



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: T.W.CHERERE-J)**

**CRIMINAL CASE (MURDER) NO. 24 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DENNIS OMBESE KEBATI.....ACCUSED**

**JUDGMENT**

1. Accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that

**On 25th February, 2011 in Kisumu East District within Nyanza Province murdered STEPHEN OTIENO OJWANG**

**PROSECUTION CASE**

2. The prosecution called six (6) witnesses in support of the charge. **PW1 Benjamin Mwaniki Nyaga** a prison officer at Kibos Medium Prison recalled that on 21st February, 2011 at about 11.30 am, he was at the prison farm where he was in charge of 2 prison officers that were supervising 104 prisoners working on the prison farm when he a prisoner shout AMEUA AMEUA meaning HE HAS KILLED, HE HAS KILLED. That immediately thereafter, accused ran towards him armed with a bloodstained jembe. That he later saw a prisoner **STEPHEN OTIENO OJWANG** lying on the ground with injuries on his head. That the said prisoner was taken to hospital where he died and accused was charged with causing his death.

3. **PW2 Daniel Chege Kinuthia** and **Morris Simiyu Barasa**, prison officers stated that they were at the prison farm with PW1 supervising prisoners working thereon on the material. They stated that they saw **STEPHEN OTIENO OJWANG** who was lying on the ground with an injury to his head but did not know who injured him.

4. **PW4 CHARO SAFARI** went to the prison's farm after receiving information that a prisoner had been injured and he found **STEPHEN OTIENO OJWANG** who had an injury on back of head. That the victim died on 25th February, 2011 and accused was arrested and charged with causing his death. **PW5 DR. JOY KALONDU** produced a postmortem report (**PEXH. 1**) prepared by Dr. Ouma which shows that deceased died of cardio-vascular arrest due to injury to the head.

5. **PW6 SGT DAVID MAKALI** took over investigations of the case long after accused person was arrested and charged. He produced a jembe (**PEXH. 2**) which was suspected to have been used to commit the murder.

**DEFENCE CASE**

6. In his sworn defence, accused conceded that he was working at the prison's farm on 25.2.11. He said he saw deceased lying on the ground with an injury to his head and denied killing him. .

**ANALYSIS AND FINDINGS**

7. I have considered the evidence on record. To secure a conviction on the charge of murder, the prosecution has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari vs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

***(a) the death of the deceased occurred;***

***(b) that the accused committed the unlawful act which caused the death of the deceased; and***

*(c) that the accused had malice aforethought.*

**(a) The death of the deceased**

8. The death of the deceased has been confirmed by the postmortem form **PEXH. 1** which shows that deceased died of cardio-vascular arrest due to injury to the head.

**(b) Proof that accused committed the unlawful act which caused the death of the deceased**

9. The prosecution did not call any evidence to proof that accused committed the unlawful act that caused the deceased's death.

10. From the foregoing; I find that the Prosecution has not proved '*actus reus*' which a crucial ingredient in an offence of murder.

11. The prosecution having failed to prove '*actus reus*', it would be futile for this court to delve into the issue of malice aforethought.

12. Before, I conclude, I wish to point out that this case has aborted mainly due to failure to call prisoners that witnessed the incident that caused the injuries that led to deceased's death.

**Disposition**

13. Consequently, I find that the prosecution case was not proved beyond reasonable doubt. I find accused **NOT GUILTY** and order that he be set at liberty unless otherwise lawfully held. It is so ordered.

**T. W. CHERERE**

**JUDGE**

**DELIVERED AND SIGNED IN KISUMU THIS 14<sup>th</sup> DAY OF March 2019**

**F.A.OCHIENG**

**JUDGE**

Read in open court in the presence of-

**Court Assistant - Felix**

**Accused - Present**

**For Accused person - Miss Ayietta for Odumba**

**For the State - Miss Gotuu**