



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO.42 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH OMUSE EKISA.....ACCUSED

JUDGEMENT

1. The accused herein Joseph Omuse Ekisa is faced with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars of the offence are that on the 9th of September, 2009 at Naitiri location in Bungoma North District within Western Province he unlawfully murdered one Christopher Etyang Papa.

2. The Prosecution called a total of 6 witnesses and mainly relied on circumstantial evidence. The accused gave a sworn statement and called no witnesses for his defence.

3. The Prosecution Case in brief is that on the night of 9th September 2009 at about 6p.m. both the deceased and the accused went to PW2's home where chang'aa was being sold. They consumed the drink and left together. The deceased did not arrive at this home. The following day his wife alerted neighbours that he was missing, they mounted a search and his body was recovered the next day floating in River Kimaiti. The accused having been the last person seen with the deceased was suspected of having murdered him as his explanation of what had happened after they left the drinking den was inconsistent.

4. **PW1 Christine Anami** – wife of the deceased recalled that on the 9th of September, 2009 at 5p.m. her husband left home never to return. His body was later recovered floating. Deceased and accused were friends. She leant of the accused arrest as he was the last person to be seen with her husband. Her husband and the accused had never disagreed.

5. **PW2 Issa Sifuna**. On 9/9/2009 the accused and the deceased went together to his place at 7p.m. They each consumed chang'aa worth 10/- each. Later he heard rumors that the deceased did not reach his home. The following day they searched for the deceased and found his body in the river. They had gotten the accused to explain how the deceased died as they were last seen together. The accused took them to different direction but they did not find the deceased though eventually the body was discovered.

He heard people say the body had been eaten by scorpions.

6. **PW3 Pius Juma** a brother to the deceased and a village elder received news from his niece on 9/9/2009 that his brother was not home, that the deceased had left the previous day and had not returned. He heard that the deceased was last seen with accused whom he looked for but did not immediately get,

the accused later took himself to his house and he sought to know about the deceased whereabouts. The accused informed him that he had parted ways with the deceased near the river. He then went with the accused to the place. The accused pointed to a place where people searched, did not succeed but later the body was recovered inside the river. The deceased body had a cut on the upper lip exposing the teeth, the ears were cut, the leg had a cut and the hands had multiple bruises.

At the time the water level was very low and the deceased body could not have been swept away.

The accused was apprehended and handed to the police.

7. PW4 Joseph Barasa. He recalled that on 9/9/2009 while in the company of one mrefu they went to PW2's for a drink. While there the deceased and the accused arrived and also ordered for a drink. Together with his companion they left at 6p.m. leaving the two behind. The next day he heard of the deceased disappearance. He witnessed the deceased body being pulled out of the river. The upper lip seemed beaten off, and the ears. The water level was not high.

8. PW5 Copl. Zablou Adulai recalled that on 10/9/2009 receiving a report from the assistant Chief that a body had been recovered at Kimilili river and that they had the suspect. He booked the report and re-arrested the suspect. On 11/9/2009 he visited scene and had the body retrieved.

9. PW6 was Dr. Edward Vilembwa of Webuye sub-County hospital. He prepared a post mortem report after examining the body.

The following were his findings:-

External injuries

- Loss of ears
- Laceration of upper lip
- Presence of injury on the neck
- Laceration of the chin
- Penetrating laceration of right arm
- Laceration of right tibia lower 1/3 and left lower limb.

Internal injuries

- Water in the lungs

Opinion formed: Cause of death was cardio pulmonary arrest with severe soft tissue injuries.

In cross examination he stated that he was of the view that the body was submerged in the water while alive and possibly after sustaining injuries.

The ear lobes had been chopped off with a sharp object like a knife and the injuries could not have been from animal bites.

10. For a murder charge to be sustained the Prosecution who have the onus of proving the same must establish three ingredients.

First, death has to be established, secondly the act or omission leading to the death of the deceased must be linked to the accused, thirdly there has to be proof that the act or omission was actuated with malice

aforethought.

11. The fact of death of the deceased is not in contention. Indeed the evidence of PW6 corroborates the evidence of all the other witnesses.

12. There is no direct evidence in this case and the Prosecution have solely relied on circumstantial evidence and mainly that the accused was the last person seen drinking with the deceased, left with him before he was discovered dead and that he gave a conflicting account of where he left the deceased the previous night, further the deceased was discovered in a river near the accused family land and near where the accused had pointed out.

13. The Principles to be considered in a case based on circumstantial evidence are well set out.

In **Abanga alias Onyango Vs R Criminal Appeal No.3 of 1990** the Court of Appeal had this to say;

“It is settled Law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”.

Also considered is the holding by Court of Appeal in **Sawe Vs R (2003) KLR at 364.**

14. **PW1** in her evidence stated that when her husband left the house he left alone. **PW2** and 4 say that while at the chang’aa den the deceased and the accused were together. **PW4** left them behind. **PW2** says the two left together at about 8p.m. **PW2** goes further to say that on being questioned the accused told those searching for the deceased that they parted ways near the river and pointed several places. **PW3** corroborates **PW2**’s evidence that the accused was interrogated and took the search party and pointed to a place and that indeed the body was found in a river near the place which happened to be the accused family land.

In defence the accused maintained that he was at the drinking den but did not sit with deceased nor leave with him.

15. In my view the defence did not dislodge the Prosecution evidence that the two were in company of each other and left the drinking den together.

16. Secondly it is obvious that the accused having been the last person seen with the deceased failed to explain how the two parted ways and the circumstances that led to the disappearance of the deceased.

17. **Section 111 of the Evidence Act Chapter 80 of the Laws of Kenya** provides;

“when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception of exemption form, or qualification to, the operation of the Law creating the offence with which he is charged and the burden of proving any fact especially with the knowledge of such person is upon him.”

18. The accused left with the deceased. He was able to point out the area after taking the search Party in circles, the deceased was found with injuries inflicted before he was submerged in water. In my assessment based on the evidence the accused was evasive in explaining circumstances that took place before the death, he was the last person seen with the deceased and had some explanation to give. His defence was a sham. The accused was no doubt last seen with the deceased he did not explain when he was called upon, he took the search party in circles. Eventually he pointed near where the body was located, the chain of events unerringly point to him such that no other logical inference can be deduced other than that of guilt.

19. Accordingly I therefore find that the Prosecution proved its case and convict the accused of the offence of murder.

DATED and DELIVERED at BUNGOMA this 8th day of February, 2018

ALI-ARONI

JUDGE