



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL (MURDER) CASE NO. 37 OF 2014

BETWEEN

REPUBLIC.....PROSECUTOR

AND

JOB OCHIENG OTIENO.....ACCUSED

JUDGMENT

1. **JOB OCHIENG OTIENO**, the accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

On 26th April, 2014 at South Alungo Sub-Location in Kisumu West District within Kisumu County murdered TAABU KORIMBA

2. The prosecution summoned a total of 2 (two) witnesses in support of its case while the defence called accused only.

Prosecution Case

3. **PW 1 Shadrack Oluoch Ochola**, assistant chief South Alungo Sub-Location recalled that on 26.4.14 at about 10.45 pm, he was awoken by villagers and one of them namely Collins Omondi informed him that Taabu Korimba(hereinafter referred to as the deceased) had been murdered by the accused at Kagwer Beach. He stated that he went to scene of crime and saw the body of the deceased, called police who removed the body from the scene and later in the day received information that accused had been arrested. **PW 2 PC Stanley Kisang** stated that he took over this matter after the investigating officer IP Kiilu was transferred. He stated that his effort to call IP Kiilu as a witness had failed since all signals sent to him did not elicit any response. He also stated that he had been unable to get any of the witnesses named in the police file. With the consent of the advocate for accused, he produced deceased's postmortem form **PEXH. 2** which shows that deceased had a stab wound on the left anterior chest wall and had died of pneumothorax secondary to a stab wound.

The Defence Case

4. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put him on his Defence. In his sworn defence, accused denied the offence. He stated that he did not know the deceased and could not have killed a man he had never met.

ANALYSIS AND FINDINGS

5. 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

6. The death of the deceased has been proved by PW1 who saw deceased's body and by the postmortem form **PEXH. 2** produced by PW2 which shows that deceased died of pneumothorax secondary to a stab wound.

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

7. The prosecution did not call any evidence to prove that accused committed the unlawful act that caused the deceased's death.

8. From the foregoing; I find that the Prosecution has not proved 'actus reus' which is a crucial ingredient in an offence of murder.

9. The prosecution having failed to prove 'actus reus', it would be futile for this court to delve into the issue of malice aforethought.

10. Before, I conclude, I wish to point out that this case has aborted mainly due to failure by the investigating officer to attend court and to avail witnesses and such negligence on his part calls for action from the relevant authority.

Disposition

11. Consequently, I find that there is no evidence that the accused person committed the offence of murder that he is charged with. I find him **NOT GUILTY** and order that he be set at liberty unless otherwise lawfully held. It is so ordered.

DELIVERED AND SIGNED IN KISUMU THIS 13TH DAY OF DECEMBER 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Accused - Present

For Accused - N/A

For the State - Ms Lobanga