



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE (MURDER) NO. 04 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

ZADOCK OKEYO ONGANY.....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 25th February, 2017 at Luala village, Muhoroni Sub-County within Kisumu County, murdered Philister Auko

PROSECUTION CASE

2. The prosecution called 9 witnesses. **PW 1 Dr. Abiero Jorum**, of Jaramogi Oginga Odinga Teaching and Referral Hospital with the consent of the defence counsel produced an autopsy report made by his colleague Dr. Rukia Aksam who had gone for further studies and who could not be found without delay. The report dated 9.3.17 shows that deceased had the following injuries:

- ***Multiple stab wounds on the abdomen***
- ***Deep cut wounds on right jaw***
- ***Stab wound on right chest wall***
- ***Deep cut wound on right posterior chest wall***
- ***Fracture left humerus***
- ***Collapse of right lung***
- ***3 linear tears on the liver***

3. The doctor formed an opinion that deceased died of internal hemorrhage with 3 linear tears on right lobe of liver and respiratory failure due to lung collapse following multiple stab wounds. He produced the postmortem form **PEXH.1**.

4. **PW2 Beatrice Mitema**, accused's cousin recalled that on 25.2.17 at about 6.30 pm, a lady she did not know and who did not identify herself went to their home and their father asked accused to escort her out of the compound. That after accused and the girl left, it continued raining heavily. That accused later returned home with wet, muddy and blood stained clothes. That her brother Jared returned home around 8.00 pm and reported that he had seen a naked girl lying dead on the road and that when she went to the scene and identified the girl as the one that accused had been asked to escort.

5. **PW3 Hezbon Mitema Okeyo**, recalled that he had asked accused to escort a girl out of his compound on 25.3.17 at about 7.30 pm and at about 9.30 pm was informed that a girl had been found dead on the road. That he went to the scene and identified the girl as the one that he had asked accused to escort.

6. **PW4 Jared Odhiambo Mitema**, accused's cousin recalled that on 25.2.17 at about 7.30 pm, he returned home and found a girl groaning in pain near their gate. That he ran to a nearby pub and called his friends who accompanied him to the scene where the girl who has several cuts on her body lay. That police were called to the scene and they arrived after the girl had died. He said he saw accused at scene of crime

and could not recall if his clothes were wet, muddy or bloody.

7. **PW5 Millicent Atieno Otieno**, said he visited the scene where deceased's body was discovered and that accused who was at the scene denied killing her. PW6 and PW7 were suspects in the murder of the deceased but they were not charged. PW8, deceased's brother identified deceased's body to the doctor that conducted the postmortem on 9.3.17. **PW9 PC Emmah Gikonyo** the investigating officer stated that she arrested accused and recorded witness statements after which accused was charged on the basis that he was the last person that was seen with the deceased.

DEFENCE CASE

8. After the close of the prosecution case, I placed accused to his defence. In his sworn statement, he conceded that he was requested by his uncle, PW2, to escort deceased on the material day at 7.00pm which he did. He said that when they had walked for about 10 minutes, the girl ran away and he returned home. He said he went back to the road after PW4 informed them that he had seen a naked girl lying along the road and he identified the girl as the one that he had escorted. He denied killing the deceased and stated that her body was found on a busy public road.

ANALYSIS AND FINDINGS

9. 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

10. The death of the deceased has been confirmed by the PW1, 2, 3, 4, 5, 8 and 9 and accused who saw deceased's body and by the postmortem form **PEXH. 1** produced by PW1 that shows that deceased *died of internal hemorrhage with 3 linear tears on right lobe of liver and respiratory failure due to lung collapse following multiple stab wounds.*

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

11. 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 persons being interested parties may have lied to save themselves.

12. As we know from Republic -vs- Taylor Weaver and Donovan (1928) 21 Cr. 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.”

13. 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.*

14. In Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR), cited by accused, 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.

15. In order to establish the accused's culpability, the prosecution led evidence to the effect that accused was the last person that was seen with the deceased. Indeed, accused does not deny that he escorted the deceased out of PW3's home on the material date at about 7.30 pm but denied any involvement in the murder. It was alleged by PW2 that accused's clothes were muddy, wet and blood stained when he returned from escorting the deceased but the said clothes were not produced in court to prove accused's linkage to the murder.

16. 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.”

17. Accused has denied the offence and stated that he returned home after the girl ran away from him. As much as accused was the last person to be seen with deceased by PW2 and PW3, accused's defence that the deceased ran away from him is not controverted. Accused's denial in my considered view destroyed and weakened the circumstantial evidence tendered against him. I therefore find that Prosecution has failed to prove 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

18. 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

18. Consequently, I have come to the conclusion 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 - Mr. Onyango

For the State - Mr. Muia