



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 54 OF 09

REPUBLIC.....PROSECUTOR

-VERSUS-

JOHN MAKALA SOTE.....ACCUSED

RULING

1. The accused is charged with murder contrary to section 203 of the Penal Code. The particulars of the offence are that on the 10th day of May 2009 at Kenya Power and Lighting Company Staff Quarters Moyale District within Eastern Province murdered Edqrd Khasakala Okayo Oyamo.
2. The facts of the prosecution case are that between 9.30 am and 11 am the deceased, an employee of KP&LC was seen by PW1 and the watchman of the staff Quarters leaving the staff Quarters and walking through the gate towards the hospital. At 11.30 am a doctor called PW2 using the deceased phone. The doctor informed him that the owner of the phone was at Moyale Hospital in a critical state. PW1 proceeded to the hospital and found deceased with deep wound on the head bleeding profusely. PW2 called their boss PW1 and informed him.
3. Eventually PW1 involved the police. They broke into deceased house. Inside they found blood splattered in every room in the house including inside the bedroom the walls and doors. On the bedroom door, PW4 the Investigating Officer testified that he saw hand prints of blood. There was blood in a bucket of water as if there was an attempt to wash of blood.
4. PW4 testified that he looked for the accused who he learnt lived with the deceased in the same house. PW1, 2 and 4 found the accused in a bar ½ a kilometer from deceased house. He was taking alcohol.
5. PW1 and 2 testified that the accused informed them that the deceased got injured when he threw a machine liner at him and that he missed, hit the door and it bounced back and hit him on the head.
6. PW4 did not take any statement from the accused person. PW4 had the house of the deceased photographed. However the one who took the photos did not testify and the photos are not exhibits in the case.
7. PW4 testified that some samples of the blood were removed from the deceased during Post Mortem. The results of analysis were not produced in court. No samples were taken at the scene.
8. The prosecution relies on statements made by accused to PW1 and 2 to support the charge against the accused. This being a murder charge the prosecution has the onus to adduce evidence to establish that it was the accused who hit the deceased and caused him severe injury on injuries which resulted in his death. There is no post mortem form to show how deceased died.
9. There was no eye witness of this incident. PW1 who testified that he saw the deceased that day said he saw him at between 10.30 and 11 am and that he was fine. At 11.30 a.m. PW2 called him

- to inform him the sad story of deceased severe injuries. He died shortly later.
10. There was a watchman at the staff quarters where accused, deceased, PW1 and PW2 lived. He was not called as a witness. PW4 however, testified that the said watchman had reported seeing the deceased at 9.30 am and at 10.30 am looking quite okay.
 11. Section 25(1)(a) of the Evidence Act described what constitutes a confession as follows

‘25A. (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person’s choice.’

12. The alleged statements made to PW1 and 2 by the accused is inadmissible as it was not properly taken as the law prescribes under Section 25(1) (A) of the Evidence Act. In any event the statements attributed to the accused did not qualify to be confessions. For one they were not made in court or before a Judge, Magistrate or Police Officer other than the Investigating Officer. Secondly the statement was not a confession. It was a self serving statement.
13. The statement did not tend to prove accused guilt. What the accused is alleged to have said was that deceased was attacking him but that he hit the door with a machine liner which sprung back and hit the deceased. That statement is not an admission of guilt or a confession tending to prove accused guilt.
14. The other fact is that PW4 did a poor job at investigating the case. No blood samples were sought from the accused clothing or hands. If accused had been involved presence of blood on his person or clothes should have been a point of investigation.
15. With the description of the scene at the deceased house, it is difficult to imagine that with all the blood in the walls, floor, doors and rooms that a person who inflicted the injuries could come out of the house without blood somewhere.
16. The deceased was seen last at 11 am or 11.30 am by PW2. PW2 testified that he got a report of deceased severe injury at around the same time. No one saw deceased leaving his quarters with any injury. No doubt he was injured at his house given the amount of blood found there. However, it is still a speculation on PW4’s part to say that the blood he found at the deceased house was his. It was so simple to prove this but no attempt was made to prove it.
17. The accused and deceased were said to have a good relationship. In addition both were quiet and very polite people. That was the testimony of PW1 and 2 who knew accused for 3 months and one year respectively. Accused was found having alcohol at a bar a kilometer or so from his uncle’s deceased home. All these facts do not tend to point irresistibly at the accused as the one who committed this offence.
18. I find the prosecution adduced evidence based only on suspicion. As the Court of Appeal held in SAWE –V- REP [2003] KLR 364 suspicion however, strong is not sufficient to found a conviction.

“1. 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 hypotheses than that of his guilt.

2. **Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**
3. **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.**
4. ...
5. ...
6. ..
7. **Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”**

19.I find that no iota of evidence was adduced to establish a prima facie case against the accused. I give the accused the benefit of doubt and acquit him of the charge of murder under section 322 of the Criminal Procedure Code.

DATED AT MERU THIS 3RD DAY OF OCTOBER, 2014

LESIIT, J

JUDGE