



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL CASE NO. 4 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

SILAS OUMA DANIEL.....1ST ACCUSED

ALIAS AGONGA LIECH.....2ND ACCUSED

JUDGMENT

1. Silas Ouma Daniel and Alias Agonga Liech are charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars of the offence are that on the 21st day of January, 2018 at Iyembe village, North Kabuoch Location in Ndihiwa Sub County of Homa Bay County, jointly murdered Fredrick Ochieng Oluoch.

3. The prosecution gave two versions on how the deceased was killed. One version is that when the deceased went out to answer a call of nature, he was heard crying and asking why he was being killed. The second was that when he was being escorted home after he had expressed some fear for his life, he was attacked together with his escorting party. They fled into different directions and two days later his body was found in a pit latrine.

4. In their defence, both accused pleaded an alibi. The second accused disowned the name under which he was charged.

5. The issues for determination are:

a) Whether the 2nd accused was charged under his real name;

b) What is the effect of the prosecution tendering two versions of the same incident; and

c) Whether the prosecution proved its case to the required standards.

6. The second accused testified that his name is Samuel Odongo Liech and said he was charged in court under a name that was not his. He produced his National identity card which bore his true name. The investigating officer equally testified that he (accused 2) was called Samuel Odongo. He never explained as to why he was charged as Alias Agonga Liech. This is an inexcusable error for identity of a person is very key to a trial.

7. Pamela Odhiambo Odongo (PW1) testified that when the deceased went out to answer a call of nature, she heard the two accused talking to him. The first accused attacked him (deceased) and he ran back to the house. The deceased had inherited her upon the death of her husband. A relative who answered the distress alarm she raised advised the deceased to go to his home.

8. When the deceased left the house to return to his home, she heard him shout the name of the second accused and asked him why he was beating him.

9. If we assume this version is true, there was no evidence adduced on the state of night for the court to form an opinion whether the deceased was able to recognize any or all his assailants. We can however conclude that it was a dark night for William Wasonga Abongo (PW5) said that they were able to recognize the attackers from the light of the torches they (attackers) had.

10. Pamela's (PW1) evidence is very doubtful and I will later show why it ought to be disregarded.

11. The second version was that while the deceased was being escorted after he had expressed fear, the escorting party was waylaid by a group of three people. This is according to the evidence of Duncan Otieno Abongo (PW6) and William Wasonga Abongo (PW5). Their evidence gives an impression that they were not near the house of Pamela. Duncan Otieno Abongo (PW6) testified that when they were ambushed, they screamed and ran into different directions. None of this two witnesses testified that the deceased called out the name of accused 2 as Pamela would want the court to believe.

12. Ordinarily, unless a person carrying a spotlight directs the light to either his face or that of another in his company, you may not be able to recognize or identify him/her. There was no such evidence and it would appear the two were charged on suspicion for undisclosed reasons. In the case of **Sawe vs. Republic[2003] KLR 354**, the Court of appeal held as follows:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

In the instant case I find that other than the contradictions in the prosecution case, the evidence on record did not go beyond suspicion.

13. The offence of murder was therefore not proved against any of the accused persons. I accordingly acquit each of the offence of murder and set him at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF MARCH, 2022

KIARIE WAWERU KIARIE

JUDGE



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