



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 22 OF 2016

REPUBLIC ..... PROSECUTOR

VERSUS

SIMON MUKUZI OBENA..... ACCUSED

JUDGMENT

1. **Simon Mukuzi Obena** 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 17<sup>th</sup> and 18<sup>th</sup> day of August 2016, at **Kingandole** sub-Location in **Butula** District of **Busia** County, murdered **Kirado Nyesia**.
3. The prosecution case was that after the accused had found his phone missing, upon enquiries he was informed that the deceased had been seen near his house. He threatened to kill him. On 18<sup>th</sup> August 2016, the deceased was found dead. The accused was arrested due to the threats he had earlier made. He was charged with the offence of murder.
4. In his defence the accused contended that after he was informed that the deceased had been seen near his house, he went to look for him to enquire about his phone. He did not find him. After the deceased was found dead, he was arrested. He denied any involvement in the murder.
5. The issues for determination are:
  - a) Whether the accused made the threats attributed to him;
  - b) Whether, if he made the threats and without any other evidence against him is prove of the offence he is charged with; and
  - c) Whether the offence of murder was established.
6. Pius Ombulu Obuya (PW1) and Fredrick Kiriswa (PW3) testified that the accused had threatened to kill the deceased on allegation of stealing his mobile phone. The two witnesses were however declared hostile witnesses. In the **Batala vs. Uganda [1974] E.A. 402** the Court of appeal for Eastern Africa said at page **405**:

**The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight.**

This decision was followed by the Court of appeal in **Abel Monari Nyanamba & 4 others vs. Republic [1996] eKLR**. The Court said:

**The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.**

In the instant case, the evidence of these two will attract very little weight, if any.

7. Sally Wesonga (PW2) testified that she met with the accused near the home of Obuya (PW1). This agrees with the evidence of PW1 who had testified that he had seen the accused meet her. The accused informed her that the deceased had stolen his phone and that he was going to kill him. This was in the hearing of Obuya who intervened and told him not to talk of killing. The evidence of this witness (PW2) therefore bolsters the evidence of the two hostile witnesses. I therefore find that the accused had issued threats to kill the deceased over his stolen

phone.

8. I must at this stage point out that this was a case where no investigations were conducted. The statement of intent that the accused made is not proof that he was the one who killed the deceased without support by any other evidence. We are aware that at the heat of the moment people may swear to wreak havoc only to reconsider the same. There is also a possibility of a third party taking advantage of the utterances. At best, this evidence only amounts to suspicion. In the case of **Sawe vs. Republic [2003] KLR 354** the Court of Appeal held:

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

9. The medical evidence which was adduced by Dr. Hilary Kiplagat (PW8) was that the deceased suffered the following injuries:

- a) An open wound on the anterior aspect of the left leg with deformity at the proximal end of the leg pointing to a tibia – fibula fracture.
- b) Several bruises on the body.
- c) Swelling of the scalp on the right side of the head.

These injuries coupled with the fecal matter that the investigating officer found around the body of the deceased would suggest that a keen investigator could have picked some material evidence from the scene and investigate whether the accused could be linked to the murder or not. It is common knowledge to investigators that any person who has interacted with a scene may carry from that scene some relevant materials and may also leave some materials behind.

10. We are aware the accused was arrested the following morning when most of the evidence would still have been available. The investigating officer did not bother to visit the house of the accused in search of exhibits, if any. This could have either incriminated the accused and support the suspicion brought about by his utterances or exonerate him. If exonerated, the investigating officer would have tried to investigate the case from another angle.

11. From the foregoing analysis of the evidence on record, I find that the prosecution has not proved the offence of murder or a lesser offence against the accused. I accordingly acquit him of the offence of murder and set him free unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 12<sup>th</sup> day of November, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**