



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 80 OF 2011**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**ALFRED OKETCH OTIENO.....ACCUSED**

**JUDGEMENT**

**Background**

Afred Oketch Otieno, the accused, is charged jointly with others not before the court with the murder of Dickens Otieno, the deceased, on 9<sup>th</sup> October 2011 contrary to section 203 as read with section 204 of the Penal Code. It is alleged that the crime was committed at Kayole Estate in Embakasi District within Nairobi County. Hearing of this case commenced before Hon. Lady Justice Florence Muchemi who took evidence of one witness Mr. James John Lawiya (PW1). The prosecution and the defence consented to proceed with the trial before me from where Justice Muchemi had reached. I took evidence of three witnesses for the prosecution and one witness for the defence, the accused.

**Facts**

From the evidence it emerges that George Omondi Osewe (PW2) was moving house on 9<sup>th</sup> October 2011. He was being assisted by the deceased and one Jeremiah Owino. The accused and one Mark sought out the deceased and insisted on going with him to clear his name over allegations of theft of gutters. The deceased did not go back to assist PW2 with shifting his household items. PW2 learned later that evening that the deceased had been killed. The matter was reported to the police leading to the arrest of the accused with Mark Makoi Wesonga after members of public took them to the Police Station. The accused was later charged and Mark released from custody.

**Proof of murder**

To discharge the burden of proof in a murder trial the prosecution must tender evidence to show that the deceased died as a result of some unlawful act or omission perpetrated by the accused with malice aforethought. The threshold to be met is proof beyond reasonable doubt. Where reasonable doubt exists, the court must give the benefit of that doubt to the accused person.

Dr. Kizzi Shako (PW4) performed the post mortem on the body of the deceased on 13<sup>th</sup> October 2011. She found extensive bleeding in the skull and after her examination she formed the opinion that the cause of death was due to severe head injury caused by a blunt object. From this expert evidence I have no doubt in my mind that the deceased died.

Who inflicted that blunt trauma on the deceased causing his death? The prosecution says it is the accused before this court. The accused says the deceased was killed by a group of people in circumstances commonly referred to locally as “mob justice”. Mob justice generally is used in Kenya to refer to a situation where someone who is suspected of having committed a crime or planning to commit a crime is attacked by members of public, instead of taking him to the police or other government authorities, and beaten up leading to severe injuries and sometimes to death.

Corporal Mark Lipali (PW3) who investigated this case told the court that the matter was reported as mob justice and that the accused was charged because he was the one who dragged the deceased to the scene in a bid to have him clear his name over theft allegations but instead he was attacked by a mob and killed. He stated as follows:

**“I noted that the accused had quarreled with the deceased telling him to go and clear his name over allegations that he had stolen some items from a plot. In the course of trying to clear his name members of public attacked him. Accused was the principal offender. He is the one who dragged him to the plot where they lived where he was attacked by members of public.”**

On cross examination, PW3 said the case looked like that of mob justice. PW3, who at one time in the course of the cross examination seemed confused, told the court as follows:

**“I confirm to the court that accused killed the deceased. Members of public killed the deceased. I cannot confirm who killed the deceased.”**

PW2 told the court that the accused, whom he referred to by his nickname Alfi short for Alfred, quarreled with the deceased over allegations that the deceased has stolen some gutters from a school after which the accused pulled the deceased by the collar of his shirt while Mark pushed the deceased. PW2 said that he was not told who had killed the deceased.

James John Lawiya (PW1) testified that he was informed of the deceased’s death by one Jillian a friend. He went to the scene which he said was at the gate of Newlight School in Kayole. PW2 went to the place and saw the body of the deceased. He learned that the deceased was killed by a mob. On cross examination he repeated that he was told that the deceased was beaten by a mob after stealing water gutters. He further went on to state that:

**“As for the accused, I know he did not kill the deceased. It was a mob who did it. I do not know any one person of that mob (sic).”**

PW1 testified before Hon. Lady Justice F. Muchemi. The Judge cross examined him after the defence. He stated on cross examination that:

**“The people I found at the scene told me the deceased was killed by a mob on allegations of theft of water gutters.”**

No other evidence on this issue was adduced and therefore the evidence can be summarized as follows: the accused and one Mark Makoi went for the deceased as the deceased was helping PW2 move houses. PW2 heard some exchange between the deceased and the accused over theft of water gutters with accused telling the deceased to go and clear his name over those theft allegations. Later that evening the deceased was killed. The evidence is not forthcoming in regard to what exactly happened at the scene. PW3 did not find witnesses to testify as to what happened at the scene and PW1 was categorical that it cannot have been the accused who caused the death of the deceased because they were friends.

This case rests fully on circumstantial evidence. To convict on circumstantial evidence, the court must examine the evidence before it to determine whether there are other co-existing circumstances that weaken or destroy the inference of guilt on the part of the accused. The evidence must also irresistibly point to the accused as the person who has committed the offence he is charged with. It is the prosecution

to prove those facts which justify the drawing of the inference of guilt.

Do the circumstances of this case lead irresistibly to the conclusion that the accused is the one who caused the death of the deceased? It is strange that police did not find any witness who could tell what exactly happened. As testified by PW2 there were many people at the place.

In his defence the accused told the court that on that day he found the deceased and Mark quarreling and that Mark was claiming that the deceased had stolen pipes from him; that after both agreed to discuss and resolve the matter the accused left them and went home where he was later attacked and beaten by members of public and that he was taken to the police station together with Mark over the same issue. He further stated that Mark was released and he was later charged. He told the court that the deceased was killed by a mob and he did not know who killed him.

I have examined this evidence with care and I note that there are gaps in the chain of events from the time the deceased left PW2 and went away with the accused and Mark to the time he met his death. There is no evidence to show where the trio went and what happened thereafter. In my considered view, it cannot be said with conviction that the accused remained with the deceased from the time they left PW2 to the time the deceased died. It cannot be ascertained whether the accused was among the people who attacked the deceased inflicting fatal injuries on him.

There are other existing circumstances that weaken the chain of events in this case. I agree with the Court of Appeal in **Criminal Appeal No. 2 of 2002, Sawe v. Republic reported in 2003 eKLR** in stating that the circumstantial evidence in this case does not irresistibly point to the accused to the exclusion of all others so as to justify conviction. Further as held in the court in the above case, the evidence in this case does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the accused. There exist suspicions that because the accused was seen in company of Mark taking or dragging the deceased away as testified by PW2, and that later the deceased was found dead, then the accused must have taken part in killing him. Indeed the Investigating Officer said he charged the accused because he was the one who took the deceased to the scene making it possible for the mob to kill him. It should be pointed out that suspicion, however strong, cannot provide the basis of inferring guilt. Guilt of an accused person in a criminal trial must be proved beyond reasonable doubt.

My conclusion on this issue is that the available evidence does not prove beyond reasonable doubt that the accused killed the deceased or took part in doing so. Having settled this issue, I find no need to proceed to the issue as to whether the accused possessed malice aforethought as this would be a futile exercise. Consequently, I find the accused not guilty of the murder of Dickens Otieno and I hereby acquit him forthwith. He is free to go home unless for any other lawful reason he is held in custody. I make orders accordingly.

**Dated, signed and delivered this 6<sup>th</sup> day of May 2015.**

**S. N. Mutuku**

**Judge**