



IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 28 OF 2012
(FORMERLY KISII HCCRC NO. 32 OF 2012)

BETWEEN

REPUBLIC PROSECUTOR

AND

GODFREY ODHIAMBO OKOTH ACCUSED

RULING

1. Godfrey Odhiambo Okoth is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge were that on 31st December 2008 at Waninga Village in Lambwe West Location within Homa Bay County in the Republic of Kenya murdered Dennis Ochieng Anyango.
2. The prosecution called 10 witnesses to prove its case. It is not in doubt that the deceased, Dennis Ochieng Anyango, was found dead in his shamba. The body was identified as that of the deceased by his cousin, George Agar Nyaluogo (PW2). Dr Ayoma Ojwang' (PW 7), who conducted the autopsy, confirmed that the body had multiple bruises on the face especially on the right side. There was bleeding around the neck. He concluded that cause of death was a head injury and suffocation.
3. The first witness, Tabitha Awuor Okoth (PW 1), the accused's mother, testified that on 30th December 2008 at about 3.00 pm, while relaxing with her sister Esther Atieno Ogutu (PW 7) and the accused, the accused left for a while and came back crying a while later. PW 1 and PW 7 inquired what had happened. The accused informed her that he had been chased by the deceased on the allegation that he attempted to steal a goat.
4. PW 1, PW 7 and the accused decided to go to see the clan elder Joshua Osoro Onyona (PW 3) about the matter. PW 3 confirmed that PW 1, PW 7 and the accused came to see him at about 4.00 pm. They wanted him to summon the deceased to explain why he had chased the accused. PW 7 sent someone to call the deceased but the deceased did not come. On the next day, 31st December 2008, PW 3 received information that the deceased body had been found in his shamba.
5. PW 4, Julia Atieno Ochieng, the deceased wife, recalled that on 30th December 2008, she had lunch with her husband at about 2 pm. After lunch she left to see a neighbour. While there, she heard her children shouting "thief, thief". She rushed back home and saw her husband and children running towards the river. At home, the children came back and told her that someone was stealing their goat and it was Ogutu, the son of Ogutu's son in law, the accused. They told her that they ran faster than their

father and left him in the bush. Her husband did not return home that evening. She testified that PW 3 sent someone at about 4.00pm to request her to see him regarding the incident that PW 1, PW 7 and the accused had reported to him. She told the emissary that she was not present during the incidence hence she did not go. Her husband did not return home. On the next day in the morning at about 5.00 am she went to the bush where the children left her husband but she did not find him. At about 9.30 am, after making breakfast, she went back further into the shamba with her daughter and it is then they stumbled upon the deceased body.

6. John Martin Ngaa (PW 8), the son of the deceased testified that on 31st December 2008, he was in the kitchen with his sister, Esther Awuor Ochieng (PW 9). PW 8 heard his father scream and when he went to see what happened, he saw the accused untether their goat. He followed the deceased to verify who the person was. The accused ran away. The deceased told him to run after the accused but was left behind screaming. He stated that the accused disappeared into the home of Mary Adongo (PW 6). He went back home and did not find his father. They looked for him in the bush but he was not there. In cross examination, PW 6 stated that when he started chasing the accused, deceased father was ahead of him and he overtook him, when he went back home he did not find his father.

7. PW 9 testified that she saw the accused after she heard her father shouting at the accused. She saw the accused untethering the goat. After an exchange of words, the accused ran away to the shamba, the deceased and her brothers followed him.

8. PW 6, Mary Anyango Odongo, testified that the accused came to her house crying at about 3.00pm on 30th December 2008. He told her he was being chased. She heard the shouts. She told him to go home. At about 3.30pm she saw the PW 1, PW 7 and the accused pass by her house as they went to PW 3's house.

9. PW 10, Sergeant John Kilonzo, the investigating officer testified recalled that on 31st December 2008, he was called by the Chief of Lambwe West Location about a death. He proceeded to the scene at Waninga Village where he found the body of the deceased in the deceased's shamba. He noted that the body had multiple bruises on the face and head. He stated that he interrogated the people there but did not find any clear evidence.

10. At the close of the prosecution case, the defence submits that the prosecution has not shown that the accused had any intention of killing the deceased or that his act or omission led to the death of the deceased. Counsel for the accused, Mr Nyauke, maintains that there is no direct or circumstantial evidence pointing to the accused as the person who murdered the deceased.

11. The prosecution submits that the accused was the last person to see the deceased alive and that he lured him to his death by causing the deceased to chase him. Ms Ongeti, the learned prosecutor, contends that since the deceased did not return, the accused should be put on his defence to render an explanation. Counsel cited the case of **Samuel Nguji Ndinguri v Republic CA Nairobi Criminal Appeal No. 25 of 1992 (Unreported)** where the court observed that, inter alia, "*common sense demands that the accused person explains where he parted company with the deceased on the material date, since that was a matter peculiarly within his knowledge and he could explain it ...*"

12. The witnesses who last saw the deceased were PW4, PW 8 and PW 9. PW 8, the deceased son, stated that the deceased told him to run after the accused and identify him. He actually left his father behind him. PW 9 stated that the deceased followed the accused into the bush but he did not come out. The evidence of PW 8 and PW 9 on whether the deceased was left behind or chased the accused in into the bush is contradictory. What is not in doubt is that when they both came back home, the deceased had returned. PW 1, PW 6 and PW 7 confirm that after he had been chased, the accused went home and thereafter proceeded to the home of PW 3 to report the incident.

13. The evidence shows that the deceased could have been killed between 3.00 pm on 30th December 2008 and 9.30 am the next day when the body was discovered. The evidence of PW1, PW 3, PW6 and PW 7 accounts for the accused's movements from the time he was chased from the deceased's shamba.

PW 7 stated in cross-examination that on the night of 30th and 31st December, the accused went to church with his mother to celebrate the New Year. There is no evidence that points to the accused being at the place where the deceased was found, being with the deceased or being involved in anything that would call upon the court to put him on his defence for the murder of the deceased. Mere suspicion that the accused could have committed the murder is not enough.

14. In such circumstances, the accused cannot be called upon to explain the enormous gap of evidence. He can only answer to the charge if there is evidence that implicates him. The prosecution has not established any evidence to link the accused to the murder of the deceased. According to the provisions of **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, I must record and I do hereby record a finding of not guilty.

15. The accused is set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 14th July 2014

D.S. MAJANJA

JUDGE

Ms Ongeti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions.

Mr Nyauke, instructed by Nyauke and Company Advocates for the accused.