



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CRIMINAL CASE NO. 68 OF 2012

BETWEEN

REPUBLIC..... PROSECUTOR

AND

WALTER OGINDO.....ACCUSED

RULING NO. 2

1. On the morning of 25th October 2012, Kennedy Odhiambo Adero (“the deceased”) was found lying dead near his father’s homestead at Apoko village, Nyakach District. Walter Ogindo Olweny (“the accused”) was implicated in the murder. On 29th October 2012, this court was informed that he had murdered the deceased murder contrary to **section 203** read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The accused pleaded not guilty and thereafter the prosecution marshalled 7 witnesses.

2. The fact and cause of the deceased’s death is not in dispute. According to the post mortem examination of the deceased body done by Dr Muturi on 31st October 2012 at the Nyanza Provincial General Hospital, the deceased died from a severe head injury following blunt force trauma.

3. The issue is thus whether the accused is the one who murdered the deceased. At this stage I am required to determine whether the prosecution has made out a prima facie case to warrant putting the accused on his defence. In doing so, I must bear in mind that the legal onus is always on the prosecution to prove its case beyond reasonable doubt and a prima facie case cannot be said to be made out if, at the close of the prosecution, the case is merely one, “*which on full consideration might possibly be thought sufficient to sustain a conviction*” (see **Ramanlal Trambaklal Bhatt v R [1957] EA 332**).

4. The prosecution case was based on circumstantial evidence. Daniel Odhiambo Ondiek (PW 5) testified that on the night of 24th October 2012 at about 11.00pm, the accused came to his home and told he had a problem he wanted to discuss. When PW 5 got out, the accused invited his for a drink at Rodgers Omondi Onyango’s (PW 4) place. PW 4 recalled that the accused and PW 5 passed by his place that night and requested for chang’aa but he told them he wasn’t selling any so they left. According to PW 5, the accused had a bottle of alcohol which they drank and walked back to accused’s home. PW 5 recalled that on the way, the accused kept complaining about his wife. They sooner reached the accused’s house and after talking he fell asleep on the accused’s seat. When he woke up in the morning, he heard people wailing outside. He left the accused in the house and when he went out he found the deceased lying near the deceased’s homestead. People had gathered and were saying that the accused had killed the deceased.

In cross-examination, PW 5 stated that that he was with the accused from 11.00pm till morning and that all that time the accused was complaining about his wife and not the deceased.

5. Among the people who responded to the wailing and alarm was James Onyango Ngadi (PW 2) who recalled that he went to see the body and he could not recall seeing anything peculiar near the deceased's body. The deceased's father, Nicholas Adero Odongo (PW 3), also arrived and viewed the deceased's body. He called the village elder and the chief. In cross-examination, he stated that he did not see any cap near the deceased but heard about it after the police arrived and people started talking about a cap that belonged to the deceased.

6. Cosmas Oluoch Were (PW 6), a village elder, also arrived where the deceased's body was and he recalled that he saw a light brown cap which people said belonged to the accused. John Owino Watata (PW 1), the Assistant Chief of Gari Sub-location, recalled that he rushed to the scene after he heard that the deceased had been killed. He found the deceased had been injured and there was a light brown cap which the people present told him that it belonged to the accused.

7. The investigating officer, Senior Seargent Joseph Ekasiba (PW 7) recalled that he went to the scene to remove the body after being informed of the incident. He told the court that there was a cap at the scene which was allegedly worn by the accused. He told the court that whereas he collected the cap, it must have been misplaced hence it was not produced in evidence.

8. I have evaluated the prosecution evidence and in my view the prosecution has failed to establish a prima facie case against the accused. The only piece of evidence linking the accused to the deceased murder is a cap that allegedly found next to the deceased body and which was said to belong to him. PW 2 and PW 3, who arrived at the scene before PW 1, PW 6 and PW 7, did not see a cap at the scene. The cap was only found later after several people had been to the scene. It is possible that someone could have placed the cap there during the movements in and out of the deceased's compound. Besides, the fact that the cap was not put to or shown to the witnesses who knew the accused, it is impossible to say positively that the cap belonged to the accused.

9. As regards the accused movements, PW 4 testified that he had been out with the deceased late in the night on what appeared to be a chang'aa drinking spree and after they had had their fill they went back to the deceased house where they both fell asleep till morning. During all that time the only thing the accused kept complaining about was his estranged wife. PW 4 was thus shocked when he later heard the accused was a suspect. The prosecution did not establish any possible motive that would have led the accused to murder the deceased. In cases of circumstantial evidence, the motive is important in that it may provide a pointer to the accused (see **Choge v Republic [1985] KLR 1**).

10. Finally, there was evidence that when PW 1 arrived at the scene, people pointed at the accused as a suspect, he sent people to villagers to call the accused from his home. The accused was brought to the gathering and he was interrogated where he made certain inculpatory statements. I hold that these statements made by the accused before the chief, who is a person in authority, in circumstances where he feared for his life are inadmissible. In this respect I am guided by what the Court of Appeal stated in **Kanini Muli v Republic NRB CA Criminal Appeal No. 238 of 2007 [2014]eKLR** that:

*A chief was regarded, for purposes of statements made to him by an accused person, as a person in authority in **Rex v Eriya Kasule & Others [1947-1949] EA 148**, while in **Gopa s/o Gidambanya & Others v Regina [1952-1953] EA 318**; a headman was treated as a person in authority. In an Africa context like that in which the appellant found herself, we would be slow to say that clan elders are "not persons in authority" in this case. On the evidence, the elders and the family of the appellant brought pressure to bear upon her to make the confession and to open negotiations with the family of the deceased so as to avoid evil of a temporal nature, namely further deaths in the family believed to be caused by the Kithutu oath. To that extent, the appellant's statement was one extorted from her either by fear of prejudice to her family or hope of the advantage of preventing further deaths in the family. We would add even sheer terror of the oath.*

11. Although there is suspicion that the accused had something to do with the death of the deceased, the evidence available does not outweigh the suspicion. Under **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of Laws of Kenya)*, I am required to enter a verdict of not guilty which I hereby do against **WALTER OGINDO**. He is therefore acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 10th day of April 2017.

D.S. MAJANJA

JUDGE

Mr Nyanga instructed by Nyanga and Company Advocates for the accused.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.