



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRC NO. 23 OF 2015 (MURDER)

(CORAM: J.A. MAKAU – J.)

REPUBLIC.....PROSECUTION

VS

CHARLES OWADE OTIENO.....ACCUSED

J U D G M E N T

1. The accused **CHARLES OWADE OTIENO** is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya**. The particulars of the charge are that on the 7th day August 2014 at Nyagoko sub-location, Rarieda Sub-County within Siaya County murdered one **PETER OYOLO GIRO**.

2. The Prosecution called six (6) Prosecution witnesses. The facts of the Prosecution's case are that PW1 Jael Awino Oyolo, wife to the deceased herein; testified that on 7th August 2014 at around 9.00pm her husband's brother Charles Owade Otieno, the accused herein, called the deceased "Oyolo Oyolo" twice and the third time her husband replied to the accused "*if at all you are calling me then I am coming*", the deceased left and then PW1 heard them talking, as if they had a disagreement. PW1 went out but did not find them, later Charles Owade Otieno, came carrying Peter Oyolo, the deceased, as she heard Peter Oyolo ask Charles Owade, "*Owade, why are you killing me*", that PW1's child one, George Otieno opened the door for them and the accused brought the deceased into the house and lay him on the ground with his legs facing the door. At that moment, PW1 was resting in her bedroom as she was not feeling well. The accused told them he had brought the deceased so that he could not be rained on. The accused then left.

3. PW1 then took a mobile phone and flashed it on her husband's face and asked him to rise up and eat, but the deceased did not answer. PW1 then sat on a chair looking at her husband lying near the door because he was too heavy for PW1 to carry him and at that moment George Otieno was still inside the house. PW1 could hear her husband groaning, as she sat on a chair in the sitting room between 3:00am-4:00am when she found the deceased had vomited blood and was already dead. PW1 called the village elder, Ochanda Langi, who came and proceeded to report to the Area Chief. That the Chief and Assistant Chief, came and confirmed Peter Oyolo was already deceased. They then went to report to the police officers who came and after confirmation of the death, proceeded to the home of Charles Owade, but did not find him but saw his trouser and shirt stained with blood. The police returned and took PW1 and the deceased to Madiany Police Post, then Aram Police Station.

4. On PW1 being cross-examined, she stated her statement to the police, she did state the accused called the deceased and that she heard her husband asking the accused why he was killing him. PW1 denied she

failed to take care of the deceased when he was brought home by the accused. She stated the accused brought the deceased in unconscious situation and she could not tell whether he was drunk or not. PW1 stated when the deceased was brought he was asking the accused why he was killing him.

5. PW2, Paul Osumba Giro, son to the deceased, told court that on 12th August 2014 at 8:45am, he went to Madiany Mortuary in company of Paul Ogege, his uncle to witness postmortem examination on the body of his father being carried out by the doctor. That he identified the deceased's body and the postmortem was carried out in his presence. That after postmortem examination he was issued with a postmortem report (MF1-P1).

6. PW3, George Otieno Oyolo, a son of the deceased testified that on 7th August 2014 between 9:00pm – 10:00pm, he was at his father's home at Nyagoko, when he heard his father talking, as if he was coming home, he also heard Charles Owade, calling him "*Oyolo Oyolo*" who replied asking Owade, "*Are you calling me?*" and told him he was coming. That the two left together and returned after 1 hour and as they were returning, PW3 heard the voice of his father, as he was asking the accused, "*Owade, why are you killing me?*" PW3 on hearing that he rushed out to check what was happening. PW3 used his mobile phone light and he was able to see Charles Owade, the accused, carrying Peter Oyolo, on his shoulder, telling him he had brought the deceased home so that he could not be rained on, that PW3 was alone at the sitting room as his mother, PW1 was in her bedroom. The accused then dropped the deceased where he always used to drop him whenever he was drunk. PW3 left him to sleep where he was dropped near a chair. That between 3:00am-4:00am, he heard his mother PW1, calling him "*Mzee Mzee, what has happened to your father*". PW3 went there and found his mother PW1, had put light on, noted his father had vomited blood. They then called the village elder through a mobile phone; that people came to their home and the following morning, they went to the Chief's office and on their way back, they found his father's shoes at their gate and the accused's hat stained with blood. PW3 stated when he observed his father, he noted he was bleeding from the mouth and had blood oozing from the left side of his head and both his hands were fractured, while his legs had cut wounds and this he noted after Charles Owade, the accused, had left the deceased after bringing him at his home. That police came from Aram Police Station and PW3 with others escorted them to the home of the accused, who they did not find at home. They then returned to the deceased's home, collected the body of the deceased and took it to Madiany Hospital Mortuary. PW3 stated that at the accused's home, they found blood stained clothes, placed on a net, inside his bedroom, in the presence of his wife.

7. On cross-examination, PW3 stated, that his father and the accused are relatives and were friends. That on the material day, he heard the accused call the deceased to accompany him somewhere. That the first time, he did not see the accused but the 2nd time, when he opened the door, he saw the accused, who carried the deceased inside the house and that his father was drunk. He saw him with aid of mobile phone light and noted, his shirt appeared to be stained with mud but the following day he confirmed it was stained with blood.

8. PW4, Samuel Odhiambo Otieno, brother to the accused, told court that on 8th August 2014 at around 5:00pm, he was called by Jack Giro Odawa, telling him that his brother Charles Owade Otieno, had killed Peter Oyolo Giro. PW4 proceeded to the accused's home, found him asleep and told him not to go anywhere. PW4 went to the home of the deceased and accompanied the relatives of the deceased and police to the accused's home, but did not find the accused. PW4 later took his brother to police on a motorbike at around 3:45pm. PW4 identified Charles Owade, as his brother (pointing at him) at the dock. On cross-examination, PW4 stated that the statements shown to him was not his, as the name there to is, of George Odhiambo and that is not his name. The statement was marked as MF1-D2.

9. PW5, No. 219173, Chief Inspector Francis Ngugi, the Investigating Officer in this case, told court that on 8th August 2014 at 8:00am. He received a call from OCS, Aram Police Station, informing him of a murder at Nyagoko sub-location, Omande village. He took a vehicle in company of PC Munene, Police driver, PC Wamalwa and Assistant Chief of West Asembo. That at the scene, he met the wife of the deceased and members of public and was shown the body of the deceased, which was inside a house at the sitting room lying on a mat. He viewed the body and noted, it had a deep cut above the left eye; right

leg had a fracture and the left shoulder had a cut wound. The wife of the deceased told him, the deceased had been brought home by the accused at 10:00pm, who told her he met the deceased at the entrance to the home of the deceased and that as it was about to rain, he decided to bring him inside the house. That PW1 told him they managed to pick two sandals; one belonging to the accused, and the other to the accused and a cap belonging to the deceased, which PW1 handed over to him. That the deceased's body was photographed and taken to Madiany Sub-County Mortuary. PW5 at the scene, took witnesses names and requested them to visit the police station. That PW5 proceeded to the home of the accused but did not find him. But on the same day, thus 8th August 2014, the accused was escorted to police station by Samuel Odhiambo, (PW4) and PW5 ordered the suspect to be held in the cells for an offence of murder. PW5 recorded the statements of the accused person under inquiry, some of the statements of the witnesses while PC Munene recorded the others. He stated he read statement of Samuel Odhiambo, as he had recorded his name as George Odhiambo; he caused the alteration after summons came from Kisumu High Court. He stated the name of George Odhiambo was an error as the witness name is Samuel Odhiambo. He stated the person who was brought to him by Samuel Odhiambo (PW4) and whom he charged is the accused (pointing at him) at the dock. During cross-examination, PW5 testified that the deceased's leg was twisted and he was able to see hand injury. He stated MFI-D1 dated 13th August 2014, the witness name is Samuel Odhiambo and MFI-D2 stating that the witness did sign any of the statements. PW5 produced MFI-D1 and MFI-D2 as defence exhibit D1 and D2 respectively.

10. PW6, Dr. Oyera Alphonse of Madiany Sub-County Hospital told court that he carried out the postmortem examination on the body of Peter Oyolo Giro on 12th August 2014 at 3:45pm. He observed that the body had the following injuries:-

(i) Distal 1/3 fracture of ulna and radius. Simple fracture.

(ii) Right mid tibufubular fracture compound wound measuring 4cmx2cm.

(iii) Distal 1/3 fracture of femur. Simple fracture.

(iv) Proximal 1/3 fracture of tibu & fibular. Simple fracture. Incision with regular edges on medial aspect left measuring 7cm x 3cm.

(v) Lit under left lateral muscles.

(vi) 2 occipital cut wounds with straight edges measuring 9cm x & 4cmx3cm.

That as a result of this examination, he made an opinion that the cause of death was due to massive bilateral haemothorax secondary to blunt trauma. He prepared Death Certificate No. 650118 and signed the postmortem examination report, MF1-P1, which he produced as exhibit P1. He stated the weapon used was a blunt object. On cross-examination, he stated he did not carry out test as to whether there was alcohol in the body of the deceased or not.

11. The accused on being called to defend himself, he opted to give sworn statement and called no witnesses. The accused told the court that on 7th August 2014 at around 7:30pm, he was from his casual work and on reaching at the gate of his brother Peter Oyolo Giro, the deceased, he found him drunk, talking to himself and as it was about to rain he told him to get up and go home. He got up and they walked together to his house and as his phone in his trouser pocket, was ringing he told his wife to keep the phone for him. He then left Peter Oyolo Giro, with his wife and he went to his home, that the following day at 6.00am, his brother Samuel Odhiambo, PW1, came and asked him whether he had seen Peter Oyolo Giro and he told him he had left him at his home. He then told the accused that he had received a call that Peter Oyolo Giro had passed on at 4:00am in the morning. That PW4, told him not to go to the deceased's home as there were many people there. That at around 9:00am while he was grazing his cows, police came to his home, but did not find him there, and left a word that he should report at Aram Police Station. That he later went and reported there, was arrested, put in cells and subsequently charged with this offence.

12. On cross-examination, the accused told the court he went to police with Samuel Odhiambo, (PW4), urging Samuel is not the one who had come to his place but it was him who went to inform him, that police were looking for him and that he heard of the death of the deceased. He urged Samuel Odhiambo (PW4) in his evidence he told the court it was the accused who had told him of the death of the deceased and that was true. He also stated what the Chief Inspector Francis Ngugi, (PW5) stated that he had escaped, that was not true as he was grazing 70metres from his home, that his wife knew when he was, adding he even saw the police going to his home, and stayed for about 5minutes, whereas it could have taken him 1-minute to walk to his house. He stated he did not bother to go and find out what they wanted. The accused admitted as stated by PW1 and PW3 he walked out together with the deceased but denied returning with the deceased carrying him. He stated the deceased walked back home. He denied having caused the death of the deceased, adding as they were going to the home of the deceased, he was talking.

13. At the close of the defence case, Mr. Adiso, Learned Advocate for the accused submitted that the Prosecution has not proved their case beyond any reasonable doubt. He urged if the deceased had been injured between 3:00am-4:00am, that PW1 and PW3 should have given the deceased medical attention. That if the deceased had come home with such serious injuries, he would not have slept because of the pain emanating from the fractured leg, unless he was under powerful pain killers. He urged further that the accused did not leave the deceased, in the state stated by PW1 and PW2. He urged that the accused's defence showed that it was not the first time, he was escorting the deceased to his home; urging as such, malice aforethought cannot be deduced from the accused behaviour of escorting the deceased more than one time. He urged that there is no evidence of there having previous differences between the deceased and the accused. On death of the deceased, he submitted the defence is not denying the death occurred urging the court to look at the evidence in its entirety.

14. M/S Odumba, Learned State Counsel, submitted that the Prosecution has proved the charge of murder beyond any reasonable doubt, urging the Prosecution proved all the essential ingredients of the offence of murder, the death and its cause; who caused the death and the malice aforethought.

15. The accused is facing a charge of murder, the burden of proving the charge of murder lies with the Prosecution to prove the charge against the accused beyond any reasonable doubt. Under **Section 203 of the Penal Code**, murder is defined as follows: -

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

16. The Prosecution in a murder case must prove that the accused had formed the necessary intention to cause death or grievous harm to the deceased. **Section 206 of the Penal Code**, describes circumstances which constitute the same as follows: -

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

a) an intention to cause the death 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, by a wish that it may not be cause;

c) an intent to commit a felony;

d) an intention by the act or omission facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony”.

17. To prove a charge of murder, the Prosecution has a duty to establish the following ingredients: -

a) death of the deceased and its cause.

b) that the accused caused the death through an unlawful act or omission.

c) the accused possessed an intention to cause harm/kill or had malice aforethought.

18. **Whether Prosecution proved the death of the deceased and its cause?** PW1 and PW3 testified that on 7th August 2014 at 4:00am, they saw the deceased vomiting blood and later he died. PW4 was informed of death of the deceased by Jack Giro Odawa and on going to the deceased's home, he confirmed the deceased was dead. PW5, the Investigating Officer, testified that the police collected the deceased's body after taking photographs of the body and took it to Madiany Sub-County Mortuary. PW2, son of the deceased identified the deceased's body, on 12th August 2014 at 8:45am at Madiany Sub-County Mortuary to the doctor for postmortem examination. A postmortem examination on the deceased's body, was carried out on the body of the deceased by Dr. Oyera Alphonse on 12th August 2014 at 3:45pm, in presence of PW2 who was accompanied by Paul Ogege. The doctor's evidence corroborates the evidence of PW1, PW3, PW4 and PW5, who told the court they saw the body of the deceased herein, before it was taken to the mortuary and that, PW2 identified the body for postmortem examination. The defence do not deny the death of the deceased. On the cause of death, PW1 and PW3 told court when the deceased was brought to their home by the accused, they noted he had injuries. PW5 when he went to the deceased's home, he observed the body had a deep cut above the left eye, right leg fractured with a cut on the left shoulder. PW6, Dr. Oyera Alphonse observed the deceased's body had fractures on both arms, leg amongst other injuries, that as a result of examination he made an opinion, that the cause of the death was due to massive bilateral haemothorax secondary to blunt trauma. The Prosecution therefore proved the death of the deceased and the cause of the death to the required standard of proof.

19. **The next issue for consideration is who caused the death of the deceased?** The accused denied having committed the offence. In this case, there was no eye witness hence the Prosecution case is purely based on circumstantial evidence. The circumstantial evidence in this case relates to the fact that as per evidence of PW1 and PW3 at around 9:00pm, the accused called the deceased to accompany him somewhere and the deceased agreed. PW1 and PW3 heard the voice of the accused, as he was calling the deceased to accompany him. PW3 stated the accused returned after 1 hour but this time he was carrying the deceased on his shoulders. PW1 and PW3 stated they heard the deceased, as he was being brought back by the accused asking the accused as follows: -

“Owade, why are you killing me?”

PW3 rushed out to check what was happening and with aid of mobile phone torch light, he saw the accused carrying the deceased on his shoulders. He dropped the deceased inside the deceased's house, where he was left to sleep. PW1 corroborated PW3's evidence in that regard. PW3 noted the accused's clothes were stained with blood. PW1 and PW3 noted the deceased vomited blood at around 4:00am, after the accused had left. PW3 noted the deceased was bleeding from the mouth, with blood oozing from the left side of the head and both hands fractured; with cut wounds on both legs, which PW3 observed after Charles Owade had left.

20. In **Sawe V Republic[2003]KLR 364**, the Court of Appeal stated thus: -

“(i) 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 hypothesis than that of his guilt;

(ii) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on;

(iii) 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.”

21. In **Elizabeth Gatiri Gachanja and 7 Others V Republic, CRA No. 51 of 2004**, the Court of Appeal set out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of guilt of an accused person. In that case, it was held as follows: -

“(i) There had been no eye witness to the death of the deceased. In such a case, the test to be applied was clear: In order to draw inference of guilt from circumstantial evidence, the facts of the case must have been incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, the burden of proving facts which justify the drawing of this inference is always on the Prosecution and never on the accused.

(ii) It was necessary for the court to be sure that there were no other co-existing circumstances which could have weakened or destroyed the inference of guilt.

(iii) In law, there was no set number of witnesses required to prove a fact. Even the evidence of one witness could have formed the basis for a conviction as long as the court had found the evidence credible. Where such evidence was on the identification of a person who claimed that he was not properly identified, then the court had to examine such evidence with the greatest care.

(v) The chain of evidence from the time they were seen with the deceased to the time that he was found dead was not broken and in the absence of any other reasonable explanation as to how he had met his death, fingers pointed to them and to no others as the perpetrators of murder. The court was therefore satisfied that even without any other evidence; the circumstantial evidence that the appellants were the last people seen with the deceased in their vehicle was enough to point a finger at them to the exclusion of any other person.”

22. In **James Mwangi V Republic(1983) KLR 522**, the Court of Appeal held thus: -

“In a case depending exclusively in circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused’s guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.....”

23. In the instant case, both PW1 and PW3 testified that on 7th August 2014 at around 9.00pm they heard the accused call the deceased to take him somewhere to which the deceased obliged and the two left together. That the accused returned after one hour carrying the deceased on his shoulders. PW1 and PW3 identified and recognized the appellant as the person, who called and went out with the deceased, returned him unable to walk and with injuries on his head, hands and legs. The accused in his evidence admitted he returned with the deceased but the deceased was walking and talking. I observed the demeanour of PW1 and PW3 and found them to be credible witnesses. I do not believe the accused was telling the truth as regards the injuries the deceased had sustained as with a fractured hand and legs he could not have walked to his home. I believe the deceased sustained the injuries when he went out with the accused and not at his home or elsewhere; unfortunately the deceased could not explain what had happened but he was heard by PW1 and PW3 asking the deceased why he was killing him before he stopped talking any further. PW1 and PW3 noted that the deceased had fresh injuries with blood oozing from his head and bleeding from his mouth, the observation of the injuries by PW1 and PW3 were noticed immediately after the accused left the deceased’s home. In my view, the chain of events from the time of the accused called the deceased to accompany him somewhere at night and returned the deceased carrying him on his shoulders was not broken; the concatenation of the events and the short interval

between the leaving of the deceased home and the returning of deceased being carried by the accused on his shoulders. The accused upon returning with the deceased injured, he did not take time to explain to his wife PW1 and his son PW3, how the deceased sustained such injuries or what befall him, so that the deceased sustained such serious and life threatening injuries. He did not bother to have the deceased taken to the hospital. In his evidence, I find the accused was not telling the truth and I find him to be incredible witness.

24. From the evidence on record, I find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanations upon any other hypothesis than that of guilt. I find no other co-existing circumstances which would have weakened or destroyed the inference of guilt. The chain of events from the time the deceased left, without any injuries to the time the accused returned the deceased on his shoulders, with several serious injuries, such as deep cut on his head, fractured arms and legs was not broken and in absence of any other reasonable explanation on how the deceased sustained such serious injuries which led to his death and the accused being the only person who called the deceased and being the last person to be seen leaving with the deceased, all fingers point at him as the perpetrator and no other person. I find that even without any other direct evidence, the circumstantial evidence that he is the only person who called the deceased out late in the night, returned carrying him on his shoulders and being the last person seen with the deceased out is in my view enough to point a finger at him to the exclusion of any other person. I accordingly find and hold that the accused is the person who caused the death of the deceased herein.

25. **Whether accused had malice aforethought?** PW1 told court that when the accused called the deceased and the deceased told the accused that if he had called him he was going to where the accused was, she heard them talking as though they were disagreeing. PW3 told Court that when the accused returned the deceased, he was carrying him on his shoulders. PW1 and PW3 heard the deceased asking the accused why he was killing him. PW3 and PW5 testified that the deceased, had deep cut wound on the head; fractured arms and leg, with other injuries. The postmortem report by PW6 corroborates the evidence of PW1, PW3 and PW5 as regards injuries sustained by the deceased. That by causing such serious several injuries, the accused intention was to cause death or grievous harm to the deceased. He also had knowledge that his act or omission would cause death or grievous harm to the deceased and further he intended to commit a felony by seriously assaulting the deceased. From the evidence on record, the accused had planned to commit the offence. I have considered the accused's defence that he walked back home with the deceased, who had no injuries and was talking. The accused did not challenge the evidence of PW1 and PW3 who stated the accused brought the deceased home carrying him on his shoulders, with serious injuries and unable to talk. I find the evidence of PW1 and PW3 was not controverted or challenged by the defence at all. The accused was placed at the scene of incident by PW1 and PW3. I find the evidence of PW1 and PW3 credible. I also find the accused was not credible witness. I find his defence is an afterthought and reject the same. Having considered the evidences as a whole, I find that the accused planned to commit the offence. For the above reason, I find that the accused killed his brother and that malice aforethought is therefore proved.

25. For the above mentioned reasons, I find the accused guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code. I accordingly convict the accused of murder of PETER OYOLO GIRO

DATED AND SIGNED AT SIAYA THIS 6TH DAY OF APRIL 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

Mr. Adiso: for the Accused

M/s Odumba: for the State

Accused - Present

J.A. MAKAU

JUDGE