



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL CASE NO. 3 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

MOSES NGAIWA OTISENO.....-ACCUSED

FREDRICK OGENGA ONYANGO.....-ACCUSED

JUDGMENT

1. On information filed herein on 26TH April 2011, Moses Ngaiwa Otsieno (A1) and Fredrick Ogenga Onyango(A2) face the charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The State alleged that on 22nd April 2011, at Nyalwanda village, Kingandole Sub Location, Marachi Central Location in Busia County the two jointly murdered Michael Shikuku Kisaka (The Deceased).
2. Dr. Janerose Ambuchi (PW7) is among the seven Prosecution witnesses who gave evidence. She produced the Postmortem Report in respect to the Examination of the body of the Deceased conducted by Dr. Ngigi Anthony. On the External appearance of the body of the Deceased, the Doctor noted as follows:-

**“Bruise on right shoulder 3 cm by 5cm. No Petechiae, no cyanosis.
Linear Scar on right side of face, old.”**

On the Internal Appearance of the body, the Doctor noted that all systems were normal. In conclusion the Doctor was not able to establish the cause of Death of the Deceased. At the bottom of the Report, it was indicated that Specimen of the Stomach contents, Liver, Kidney and Blood had been removed for further examination. There was no evidence, however, on whether that further examination was ever conducted or the outcome thereof.

3. At the close of the hearing, the Defence Counsel submitted as follows:-

The High Court in Republic v Josphat Kipruto Bett[2015] eKLR held that for the offence of murder to be proved, the prosecution must prove the cause of death beyond reasonable doubt. This view is further supported by the Court of Appeal in Dorcas Jebet Ketter & Another v Republic [2013] eKLR where the Court held that a conviction cannot be sustained in a murder trial where the cause of death is uncertain as the prosecution would not have the basis of connecting the accused person’s actions with the fact death. (sic)

The State on the other hand urged me to ignore or disregard the Expert opinion and consider the Evidence in totality.

4. There would be instances where death and its cause can be established without Medical evidence.
In

Ndungu vs Republic [1985] KLR 487 at page 492 the Court of Appeal held:- The judgment in Cheya gives no report of what injuries were sustained although there is a reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases, for example the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution.

Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class.

5. In the matter before this Court, the body of the Deceased was found. A Post Mortem was conducted. The Doctor did not state that the nature of injury on the body was such that the cause of Death could not be determined even after Post Mortem. The Doctor after Post-Mortem, remarked,

“Cause of Death was not established.”

I take the view that, in these circumstances, I can only disregard this opinion of the Expert if there is cogent evidence that the Deceased died at the hands of a murderer.

6. The evidence presented by the Prosecution was that on 21st April 2011, at about 7.30p.m. Both Accused Persons visited the kiosk of Lawrence Olito Kisaka (PW1) in the presence of the Deceased. A1 asked for change but it was not available. The three left together. After some distance, PW1 heard the Deceased argue with A1. The Deceased was demanding some money from A1. A1 slapped the Deceased but in spite of this the Deceased followed the Accused persons. On the following day, the body of the Deceased was found by the roadside. It was on its stomach and there was a cut injury to the face.
7. On 21st April 2011, at about 7.30p.m. Antoline Juma (PW2) met A1 and A2 walking from the kiosk of PW1. A2 was about 30 metres ahead of A1. That A1 told her that he would cut someone's buttocks. But PW2 did not see the Deceased on that evening.
8. On 21st April 2011, A2 went to fetch the Deceased from the home of Monica Juma Wangia (PW3). PW3 is a wife of the Deceased. PW3 told A2 that the Deceased was at the home of her co-wife. On the following day she came across the body of the Deceased as she walked to the home of one Alice Ayako where she was to do some farm work. The face had a cut and had bled. Thereafter he went to the house of A2 who commented

“So Moses Ngaiwa(The 1st Accused) injured the Deceased?”

9. As for Pius Oyanga Opata (PW5), he saw the body of the Deceased as it lay on the roadside. It had a cut on its neck and was bleeding. There was no injury to the face.
10. Is the above sufficient evidence for this Court to depart from the opinion of the Doctor? Only one witness (PW1) alleges that he saw the Deceased being assaulted. The assault was in the nature of a slap. And when the Deceased's body was found, PW1 saw that it had a cut injury on the face. PW2 did not go close enough to the body to see if he had any injuries. PW3 like PW1, saw the body with a cut on the face. PW4 did not see injuries to the face of the Deceased as he did not go

close to it. The evidence of PW5 differed from that of PW1 and PW5, he stated, **“I saw an injury on the neck. The face was facing the side of the road. The face had no injury.” (my emphasis)**

PW6 did not see the body of the Deceased.

11. Of the seven Prosecution witnesses, four saw the body of the Deceased. Two saw a cut on the face of the Deceased while one saw an injury on his neck. That one witness never saw any injury to the Deceased's head. The 4th, the Doctor, saw a bruise on the right shoulder and an old linear scar on the right side of the face. There is inconsistency between the evidence of PW1 and PW3 on the one hand and PW5 on the other. There was no consensus on the visible injuries, if any, to the body of the Deceased. This would be an instance when the Court must give some latitude to the opinion of the Expert.
12. In their Defence, both Accused Persons denied the offence. The net result is that looked at, as a whole, there is neither direct nor circumstantial evidence that proved that the Deceased Death was caused by the two Accused persons or in the least that the death was a murder. This is not occasion when a Court can reject the opinion of an Expert. That opinion is that the Cause of the Death of Michael Shikuku Kisaka was not established by a Post-mortem examination.
13. The upshot is that I cannot find that the two Accused persons were responsible for the Death of the Deceased. I do hereby acquit both of them of the charge of Murder. They shall be set at liberty unless held for some other lawful reason.

Dated, signed and delivered at Busia this 9th day of March 2016.

F. TUIYOTT

J U D G E

In the presence of:-

Orwasa - Court Assistant

Owiti - for State

Bogonko - for Accused Persons.