



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 20 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

1. VITALIS OTIENO AKUKU

2. DAVID OWINO OJWANG alias DOROSI.....ACCUSED

JUDGMENT

1. **Vitalis Otiemo Akuku** and **David Owino Ojwang** alias **Dorosi** are 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 25th and 26th day of July 2016, at **KINGANDOLE** Sub-location, of **BUTULA** District, in **BUSIA** County, jointly murdered **Eunice Murembo Wesonga**.

3. The prosecution case is that Eunice Murembo Wesonga had visited her mother on 25th July 2016. When she left in the evening to return to her home, she never reached her destination. The following morning her body was discovered near Sirla river. The two accused persons were linked to her death for they were the ones seen with her last. There was also some incriminating evidence that was recovered in the home of the first accused. The duo had also vowed to do something to the deceased after she had implicated them with theft of chickens.

4. The first accused in his defence contended that he accompanied the deceased to the home of Tumbo after she had invited him. She collected some chang'aa and sold some to him on credit. She took his phone as lien. He however went for the money and redeemed his phone. He denied to have escorted her when she left for her home.

5. **David Owino Ojwang** alias **Dorosi**, accused two, opted to keep mum and did not call any evidence.

6. The issues for determination are as follows:

- a) Whether or not the two accused persons were the last to be seen with the deceased;
- b) Whether or not a blood-stained knife was recovered in the home of the first accused;
- c) Whether or not the two accused persons had threatened the deceased for alleging that they were thieves; and
- d) Whether or not the two accused murdered the deceased.

7. According to the evidence of Martin Onduso (PW2), the deceased left Tumbo's home at about 6.30 pm. This is where she was selling chang'aa. Vitalis Otiemo (accused one) took some chang'aa worth Kshs. 50/= and offered his touch screen phone as lien. The accused did not deny this fact. In his evidence, he said that he took the glass of chang'aa half way and went to his home for the money and redeemed the phone. If this issue was being viewed as a possible motive for the murder, it was not followed through with some other evidence.

8. This witness further testified that Vitalis Otiemo Akuku (accused1) left Tumbo's home after about ten minutes of the departure of the deceased from the home. He however did not tell the court which direction he took. This evidence is not therefore sufficient for any reasonable tribunal to conclude that this was the last person who was with the deceased. There is no evidence on record to show that the first accused must have followed the deceased. There was no evidence that indicated that the second accused escorted the deceased. He is not being mentioned as one of the people present in the home of Tumbo.

9. Anyesi Nyangweso Makokha (PW3) is the mother of the deceased. She contended that she had seen the deceased and the two accused

persons leaving her home. She said that this was at about 5 pm. This is not in dispute. The first accused testified that the deceased sent for him and informed him of some chang'aa in the home of Tumbo. The deceased met her death when she left Tumbo's home.

10. The contention by the prosecution that the two accused persons were the ones who were last seen with the deceased was not supported by any evidence.

11. It was contended by some prosecution witnesses that a blood-stained knife was recovered from the home of the first accused. Anyesi Nyangweso Makokha (PW3) the mother of the deceased testified that she was present when Nancy, the wife of the first accused recovered it. They took it to the police. She however changed this contention during re-examination. She testified that she first saw the knife at the police station and that she never went to the home of the first accused. It is doubtful if indeed there was any recovery of a knife for the evidence of the investigating officer was silent about it. No knife was produced as an exhibit. The court of appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283** 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 that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

The mother of the deceased has portrayed herself as a witness who cannot be relied upon.

12. The issue of the threat to the deceased was testified to by Anyesi Nyangweso Makokha (PW3) the mother of the deceased. She said that Dorosi, the second accused, had threatened to do something to the deceased that she (PW3) was not going to believe. This was after the deceased had alleged that the two accused persons had stolen her (PW3's) chickens. This contention is not supported by any other evidence and more so by her own evidence. If indeed there was an existing grudge as she would want the court to believe, then the two would not have been available to escort the deceased from her (PW3's) home on 25th July 2016. In her evidence during cross-examination she testified that prior to 25th July 2016, the duo would meet the deceased at her (PW3's) home or accompany her there. This is not a conduct of people with a grudge. I therefore dismiss the contention of existence of a grudge between the accused persons and the deceased. The contention that Dorosi had threatened the deceased was not proved. It remained an allegation from an unreliable witness.

13. The prosecution did not adduce any evidence to connect any of the accused to the offence of murder of Eunice Murembo Wesonga. I accordingly acquit each one of them of the offence. Each is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 6th day of February, 2019

KIARIE WAWERU KIARIE

JUDGE