



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL CASE (MURDER) NO. 16 OF 2017**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**ROBERT OMONDI AUMA.....1ST ACCUSED**

**ERICK OKOTH WAYUMBA.....2ND ACCUSED**

**JACOB OTIENO ONGONDO.....3RD ACCUSED**

**JUDGMENT**

1. **ROBERT OMONDI AUMA, ERICK OKOTH WAYUMBA and JACOB OTIENO ONGONDO**, accused persons herein are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that:

*On the night of 15th May, 2017 at about 11.00 hours at Kakoko Village, Masogo sub-location, Kobura Location, Nyando sub-county within Kisumu County jointly with others not before the court murdered Adhanasio Okumu Abuto*

**PROSECUTION CASE**

2. The prosecution called six (6) witnesses. **PW1 Joyce Atieno Abuto**, the mother to **Adhanasio Okumu Abuto (hereinafter referred to as Adhanasio)** stated on 15.5.17 at about 8.00 am, the chief, whom she did not name, went to her home looking for Adhanasio and he directed her to the home of Hezbon where Adhanasio was. That immediately thereafter, the 3 accused persons together with Austin, Ishmael and Buda also arrived looking for Adhanasio and she directed them to the home of Hezbon. She said she followed them there and she heard the 1st accused tell Hezbon that they were looking for the Adhanasio and would kill him if they found him after which they walked away. That at about 10.00 pm that day, her sister in law, one Phanice informed her that Adhanasio had been beaten and killed. The witness said she went to the scene at Kochieng where she saw Adhanasio’s body which had deep cuts on the head.

3. **PW2 Phanice Awino** recalled that on 15.5.17 at about noon, one Rose Nyamori informed her that Adhanasio had been beaten by a group of people and left for dead. The witness stated that she saw deceased’s body which had deep cuts on the head before it was taken away by police.

4. **PW3 Paul Abuto**, the father to Adhanasio and **PW4 Lawrence Anyango Awino**, senior assistant chief Lela sub-location stated that they arrived at the scene long after Adhanasio had been murdered. PW3 later identified Adhanasio’s body to the doctor who conducted a postmortem at Ahero Hospital Mortuary on 25.5.17.

5. **PW5 Hesbon Achillo Achillo** recalled that on 15.5.17 at about 10.00 am, a group of about 10 people who were armed with pangas and knives and who included accused 1, whom he said was also known as Ojillo, accused 2 whom he knew physically and accused 3 whom he said was also known as Asha went to his home looking for Adhanasio and not finding him they went away. That about 30 minutes later, he received information that Adhanasio had been murdered.

6. **PW6 PC Miemiles Karimi**, the investigating officer upon receiving information of the murder, visited the scene and removed the body to the mortuary. With the consent of the defence counsels, he produced the postmortem **PEXH. 1**, dated 25.5.17 which shows that deceased died of external blood loss due to sharp force trauma following an assault. He stated that accused persons were arrested and charged after they were identified by PW1 and PW5.

## DEFENCE CASE

7. After the close of the prosecution case, I placed the 3 accused persons on their defences.

8. Accused 1 in his sworn defence stated that he did not leave home on the material night. He further stated that he did not know the deceased and denied murdering him. He called his wife Caroline Atieno Omondi as a witness and she stated that accused 1 did not leave home on the night of 15.5.17. Accused 2 in his sworn defence stated that he did not leave home on the material night. Accused 2 further stated that he knew the deceased but denied murdering him. Accused 3 in his sworn defence stated that he did not leave home on the material night. He further stated that he knew the deceased but denied murdering him. He called his wife Effie Atieno Juma as a witness and she stated that accused 3 did not leave home on the night of 15.5.17.

## 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 v 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.*

10. In the case of Joseph Kimani Njau v Republic [2014] eKLR, the court held:-

*“The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution”.*

### **(a) The death of the deceased**

11. The death of the deceased has been confirmed by the PW1, 2, 3, 4, 5 and 6 who saw deceased's body and by the postmortem form **PEXH. 1** produced by PW6 that shows that deceased died of external blood loss due to sharp force trauma following an assault.

12. The time of deceased's death did not come out clearly in evidence since no one witnessed the murder and those that saw the body said they arrived at the scene between 10.00 am and 4.00 pm on 15.5.17.

### **(b) Proof that accused persons or any one of them committed the unlawful act which caused the death of the deceased**

13. As earlier stated herein above, none of the prosecution witnesses witnessed the murder. The foregoing 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.

14. 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.”*

15. In the case of 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.*

16. In the case of 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.*

17. In order to establish the accused's culpability, the prosecution led evidence from PW1 and PW5 that on 15.5.17 between 8.00 am and 10.00 am, armed persons who included the accused persons had been looking for the deceased. According to PW6, it was on the basis of the evidence by PW1 and PW5 that accused persons were suspected to have murdered 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. Although accused persons denied looking the deceased on 15.5.17, I am satisfied that the evidence by PW1 and PW5 that they indeed looked for the deceased on that day is corroborated. Accused persons further denied seeing the deceased or murdering him and their defences in my considered view destroyed and weakened the circumstantial evidence tendered against them since the prosecution did not lead evidence to the contrary.

20. Consequently, I find that Prosecution has failed to prove circumstances which taken cumulatively would 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 persons and none else. In the end, I find that the unlawful act which caused the death of the deceased which constitutes the ‘*actus reus*’ of the offence has not been proved as against the accused persons.

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

21. Having found no evidence to link accused persons to the unlawful act that occasioned the death of the deceased; it would be pointless to delve into the issue of malice aforethought.

**Disposition**

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

**DATED AND DELIVERED IN KISUMU THIS 12TH DAY OF NOVEMBER 2018**

**T. W. CHERERE**

**JUDGE**

Read in open court in the presence of-

**Court Assistant - Felix**

**Accused 1 - Present**

**Accused 2 - Present**

**Accused 3 - Present**

**For Accused 1 - Mr.Omondi**

**For Accused 2 & 3 - Mr.Omondi h/b for Mr. Orieyo**

**For the State - Mr. Muia**