



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 29 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JEREMIA ODIKOR.....ACCUSED

JUDGMENT

1. **Jeremiah Odikor** 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 13th day of August 2016, at **Kakoli** village **Teso North** sub County of **Busia** County, murdered **John Oleket Omutebe**.
3. After the children of the deceased and those of his neighbor became sick and could not respond to treatment, the services of the accused and others were sought so that they could offer prayers for it was believed that the sicknesses were being caused by witchcraft. The deceased conceded as much and confessed to have buried some witchcraft paraphernalia in his compound. In the process of digging up the same the accused and others severely beat him and he succumbed to the injuries he sustained.
4. Jeremiah Odikor, the accused, contended that the deceased had summoned him to go and offer prayers. When he arrived at the home, he found very many people and the deceased was digging up allegedly for “medicine” that had been buried there to protect the home. After the digging, the “medicine” was burnt. He returned to his home. He denied any involvement in the beating of the deceased.
5. The issues for determination are:
 - a) Whether the deceased was killed by a mob;
 - b) Whether the accused was part of the mob; and
 - c) Whether the offence of murder was established.
6. According to the evidence of Felix Okone Okojo (PW1), when the deceased was being forced to dig up for the witchcraft medicine at the base of a tree, the accused was one of the people who were beating him and forcing him to do so. He testified that the accused had a stick with which he used to beat the deceased. The group in company of the accused dug a hole at the door and when they failed to get anything they forced the deceased to sit in and they covered him with the soil except for his head. He intervened and removed the deceased who was at the time unconscious.
7. The evidence of Erick Nabiswa (PW2), who is the son of the deceased testified that on the material day he was sent home from school for some examination fees. The accused in company of three other men went to their home and asked his father to give them a hoe. When he declined, the accused sent him to fetch one. He complied and gave the hoe to the accused. They then forced the deceased to dig at the base of a tree allegedly for a snake. They continued to beat him as he dug. They then asked him to dig at the door for witchcraft paraphernalia. When he had dug a hole of about 2¹/₂ feet deep he was ordered to sit in. He was covered with soil except for his head. The deceased became unconscious and this is when Felix became harsh to the group and removed the deceased from the soil before he was taken to hospital.
8. The evidence of these two purported eye witnesses is contradictory. Felix Okone Okojo (PW1), testified that he was attracted to the scene by screams and cries. When he arrived at the scene, he found the accused and a group of people some of whom had sticks. This evidence suggests two things; that there were more people at the scene other than the four Erick Nabiswa (PW2) named as the accused, James Omsolo, Pius Okojo and Gerald Asese Wanjala. Secondly, it suggests that there were other people who raised an alarm and were crying. Erick denied to have raised an alarm and did not testify of anybody else doing so.

9. Erick Nabiswa (PW2) testified that Felix went to the scene after the deceased had been put in the hole and covered. However, Felix in his evidence testified that he was present even at the time the deceased was digging at the base of the tree.

10. The evidence of Erick Nabiswa (PW2) was that it was his father who dug the hole at the door where he was eventually buried. The evidence of Felix (PW1) was that this hole was dug by Wanjala, a friend of the accused.

11. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller and Potter JJA) 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.

I find the evidence of these two witnesses unreliable for they do not appear to be straightforward and trustworthy.

12. The accused on his part contended that when he went to the home of the deceased in answer to a prayer request by the deceased at about 4 p.m., he found many people in the home who were clan members of the deceased. He said upon his arrival, he found the deceased digging a hole at his door. He dug out some "medicine" he had allegedly placed there to protect his home. After it was burnt, he (accused) left for his home. This evidence was supported by that of Crispus Ouya Odude (DW2) and who had accompanied him to the home.

13. Teresa Musabi Olekete (DW3) is the widow of the deceased herein. In her evidence, she testified that the deceased owned up to pastor Haggai and another pastor from Amagoro that their children were falling sick due to some protection medicine he had been given by a witch doctor. He was therefore asked to dig the same up. The pastor from Amagoro had gone there with his followers.

14. In her evidence, she testified that after the witchcraft paraphernalia was dug up, her son was sent to buy kerosene and the witchcraft items were burnt. After these people had left, the deceased went to water his tobacco seedbed. It was after watering his seedbed that he told her that he was unwell for he could hear many vehicles but was not seeing them. After one month, Haggai Ikapoloi went and took him away. Two weeks later, she received a report that her husband had died at Kocholia. She contended that her husband was not beaten by the accused or by anybody.

15. The incident that allegedly led to the death of the deceased occurred on 23rd July 2015. He died on 13th August 2015. In view of the many contradictions in the prosecution case, it would have been prudent for the investigating officer to record and adduce evidence in court to show when the deceased was admitted in hospital and what complaints he had at the time and against whom. Since his widow has testified that no one beat him on 23rd July 2015, we cannot conclude that the alleged assault on him caused his death. There was a lot of assumption on the part of the investigating officer including his failure to attend court to testify three years after the case was filed in spite of several adjournments in favour of the prosecution.

16. I therefore find that the prosecution has failed to prove its case against the accused whom I acquit of the offence of murder and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 11th day of December, 2019.

KIARIE WAWERU KIARIE

JUDGE