



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 23 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

D G O.....ACCUSED

JUDGMENT

1. The accused, **D G O**, is charged with murder, contrary to S. 203 read with S. 204 of the Penal Code, in that on the 12th February 2012, in Marani District, Kisii County, murdered J A O (deceased).

2. The case for the prosecution was that the deceased was a young brother of the accused and on the material date they were left at home with their infant brother (now deceased) when their parents went to attend to their respective chores away from home.

Later, the accused was heard by **P O (PW 1)** and **R W (PW 2)**, screaming that the deceased was dead.

3. P and W and others rushed to the scene and confirmed that the deceased was indeed dead.

P and R noted some injury marks on the deceased's neck. The accused indicated to them that he did not know how the deceased died and that he had gone to the river at the time.

4. The area chief was notified of the incident and he passed the information to the police.

The accused's father, **E O G (PW 3)**, was also notified by villagers. He arrived at home and confirmed that the deceased was dead. He was told that the accused was suspected and arrested.

Police officers visited the scene and removed the body of the deceased to the mortuary and at the same time commenced investigations.

5. **PC Gilbert Koech (PW 4)**, took over the investigations from a colleague who was transferred. He confirmed that a post mortem examination was conducted on the body of the deceased and produced the necessary post mortem report (P.Ex 2).

The accused was eventually charged with the present offence.

6. In his defence, the accused denied the offence and said that he was left at home together with the deceased and an infant sibling while their parents attended to their respective chores. After a while, he left for a nearby river to wash his clothes. He returned home after an hour and found his infant brother but did not see the deceased. He shortly found him lying on the ground and thought that he had

experienced an epileptic attack as he was a known epileptic. He (accused) attempted to lift him (deceased) up but there was no response. He (accused) alerted his aunt (PW 1) and R (PW 2) by screaming for help.

7. He was then told that the deceased was dead. His uncle called O arrived at the scene and cast suspicion on him. He was thereafter arrested by the area chief and handed to the police. He contended that he did not commit the offence and said that he had no grudge with the deceased or any other person in his village.

8. From all the foregoing evidence, it is apparent that the issue for determination is whether the deceased was murdered and if so, whether the accused was responsible for the offence.

The post mortem report (P.Ex 1) indicated that the cause of death was asphyxia due to manual ligature strangulation due to assault.

In effect, this meant that the cause of death was a direct result of a criminal act of assault committed against the deceased by an individual.

9. The fact was not disputed but the accused disclaimed responsibility for the offence and implied that he was not at the scene at the time that the deceased may have been assaulted. He said that he had gone to a nearby river to wash his clothes. This fact was not disproved by any evidence from the prosecution. Those who arrived at the scene first (i.e P (PW 1) and R (PW 2) indicated that they found the accused and his infant brother and that the accused told them that he had been at the river when the deceased died. The two witnesses had no reason to doubt the accused.

10. However, P (PW 2) indicated that a rope was later found at the scene thereby implying that the deceased was strangled with it. No such rope was produced in evidence nor did any witness say that they saw the accused using it to strangle the deceased.

E (PW 3), the father to both the deceased and the accused did not know what happened to the deceased and how he died after leaving him at home with his siblings in good health.

11. He (PW 3) did not see any injury on the body of the deceased contrary to what P (PW 1) and R (PW 2) stated. The two said that the body had injury marks on the neck and this was consistent with the findings of the doctor contained in the post mortem form (P.Ex 1).

PC Koech (PW 4) was not the person who started and completed the investigations. He was not in a position to inform the court the circumstances under which the deceased was killed and by whom.

12. Basically, the evidence against the accused was not direct as nobody saw him in the act of committing the offence. But, because the deceased was left under his care being the elder brother, he was suspected with having something to do with the death of the deceased. Evidence based on suspicion would be regarded as circumstantial evidence if it is supported by other credible evidence which is herein lacking.

13. Viewed on its own, mere suspicion no matter how strong cannot be used as evidence in a criminal case especially of a capital nature (see, **Faith Lucas Vs. Republic Msa Criminal Appeal No. 274 of 2006**).

In **Sawe Vs. Republic (2003)KLR 364**, it was held by the Court of Appeal that suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

14. Such evidence to prove the guilt of the accused beyond reasonable doubt is herein lacking. The prosecution was thus left to cling to the element of suspicion hoping that it would be sufficient for a finding of guilt against the accused.

This was never to be and in the end result, this court enters a verdict of not guilty as charged in favour of the accused and acquits him accordingly.

[Delivered and signed this 2nd day of March 2017]

J.R. KARANJAH

JUDGE

In the presence of

CC Mohe/Dorothy

State Counsel – Ms. Mbelete

Mr. Bigogo for accused

Accused