evidence must satisfy the conditions prescribed by the Court of Appeal in the case of **Republic vs. Kipkering Arap Koskei & another 16 EACA 135**, which held:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

12. In the instant case the accused contended that as he was going home with his motor cycle, he heard noises coming from Junction Lodge. When he went to check, he found Samuel and Martin beating the deceased while Cynthia was attempting to separate them. When they saw the motor cycle light they ran away. He chased the two and in the process lost one shoe. He returned to where Cynthia and the deceased were. This is where Ochieno (PW4) and Emmanuel (PW5) found him looking for his lost shoe.

13. This explanation by the accused is plausible and renders the prosecution evidence to be mere suspicion of his involvement over his motor cycle's lost key. The Court of Appeal in the case of **Sawe vs. Republic [2003] KLR 354** said:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

14. I therefore find that the prosecution has not proved the offence of murder against the accused. I acquit him of the offence of murder contrary to section 204 of the Penal Code, and set him free unless if otherwise lawfully held.

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

KIARIE WAWERU KIARIE

JUDGE