



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 24 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

FELIX OLOLI OMUSUGU.....ACCUSED

JUDGMENT

1. Felix Ololi Omusugu 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 25th day of August 2019, at Kakapel village in Teso North sub County of Busia County, jointly with another not before court murdered Robert Karani Aluku.
3. The prosecution case is the deceased herein passed by the home of his brother in-law with a view to request his nephews to escort him home for it was late. His brother in-law raised an alarm and in accompany of his sons, who included the accused attacked him. They later dumped him near a bridge.
4. Felix Ololi Omusugu in his defence, contended that the deceased was attacked by an irate mob after he was found in a sexual liaison with his (accused's) mother. At the time of the incident he said he was away. He returned home after the incident.
5. The issues for determination are:
 - a) Which of the two versions of the incident is convincing;
 - b) Whether the accused was involved in the beating of the deceased; and
 - c) Whether the offence of murder was established against him.
6. According to the evidence adduced by inspector James Mutune (PW4) and who was the investigating officer, it would appear the deceased was beaten on mistaken identity by Dennis Omusugu his brother in-law in company of his sons. From the evidence of this witness, the deceased narrated to him the circumstances that led to the unfortunate attack.
7. On 24th August 2019 after the deceased had participated in the National census exercise, at about 8 p.m. he went to a nearby market where he stayed late. While going home he decided to pass by his sister's home so that he could request his nephews to escort him home. This is when Dennis Omusugu raised an alarm and attacked the deceased in company of his sons who included the accused herein.
8. After they had beaten the deceased, they took him to Malaba police station where they were advised to take him to hospital. When they went away, they abandoned him at a bush. He managed to crawl to the road where some good Samaritans informed his father of his condition. His father went and took him to hospital. This evidence by the investigating officer was attributed to the deceased.
9. It was contended for the accused that deceased was found in the bedroom of James Omusugu Patrick (DW2) and who is the father of the accused. This witness testified that he returned home at about 8 p.m. and found the deceased in bed with his wife. Both were naked. His wife went out and raised an alarm. Neighbours responded to the alarm and found the deceased still in his bedroom, naked. They attacked him. His evidence was that the accused returned home at about 11 p.m. after the incident.
10. Certainly the prosecution version leaves so many gaps that make one doubt its authenticity. The first issue that went unanswered is why such close relatives would attack their kin and then take him to the police. If we assume it was a mistaken identity, then the beating could not

have continued for long without them realizing the truth. After such realization, the place to take him could have been to hospital assuming there were injuries at the time of realization.

11. The second issue that comes to mind is the nature of light at the time. If we go by the version attributed to the deceased, it must have been a dark night; that is why his relatives were not able to identify him.

12. Moses Ikapolok (PW2) is the witness who testified that the accused in company of Dennis Omusugu and Edwin passed him while riding on a motor cycle with the deceased. He said that it was between 7 p.m. and 8 p.m. This contradicts the evidence attributed to the deceased who told the investigating officer that he left his house for the market at about 8 p.m. and where he stayed late before his encounter with the accused and his family.

13. The evidence of Moses Ikapolok (PW2) is that he found the accused, Dennis Omusugu and Edwin beating the deceased using clubs. When the deceased gave him his father's contact, he phoned him. He (deceased's father) found him at the scene. This again contradicted the evidence attributed to the deceased who said that he was abandoned unconscious in a bush and from where he managed to crawl to the road where he sought help.

14. It is apparent that the investigating officer did not believe the evidence of Moses Ikapolok (PW2) and that of Yesse Aluku Murunga (PW1) as to who injured the deceased. If he did, no explanation was given as to why the other two were not charged with the offence. The particulars of the charge support this finding for the accused was charged "**jointly with another**" and not "**jointly with others.**"

15. From my analysis of the evidence on record, I find that it is highly likely that the deceased was beaten by a mob after he was found in sexual congress with the wife of Dennis Omusugu in the latter's bedroom. I also make a finding that the prosecution has not proved to the required standards that the accused was part of that mob.

16. The prosecution has therefore not proved the offence of murder against the accused. I accordingly acquit him of the offence of murder contrary to 204 of the Penal Code and set him at liberty unless if otherwise lawfully held.

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

KIARIE WAWERU KIARIE

JUDGE