



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HCCRC NO. 6 OF 2015
(CORAM: J.A. MAKAU – J)

REPUBLIC PROSECUTOR

VERSUS

JENIPHER AKOTH JUMA 1ST ACCUSED

DISMAS JUMA OYUGI 2ND ACCUSED

JUDGMENT

1. **JENIPHER AKOTH JUMA**, the first Accused and **DISMAS JUMA OYUGI**, the 2nd Accused, 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 2nd day of December 2010 at Kakum-Kombewa Sub-Location, Siaya District within Nyanza Province, jointly Murdered **CHARLES OWINO OYUGI**.

2. The accused were represented by Mr. Ooro, Learned Advocate, whereas M/s. Maurine Odumba, Learned State Counsel, represented the State.

3. The Prosecution called seven (7) witnesses. The facts of the prosecution case are that on 2.12.2010, PW1, nephew to the deceased herein at around 8.00 p.m. he heard screams from outside, and rushed out to check what was amiss. He found his uncle Owino lying on the ground near the house of his step-mother one Grace. PW1 also found Grace and Syprose saying Owino was dead. PW1's grandmother Nyauranga joined them and enquired what had happened and Grace told her, they were inside the house when she heard Owino fighting with Dismas Juma Oyugi and Jenipher thus the, 2nd and the 1st accused therein. PW1 only found the deceased lying on the ground bleeding from the head. The Police from Siaya Police Station came to the scene, collected the deceased's body and took it to Siaya Referral Hospital Mortuary. That the 1st Accused was arrested by a member of Public who took her to the Police Station through the Assistant Chief's Office. The 2nd Accused was arrested when he went to complainant that his properties had been burnt and his livestock taken away. The two were subsequently jointly charged with this offence.

4. The Prosecution called seven witnesses in support of the charge against the two accused persons. The Accused on being put on their defence denied the offence. The 1st Accused gave unsworn statement denying knowledge of the offence whereas the 2nd Accused denied the offence and gave a defence of alibi. The 1st Accused stated that on 2.12.2010 she was at her home with her children and that she went to check whether the livestock were securely locked in the boma. This was at around 8.00 p.m. That after closing the gate to the cattle boma, as she was going out she saw light from a tin lamp from the house of

Grace and Syprose Auma. She saw Grace and Juma Otieno (PW6) standing in front of the Grace's house. That before she reached where they were PW6 told her it was Otieno and it is like he was dead. DW1 was then armed with a stick which she had picked as she was checking on her livestock. DW1 then left and proceeded to her house. Later her brother-in-law Hezron Oketch approached her telling her that he had heard that she had done a bad thing, he later with another brother-in-law to the 1st Accused one "Mzee" and a worker arrested her for allegedly having killed the deceased. The 1st Accused was later charged with this offence which she denies.

5. The 2nd Accused denied having committed the offence and gave a defence of alibi, stating that he was away at Musanda, and when he arrived at home at 6.00 p.m. he did not find his wife. That as he had some other work to do he left for Siaya Town at 6.30 p.m. and did not return home. That while at Siaya Town he was informed of the death of Owino. He stated on his way to Siaya he passed through the home of Syprose and saw many people drinking alcohol, who demanded him to buy them alcohol, and on refusal they told him he was proud because he had moved out of his old homestead demanding he moves his livestock away otherwise they would burn them. DW2 stated the following day he was informed of the deceased body having been moved to Siaya Referral Hospital Mortuary and of people at home, having burned his structures and his livestock taken away. He went home and confirmed that was so and decided to report the matter to Siaya Police Station. That at Siaya Police Station when he told Police he was husband to the 1st accused he was put in cells and later charged with this offence.

6. PW1, Felix Omondi Juma, son to the Accused and nephew to the deceased told the court that on 2.12.2010 at 8.00 p.m. he was at home when he heard screams from outside, went out and found Owino lying on the ground next to the house of Grace his step-mother. That he was joined outside by Syprose (PW2) and Grace. That Grace told them she heard Owino, the deceased fighting with Dismas Juma Oyugi (the 1st Accused) and Jenipher Akoth Juma (the 2nd Accused). PW1 stated that at all that time, the 1st Accused, and 2nd Accused were inside their house with his young sister and the only time 2nd accused went out was when he was escorting PW1 and other children to go to bed and that before he went to bed and as they were eating, PW1 heard the voice of Owino abusing the 1st first accused as the deceased was drunk. PW1 told court he did not witness any fight between the accused and the deceased herein.

7. PW2, Syprose Auma Onyango, told Court that on 2.12.2010 between 8-8.30 p.m. she was asleep when she heard something running and heard Jackline Oketch calling her "Sip come out" and when she came out with a tin lamp, Jackline told her to go and see her brother-in-law. PW2 went and found her brother-in-law lying on the ground behind her house, and noted he had no shirt and blood was on his head. PW2 stood their till a neighbor Alice Adhiambo said it was Dismas and Jenifer who had killed the deceased.

8. PW3, Philip Jurah Assistant Chief from Kakum-Kombewa Sub-Location told Court that on 2.12.2010 at around 9.15 p.m. while relaxing at his home he received a telephone call from one Hezron Oketch Oyugi telling him that his cousin Charles Owino Oyugi had been attacked by his brother Dismas Juma Oyugi and his wife Jennifer Akoth Juma who beat him to death. The said Hezron Oketch Oyugi subsequently went to PW3's home and explained to him what had happened and both of them proceeded to the scene of incident. PW3 noted the deceased was already dead and had a wound on his head with blood oozing out. PW3 and others went to accused's home but did not find them. He then returned to the scene and called Police giving them direction to the scene of incident. The Police came to the scene and collected the deceased body.

9. PW4, Dr. Belinda Omondi, a Medical Officer at Siaya Referral Hospital, produced postmortem Report on behalf of Dr. Anne Metho which she had conducted on 3rd December 2010, at 14.35 hours after the deceased's body was identified by Joseph Ochieng Oyugi (PW5) and David Ajwang Awange. The Doctor formed an opinion the cause of death was massive internal bleeding secondary to blunt trauma. The Post Mortem Report was produced as exhibit P1.

10. PW5, Joseph Ochieng Oyugi, step brother to the deceased testified that on 3.1.2010 he was called to go and identify the body of the deceased at Siaya Referral Hospital mortuary for postmortem purposes and proceeded to do so with David Ajwang Awange and later collected the body for burial.

11. PW6, James Otieno Wayodi, stated that on 2.12.2010 at around 8.30 p.m. he was at the house of Grace when they heard footsteps of a person outside, followed by something falling on the ground. That they went out with a tin lamp and found that it was Owino who had fallen down. He looked around and saw Jenipher Akoth at a distance of 30 feet walking towards their direction armed with a stick and she tried to hit Owino but he told her not to dare hit him, that at the material time they were three of them thus, Grace, himself and Jenipher before others joined them. That on checking on Owino's body they confirmed he was already dead. Jenipher then left for her home. That brother to the deceased, Zachary was called and he called Assistant Chief at around 9.00 p.m. Police vehicle came from Siaya Police Station and collected the body of the deceased. PW6 stated that the 1st accused is his sister-in-law being wife to the 2nd Accused. PW6 told court that he did not see the 2nd Accused that night.

12. PW7, No. 89115 PC Thomas Angayo, told Court that on 2.2.2010 at around 23.50 hours he was on duty at Siaya Police Station in company of Deputy OCS inspector Jane Munywoki and Duty Officer Cpl (late) Kinsi when they received a telephone call from Assistant Chief of Kakum-Kombewa Mr. Philip Puran informing them of Murder at Nyamgungu village. That they left in Station vehicle for the scene of incident. That at the scene the deceased body was lying near the house of Grace without shirt and had a bruise on the head and was bleeding. That PW7 interrogated people around and was told there was a quarrel between the deceased and the 2nd accused, as the deceased was complaining that the 2nd accused had taken his cow to graze at his land. That the deceased and the two were allegedly drunk. That when the deceased left the home of the accused person, the 1st Accused followed the deceased and a fight ensued between the first accused and the deceased. The 2nd Accused came to Assist the 1st Accused's his wife, their son intervened and was hit by the 2nd accused, that later it was discovered the deceased had died. PW7 and his team collected the deceased's body and took it to Siaya District Hospital Mortuary. That the Accused were not arrested on that day as they had disappeared. That 1st Accused was arrested on 3.12.2010 and the 2nd Accused took himself to Police on 10.12.2010. The postmortem the body of the deceased was carried out. That on 2.12.2010 at the scene of the crime PW7 recovered a rungu near the body of the deceased, exhibit P2. PW7 stated the 1st Accused was arrested by members of public.

13. The two Accused person faces a charge of **Murder contrary to Section 203 of the Penal Code.** **Section 203 of the Penal Code** provides:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

14. Malice aforethought is one of the ingredients of the offence of murder. The prosecution in a case of Murder has to present facts which establish Malice aforethought. **Section 206 of the Penal Code** sets down the facts which constitutes Malice aforethought as follows:

“206. Malice aforethought shall be deemed to be established by Malice aforethought.

evidence proving any one or more of the following circumstances -

(a) an intention to cause the death of or to do grievous harm

to any person, whether that person is the person actually

killed or not;

(b) knowledge that the act or omission causing death will

probably cause the death of or grievous harm to some person,

whether that person is the person actually killed or not,

although such knowledge is accompanied by indifference

whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or

escape from custody of any person who has committed or attempted to commit a felony.”

15. To prove a charge of Murder, the prosecution has a duty to establish the following ingredients:-

(i) Death and cause of death of the deceased.

(ii) That the Accused caused the death through an unlawful Act or omission.

(iii) That the Accused person had an intention to cause harm/kill or had malice aforethought.

16. **Whether prosecution proved death of the deceased and cause of death?** The postmortem on the body of the deceased was carried out by Dr. Anne Metho on 3rd December 2010 in presence of PW5 and PW7. PW5 identified the deceased's body to Doctor for postmortem purposes. The evidence of the doctor corroborated the evidence of PW1, PW2, PW3, PW5, PW6 and PW7 who told the Court the deceased was already dead when they found him lying down near the door to the house of Grace and PW7 who stated he took the deceased body to Siaya Referral Hospital Mortuary. PW4 told the Court the Doctor formed the opinion that the cause of death was due to massive internal bleeding secondary to blunt trauma. I therefore find the prosecution proved the death of Charles Owino Oyugi and the cause of death as per Postmortem Report exhibit P1..

17. **Who caused the death of the deceased herein?** The 1st and the 2nd Accused totally denied having committed the offence. In this case there is no witness who claims to have witnessed the commission of the offence. PW1 stated when he came out of the house after hearing screams he found the deceased lying on the ground. He did not find or mention seeing the accused around as he stated he had left them at their house. PW1 stated he was joined by Grace and Syprose there. Grace told PW1 that she was in the house when she heard the deceased fighting with the accused persons, however, of great significant is that Grace was not called as a witness. Her evidence was therefore not availed to this court, and what Grace told PW1 and PW2 remains a hearsay. PW1 stated she heard the deceased abusing his father, the 2nd accused but he did not come out of the house. The evidence of PW1 is therefore of no material value to the prosecution case. PW2, Syprose Auma Onyango, did not witness anyone assaulting the deceased but she stated Jackline Oketch, who was not called as a prosecution witness called her and told her to go and check on the brother-in-law Charles Owino. That as she stood where the deceased was lying a neighbor Alice Adhiambo told her it was the 2nd accused who had killed the deceased. She was told that in presence of Jackline Oketch. The prosecution did not call the two vital witnesses to shed light on the death of the deceased. What therefore PW2 told the court remains hearsay evidence and of no value to the prosecution case. PW3 stated he received a telephone call from Hezron Oketch Oyugi telling him the deceased had been attacked by the 2nd Accused and the 1st Accused beating him till he died. The prosecution did not call Hezron Oketch Oyugi to give evidence on the alleged beating and deceased death. PW1 James Otieno Wayodi stated that after hearing something fall he went out with Grace and on looking around he saw Jenipher Akoth at a distance of 30 feet walking towards where deceased had fallen armed with a stick and tried to beat Owino but he dared her strike him. That as at that time they were three, thus himself, Grace and Jenipher. The evidence of PW6 is not corroborated by any of the witness who were at the site, thus PW1 and PW2. It is of great interest to note that Grace who has greatly featured in this case was not called as a witness. PW7 gave evidence on how following his investigation he got evidence incriminating the two Accused persons, however no single prosecution witness has been assembled in support of this case or in support of PW7's evidence as to who caused the death of the deceased. The prosecution evidence to say the list is insufficient and scanty as regards who caused the

deceased's death.

18. I have very carefully evaluated the entire prosecution evidence, and I have found the evidence to be inconsistent, contradictory and based purely on hearsay and suspicion. I find the evidence adduced not sufficient to discharge the burden of proof put squarely on the shoulders of the prosecution. The evidence is inconsistent and riddled with contradictions. I find however the case is based on suspicion, but the suspicion against the accused cannot be a basis of proving a case against any of the accused persons.

19. **Under 143 of the Evidence Act** it is provided as follows:-

“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

That though in a criminal case no particular number of witnesses are required for a proof of any fact, from the evidence of PW1, PW2, PW3, PW6 and PW7 several vital witnesses who were mentioned such as Grace, who claimed the deceased and the accused were fighting, Jackline Oketch, who called PW2 to go and see the deceased, Alice Odhiambo, who said the 2nd Accused threatened the deceased, Hezron Oketch Oyugi who told PW3 that the two accused persons killed the deceased, the failure to call such material witnesses weakened the case for the prosecution and created doubt in the Court's mind whether indeed what the witnesses claimed they witnessed and told the court happened was indeed true.

20. In **Tetu Ole Sepha V R CRA No. 15 of 2008 (NRB)** the Court of Appeal held:-

“Although evidence of Administration Police would have buttressed the prosecution, there was sufficient evidence which placed the Appellant at the scene of crime and therefore the omission could not have been the basis for any adverse inference.”

21. In the instant case I find there is no sufficient evidence which placed the Accused at the scene of the Crime. PW1 and PW2, did not place the Accused at the Scene of crime. PW6 said he saw the first Accused at about 30 feet advancing to where the deceased had fallen armed with a stick. PW6 did not say the 1st Accused struck the deceased as no one can strike someone with a stick from a distance of 30 feet. PW6 stated he never saw the 2nd Accused. That if the two Accused acted jointly as it appears in the charge sheet, PW6 could not have in anyway seen one of them and failed to see the other. I do not believe his evidence that he dared the 1st Accused to beat the deceased nor do I find sufficient evidence that the 1st accused caused the death of the deceased, even if she was armed as alleged, as the first accused gave explanation as to why she was armed with a stick. I therefore find the prosecution's failure to call several vital witnesses to be because the witnesses would have given adverse evidence against the prosecution. I therefore find that the prosecution failed to prove the Accused caused the death of the deceased.

22. **Whether Accused had malice aforethought?** PW1 told the Court on the material night his parents were in the house and even when the 2nd Accused was abused by the deceased, he did not go out of the house. None of the prosecution witnesses told the Court that there had been bad blood between the deceased and the Accused persons and I find as such that there is therefore no evidence that was laid down before this Court to demonstrate that any of the Accused persons had planned to commit the offence. For the above reasons, I will find that malice aforethought is not proved against any of the accused persons.

23. **The upshot is that I find the prosecution has failed to prove the charge of murder against Jenipher Akoth Juma and Dismas Juma Oyugi. I accordingly dismiss the charge against the accused persons and accused are hereby acquitted from the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. Each of the Accused is set at liberty forthwith unless otherwise lawfully held.**

DATED AT SIAYA THIS 25TH DAY OF JANUARY, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

IN THE PRESENCE OF:

MR. OORO FOR THE ACCUSED

M/s. ODUMBA FOR STATE

1ST ACCUSED – PRESENT

2ND ACCUSED – PRESENT

C.A.

1. PATIENCE BERYL OCHIENG

2. LEONIDA ATIKA

3. SARAH OORO

J.A. MAKAU

JUDGE