



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE (MURDER) NO. 02 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

MOSES OTALA DIGOLO.....ACCUSED

JUDGMENT

1. Accused herein 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 5th January, 2014 at Got Osimbo sub-location in Ugunja District within Siaya County murdered one William Owino Odhiambo

PROSECUTION CASE

2. The prosecution called 7 witnesses. **PW 1 Chrispine Otieno Onyango** recalled that on the night of 4.1.14, he accompanied **William Owino Odhiambo** (deceased) to a disco where they stayed until 2.00 am. It was his evidence that as they were leaving to go home, they were attacked by 5 men out of whom he identified Fred (accused herein) who had a sword; Otis who had a rungu and Moses who had a panga. He stated that he managed to escape and did not witness the attack on the deceased and the following day, he met deceased who had injuries on his head and also complained of chest pains and he later died without naming his assailant/s.

3. **PW2 Janet Akinyi Malal**, deceased's mother recalled that on 5.1.14, deceased who was bleeding from the head collapsed outside her house and stated that he had been assaulted on his way from a disco. That she escorted deceased to hospital where he was treated and discharged. That his condition later deteriorated and he died the same day on his way back to hospital. It was her evidence that deceased did not name his assailant/s.

4. **PW3 Fredrick Owino Obier**, recalled that on the night of 4.1.14, he accompanied accused to a disco and on their way home, they were attacked by people he did not identify, who were armed with pangas and accused was injured. He stated that he was arrested on 6.1.14 and was released after recording his statement.

5. **PW4 George Ochieng Oduor**, identified the body of the deceased to the doctor that conducted an autopsy on 10.1.14

6. **PW5 Dr. Collins Odinga**, of Jaramogi Oginga Odinga Teaching and Referral Hospital, with the consent of the defence counsel produced an autopsy report made by his colleague Dr. Philip Okoth who had gone for further studies and who could not be found without delay.

The report dated 10.1.14 shows that deceased had the following injuries:

- **6 cm cut on plane of scalp**
- **Depressed fracture of skull**
- **Hematoma build up in skull compressing the brain**

The doctor formed an opinion that deceased died of cardiorespiratory failure due to brain stem herniation as a result of compression by a cerebrovascular hematoma initiated by head injury caused by a heavy sharp object. He produced the autopsy report as **PEXH.1**.

7. **PW6 Sylvester Odundo** stated that on 6.1.14, he accompanied police to accused's house from where a piece of wood suspected to have been used to murder the deceased was recovered.

8. **PW8 CPL Isaac Kimurgor** the investigating officer stated that after receiving the report regarding deceased's death, he went to his home

and removed the body to the morgue. That in the course of investigations, he was informed that deceased was hit with a piece of wood by accused whom he managed to arrest and recovered from his house, a piece of wood **PEXH. 2**, which was suspected to be the murder weapon. He told court that he was informed that deceased had hit accused with a panga and accused had hit him back with a piece of wood. He confirmed that accused had injuries at the time of arrest and that the piece of wood recovered from his house was not blood stained.

DEFENCE CASE

9. After the close of the prosecution case, I placed accused to his defence. In his sworn statement, he stated that he had gone to a disco on the night of 4.1.14 in company of **PW3 Fredrick Owino Obier** and that on their way home, they were attacked by people he did not identify, who were armed with pangas and they injured him. He denied being armed or fighting back the attackers. He stated that deceased was unknown to him and also denied that the piece of wood produced in court was recovered from his house.

ANALYSIS AND FINDINGS

10. I have considered the evidence on record. For Prosecution to secure a conviction on the charge of murder, it 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

11. The death of the deceased has been confirmed by the PW 2, 4 and 8 who saw deceased's body and by the postmortem form **PEXH. 1** produced by PW5 that shows that deceased died of cardiorespiratory failure due to brain stem herniation as a result of compression by a cerebrovascular hematoma initiated by head injury caused by a heavy sharp object.

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

12. None of the prosecution witnesses saw accused commit the unlawful act that caused the death of the deceased. That leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence taking into consideration the fact that the accused being an interested party may have lied to save himself.

13. As we know from **Republic –vs- Taylor Weaver and Donovan (1928) 21Cr. App. R. 20**

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

14. In **SAWE –V- REP[2003] KLR 364** the Court of Appeal held:

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

15. In **Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR)**, cited by accused 1, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i. 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 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.

16. In order to establish the accused's culpability, the prosecution led evidence from PW1 to the effect that on 4.1.14 around 2.00 am; he was

in company of deceased when they were attacked by 5 men out of whom he identified Fred (accused herein) who had a sword; Otis who had a rungu and Moses who had a panga. He stated that he managed to escape and did not witness the attack on the deceased. Accused and PW3 have confirmed that they were at the scene of the attack but both stated that it was accused that was attacked and he was not armed and did not fight back.

17. From the evidence on record, it is apparent that there was a fight on the material night that involved two groups of about 5 or 6 people each. It doesn't appear like PW1 informed the investigating officer that accused was armed with a panga because the investigating officer's evidence was to the effect that he was informed that accused hit deceased with a piece of wood. Prosecution evidence regarding the panga and piece of wood is not corroborated and has been weakened by accused and PW3 who stated that accused was not armed and did not fight back. The persons that allegedly informed the investigating officer that they saw accused hit the deceased with a piece of wood did not testify. Further to the foregoing, the piece of wood that was allegedly recovered from accused's house did not have any iota of evidence to link it to the assault on the deceased.

18. It is important to state that suspicion cannot suffice to infer guilt. The Court of Appeal in the case **Joan Chebichii Sawe v Republic Crim. App. No. 2 of 2002** had this say about suspicion in a criminal case:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998 (unreported)), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

19. Accused has denied the offence and as much as there is evidence that he was at the scene where him and deceased were attacked, his defence that he did not murder the deceased is not controverted. Accused's denial in my considered view destroys and weakens the circumstantial evidence tendered against him.

20. From the foregoing, I have come to the conclusion that circumstances in this case are not of a definite tendency unerringly pointing towards the guilt of the accused (See **Bhatt v Republic [1957] E.A. 332**). The evidence tendered against accused is discredited and it is not enough to prove his guilt. I am therefore unable to say that the Prosecution has proved beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which constitutes the 'actus reus' of the offence.

(c) Proof that the said unlawful act or omission was committed with malice afterthought

21. Having found no evidence to connect accused to the unlawful act that resulted in deceased's death, it would be futile to delve into the issue of malice aforethought.

Disposition

22. Consequently, I find that the state has failed to prove its case beyond reasonable doubt. Accused is found **NOT GUILTY** of the offence of murder and he is accordingly acquitted. Accused shall be set at liberty unless otherwise lawfully held. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 19th DAY OF July, 2018

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistant - Felix

Accused - Present

For Accused - Ms. Julu/Ms. Akinyi

For the State - Mr. Muia