



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL CASE NO.18 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PETER AGUKO OKUMU1ST ACCUSED

AUSTIN ODIWUOR ODHIAMBO..... 2ND ACCUSED

PHILEMON ODHIAMBO OKUMU.....3RD ACCUSED

DOO.....4TH ACCUSED

JUDGMENT

1. **Peter Aguko Okumu** (Accused one), **Austin Odiwuor Odhiambo** (Accused two), **Philemon Odhiambo Okumu** (Accused three) and **DOO**(Accused four), are charged with murder, contrary to **Section 203** as read with **Section 204** of the **Penal Code**, in that on the night of 28th/29th September 2016 at Kokoth B Sub-Location, Kokoth Kataa Location in Rachuonyo North – Homa Bay County, with others not before court jointly murdered Charles Okeyo Akumu.

2. The case for the prosecution was that the deceased was in one way or the other related to the four accused persons and on the material night he was attending a funeral ceremony while in the company of his wife, **Catherine Achieng (PW3)**. Their son **Dennis Otieno Okeyo (PW2)** and daughter, **Molly Akinyi Okeyo (PW4)**, remained at their nearby home. He (deceased) was in the process called aside by the second accused and the two left the scene. Shortly thereafter, his wife was informed by their son (PW2) that he (deceased) had been injured after being assaulted by the four accused.

3. The wife (PW3) rushed to their home and found the deceased lying on the ground in a state of injury such that he spoke faintly and told her that the four accused had assaulted him for reasons unknown to him. His son (PW2) and daughter (PW4) were at home at the material time of the assault which was around 8.00 p.m. or 9.00 p.m., when the son was attracted by screams near or within their home. He gathered that the screams were those of his sister (PW4) and rushed to the scene. He met the sister in the company of their grandmother, **Damaris Awiti Akumu (PW6)**. They were 100 metres away from the actual scene where the deceased was being assaulted. They all rushed to that scene which was near the homestead of the first accused, an uncle to the aforementioned children of the deceased.

4. The children (PW2 and PW4) and their grandmother (PW6) then witnessed the deceased being assaulted by a group of people who according to the deceased's son (PW2) included the four accused and according to the daughter (PW4), included the first and fourth accused. The grandmother (PW6) identified the first and third accused as having been part of the assailants. She (PW6) heard her son (deceased) saying that the first accused was his killer. The daughter (PW4) also heard the deceased saying that the first accused together with the second and fourth accused were his killers.

5. A fisherman, **Grishon Aguko Odoyo (PW5)**, was on the material night at about 9.30 p.m., heading to the funeral ceremony when he heard a person screaming as if being assaulted in a nearby homestead.

He recognized the screaming voice as that of the deceased but did not see the assailants. He then proceeded to the deceased's homestead and alerted his daughter (PW4). They then went to fetch her grandmother and on the way they spotted the assailants. He (PW5) said that they (assailants) included the first, second and third accused.

6. Due to the injuries inflicted upon the deceased, an attempt was made to have him transported to hospital but this did not succeed. He succumbed to his injuries on the following day. The matter was reported to the police and investigated by **IP Joseph Ngare (PW7)**, of Kendu Bay Police Station. He gathered that the deceased was assaulted about seventy (70) metres from his homestead and that the four

accused and others were suspected of having been the assailants. He noted that the body of the deceased had visible injuries on the head, chest and shoulders.

7. The postmortem of the body of the deceased was conducted by a Dr. Ochola, who was said to be away in Uganda undertaking further studies. His colleague **Dr. Efrin Onanga (PW8)**, produced the necessary postmortem report form (**P. Exhibit 1**) which shows that the cause of death was internal bleeding due to severe chest and abdominal injury following assault with blunt and sharp objects.

The postmortem was carried out on 3rd October 2016, after the body of the deceased was identified by his son (PW2) and his brother, **Daniel Onyango Akumu (PW1)**.

8. The four accused were arrested in the course of investigations by IP Ngare (PW7) and were eventually charged with the present offence. They all denied the charge in their defence and implied that they were not the people who assaulted the deceased, neither were they in the group that did.

Accused one and three indicated that they were unwell and sick on the material night such that neither of them could leave his homestead. Accused four indicated that he was a school pupil at the time and was on the material night at his home engrossed in his school homework. Accused two did not raise an alibi. He indicated that he was at the material funeral ceremony but did not see the first, third and fourth accused among those in attendance.

9. He (accused two) also indicated that the deceased was at the scene but quite intoxicated and carrying a big rungu (club) which he nicknamed "**Otugo-diep**" i.e a catalyst of a running stomach or diarrhea."

He (accused two) further indicated that the deceased was also carrying a jerrycan containing a liquid substance and was disorderly such that he shouted and abused church elders before approaching the grave and pouring "changaa" (illicit liquor) thereon. He (accused two) shortly thereafter saw some of the mourners beating and carrying the deceased high up. He (deceased) was in the process ejected from the scene for being drunk and disorderly.

10. The second accused went on to indicate that his attempt to rescue the deceased proved futile as it was thwarted by Dennis (PW2) and other members of the deceased family when they attacked him. He contended that he did not assault the deceased and did not know what happened to him following his ejection from the funeral ceremony. He also contended that the deceased was killed by those who assaulted him who included his son Dennis (PW2).

11. All the facts aforementioned emanate from both the prosecution and defence cases and from them, it is easily discernable that the deceased died as a result of serious injuries inflicted upon him by a group of people and that the incident was a culmination of a fracas which commenced at a funeral ceremony attended by a number of local villagers including the deceased, such circumstances negated the possibility that there was a premeditated intention to cause the death of the deceased by those who engaged in the unlawful act of assaulting and occasioning him injuries which proved fatal.

12. However, such an intention could be imputed where the degree or manner of injury was so severe, gruesome or macabre as to leave no doubt that the assailants or assailant clearly had no intention to inflict mere bodily injury but to actually "**snag**" life from the victim.

Indeed, under **Section 204** of the **Penal Code**, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

And, under **Section 206** of the **Penal Code**, malice aforethought shall be deemed to be established by evidence proving an intention to cause the death of or to do grievous harm to any person.

13. The injuries sustained by the deceased as shown in the postmortem form (P. Exhibit 1) are more indicative of an intention to cause bodily harm rather than to cause death and/or grievous harm. The use of sharp and blunt objects by the assailants in undertaking the criminal transaction was a demonstration of the assailants' usage of excessive force which resulted in the deceased suffering fatal injuries.

It did not matter whether or not the deceased was a nuisance at the funeral ceremony on account of his drunken stupor, those who assaulted and inflicted fatal injuries on him did act criminally and hence, contrary to the law. Suffice to say that they effectively took the law into their own hands by inflicting unlawful "**punishment**" upon the deceased.

14. In essence, there was no dispute that the deceased died as a result of having been unlawfully assaulted by a group of people at a scene not far away from his home and the home where the funeral ceremony was in progress. His assailants, most likely than not, were among the mourners at the ceremony.

The basic issue that arises for determination is whether the four accused or any one of them was positively identified as having been part of the assailants/offenders.

The obligation to establish their guilt lay with the prosecution as there was no obligation on the part of the accused to prove their innocence.

So, the prosecution was expected to discharge its burden of proof by providing sufficient, credible and cogent evidence in order to disprove and/or discredit the alibis raised by three of the accused thereby showing that they were placed at the scene at the material time of the offence and that they were indeed, alongside the second accused, positively identified and/or recognized as having been part of that group of people which assaulted and fatally injured the deceased.

15. It is a principle of law that in all criminal cases, the burden remains on the prosecution to prove its case against an accused person beyond reasonable doubt (See, **Mkendeshwo –vs- Republic (2002) 1 KAR 461**) and as a general rule the accused assumes no legal burden of establishing his innocence except in certain limited cases where the law places a burden on the accused person to explain matters which are particularly within his personal knowledge (See, **Chemogong –vs- Republic (1984) KLR 611 (S.111) Evidence Act**).

16. As was held in **Republic –vs- Eria Sebwalo [1969] EA 174**, where the evidence relied on to implicate an accused person is entirely on identification that evidence should be water tight to justify a conviction.

The reference here is identification at the scene of the crime during the commission of the offence rather than dock identification during trial.

In **Gabriel Njoroge –vs- Republic (1982-88) 1 KAR 1134**, it was held that dock identification is worthless unless it has been preceded by a properly conducted identification parade. However, in this case, the need for an identification parade may not have occurred as the witnesses indicated that they were previously and personally known to the accused. They therefore implied that their alleged identification of the accused was based on recognition.

17. Even in cases of identity based on recognition, extra care is required as witnesses purporting to recognize people they know may still be mistaken.

In **Republic –vs- Turnbull [1976] 3 KLR 455**, it was stated that:-

“Recognition may be more reliable than identification of the stranger, but even when the witness is purporting to recognize someone whom he knows the jury should still be reminded that mistakes in recognition of close relatives and friends are sometimes made”.

18. It is clear from all the foregoing that the prosecution evidence of identification must be cogent and credible enough to prove the case against the accused person beyond any reasonable doubt and not merely to raise suspicion against him. In any event, suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence (See, **Sawe –vs- Republic (2003) KLR 364**).

Herein, the evidence adduced by the prosecution against the accused is largely direct evidence inasmuch as it is based on the alleged identification of the accused as being part of the group of people who assaulted and fatally injured the deceased.

The prosecution thus sought to rely on direct rather than indirect or circumstantial evidence in proving the guilt of the accused.

19. However, accused one, three and four relied on alibis as their defence. In so doing, they sought to disprove the prosecution claim that they were seen and identified at the scene of the crime, while committing the offence.

As was held in the case of **Said –vs- Republic (1963) EA 6**, an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. (See also, **Kiarie –vs- Republic [1984] e KLR**).

20. The burden to rebut or disprove the alibi always lies on the prosecution and does not at all shift to the accused.

In support of their respective alibis, the first accused called as his witness, **Ludia Auma Aguko (DW1)**, who is his wife. The third accused also called his wife, **Jennifer Anyango Odhiambo (DW4)**, while the fourth accused called his grandmother, **Loice Juma Nyamwaya (DW3)**.

21. The evidence by **Mary Obiero (DW2)** did not relate to the material incident and was therefore of no probative value.

Hillary Oluga (DW5), testified that the deceased was on the material night at the funeral ceremony but quite disorderly such that he had to be removed from the scene. He (DW5) said that Austin (accused two) briefly left the scene and returned to say that he had been assaulted.

22. Basically, the incident occurred in the hours of darkness. Evidence from both sides show that the funeral ceremony was taking place in the night and that the deceased was assaulted after being ejected from the ceremony due to his drunken state and disorderly conduct.

The assailants hid behind the cover of darkness to commit the offence. It is apparent that in doing so, they purported to **“discipline or punish”** the deceased for his orderly conduct at the funeral ceremony. Most unfortunately, the force used by the assailants was excessive as the deceased succumbed to the injuries inflicted on him.

23. Clearly, the foregoing factors disproved any notion that in assaulting the deceased, the assailants acted with malice aforethought. The circumstances leading to the incident indicated otherwise.

Indeed, a trial court has a duty to deal with alternative defences which emerge from the evidence which reduce the charge to manslaughter even though they are not put forward by the defence as was held in **Okeyo Kigen –vs-Republic [1965] EA 188** and **Kioko –vs- Republic (1983) KLR 289**.

24. Be that as it may, on the crucial question of identification, it was imperative for the prosecution to establish that the alleged identification of the accused was not only watertight but also proper and reliable. This could only be achieved by the prosecution only after establishing that adequate opportunity and favourable conditions for positive identification of the accused existed at the material time of the offence.

Identification of offenders in difficult circumstances would most likely than not result in wrongful and/or mistaken identification.

25. In **Republic –vs- Turnbull** (supra), it was made clear that in cases of identification among the important factors to consider is the intensity of the light at the scene. Herein, the key identifying witnesses were **Dennis (PW2)**, **Molly (PW4)** and **Damaris (PW6)**.

Dennis, indicated that he identified the four accused and was able to do so with the help of Flashes from torches in possession of the first and third accused. He did not explain how this was possible as he did not indicate the intensity of the torch light and whether this was directed at each of the accused or any one of them for him to identify or recognize them positively. He never mentioned his own torch during examination in chief. His allegation in cross examination that he had a torch which he flashed on the four accused as they assaulted the deceased was most likely a lie and an afterthought.

26. **Dennis (PW2)** did not also indicate the duration he took to observe and recognize the assailants. He said that he was chased away from the scene and implied that this was done no sooner had he arrived there. This meant that he did not even have enough opportunity to identify the assailants or any one of them. His evidence of identification against all the accused was generally insufficient and unreliable and could not in the circumstances dislodge or discredit the alibis raised by accused one, three and four.

27. What has been stated hereinabove regarding the evidence of identification by Dennis (PW2) would apply “**mutatis-mutandis**” to that of Molly (PW4) with regard to the alleged identification of the first and fourth accused and to that of Damaris (PW6) with regard to the alleged identification of the first and third accused.

In essence, the prosecution evidence of identification against all the accused or any one of them was not watertight and was wanting in credibility and reliability such that the possibility of mistaken identification could not be overruled, regard being given to the fact that the alibis raised by accused one, three and four were not dislodged.

28. It is therefore the finding of this court that the four accused were not jointly or severally positively identified as having been part of the people who assaulted and fatally injured the deceased. They were merely suspected perhaps due to strained family relationships and/or disputes but, suspicion alone is worthless in proving a criminal charge against a suspect.

29. Other than identification of the accused, the evidence by **Catherine (PW3)**, **Molly (PW4)** and **Damaris (PW6)**, indicated that the deceased made a dying declaration in which he mentioned the four accused as his assailants. However, this evidence was discredited by that of **Dennis (PW2)** which indicated that the deceased was so seriously injured that he could not talk.

30. In their submissions, the accused implied that the failure by the prosecution to avail crucial witnesses was fatal to their case and a pointer to insufficiency of investigations. In effect, the defence was calling upon the court to draw an adverse inference that had the witnesses been called, they would have given evidence adverse to the prosecution case. (See **Bukenya –vs- Uganda (1972) EA 549**).

However, such inference cannot be drawn herein as it is not in every case where the prosecution fails to call certain witnesses that a court will draw an adverse inference.

31. Further, the number of witnesses called by the prosecution is not a determinant factor in proving a criminal charge against a suspect. (See, **section 143 Evidence Act**). What matters is the **quality** rather than the **quantity** of the evidence availed by the prosecution. Failure to call other or crucial witnesses might affect the standard of proof but would not necessarily be fatal to the prosecution case.

All in all, the prosecution was unable to prove its case against all the four (4) accused persons beyond any reasonable doubt. They are therefore found **NOT GUILTY** as charged and are accordingly acquitted.

J.R. KARANJAH

JUDGE

05.11.2019

[Dated and delivered this 5th day of **November, 2019**].