



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CRIMINAL CASE NO. 25 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CHRISTINE ANYANGO.....ACCUSED**

**JUDGMENT**

1. Christine Anyango is 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 1<sup>st</sup> day of August, 2017, at Ongaro village, Ndhiwa Sub County of Homa Bay County, murdered George Opiyo Buga.
3. According to the prosecution, due to unknown reasons, the accused fatally cut the deceased on the neck with a machete.
4. The defence of the accused was that unknown people attacked her husband when he went out to answer a call of nature.
5. The issues for determination are:
  - a. Whether the accused was the one who inflicted the fatal injury to the deceased; and
  - b. Whether the offence of murder was established.
6. The deceased and his mother (Mary Akoth Buga) lived in the same compound. The investigating officer, PC Shadrack Melly (PW4), said the two houses were ten metres apart.
7. We gather from Mary Akoth Buga (PW1) that the deceased and the accused were staying in their house with their three year old child.
8. On the fateful morning of 1<sup>st</sup> August, 2017 at about 6 a.m., Mary Akoth Buga (PW1) testified that she heard the accused shout: "Aah! Aah! Aah!" When she opened her door, she saw the deceased walking towards her house with a leaning gait. He only had his underpants on. When she approached him, he fell down and went mute. He was bleeding from the neck. She raised an alarm.
9. The area assistant chief (PW2) testified that he received a report that the deceased was attacked in his home by unknown assailants. He called the police who went to the scene.
10. PC Shadrack Melly (PW4) was one of the officers who visited the scene. His evidence was that the deceased had profusely bled. His body lay between his house and that of his mother (PW1). Stains of blood led them from where the body lay to his bedroom. In the bedroom, he found the entire beddings and the mosquito net blood stained. This is why he arrested and charged the accused.
11. Christine Anyango, the accused gave a different version of the incident. She testified that at about 5 a.m. her husband went out for a call of nature. On reaching at the door she heard him ask, "Who are you?" There was some commotion and he returned to the house to look for a machete. He was bleeding profusely. She was shocked. She went out and raised an alarm. The deceased went towards his mother's house while holding a club. He however fell down on the way. This is where the police found his body. When she went out she said that she saw some footprints that went behind the house.
12. There was no direct evidence against the accused. The prosecution adduced circumstantial evidence. What is circumstantial evidence? In the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** Osiemo Judge explained what circumstantial evidence is, as follows:

**Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.**

13. Earlier the Court of Appeal in the case of **Rep vs. Kipkering Arap Koskei & another 16 EACA 135**, had held:

**In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.**

In the instant case, I will endeavour to find if the evidence tendered justify the inference of guilt of the accused.

14. The mother of the deceased was attracted to the scene by the accused who shouted, "Aah! Aah! Aah!" This contradicted the contention by the accused that when she went out, she raised an alarm to which many people including her mother in-law responded.

15. The contention by the accused that the deceased went towards his mother's house while armed with a club was not supported by the evidence of her mother in-law. In her evidence Mary Akoth Buga (PW1) did not say the deceased had any weapon. The police officers who collected the body of the deceased where he collapsed and died also did not testify of any club.

16. Though the accused testified of seeing some footprints going towards the house, she was not able to say what helped her to see them yet she admitted that at 5 a.m. on that day it was dark.

17. Other than the accused who suggested that the deceased was killed by unknown intruders, the other person who testified of unknown intruders was Elijah Otieno Abuto (PW2), the area assistant chief. The evidence by this witness has no probative value for he said he received the report. Whoever informed him so did not testify for the evidence to be tested. This is therefore inadmissible hearsay.

18. The blood stained beddings as well as the mosquito net was a clear indication that the deceased was attacked in his bed.

19. The evidence on record is that the deceased on the material day, was with the accused and their three year old child and nobody else.

20. All these facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of her guilt. I find that the accused inflicted the fatal injury on the deceased.

21. In order to found conviction on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10<sup>th</sup> Edition** malice aforethought is defined as:

**The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).**

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

**Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

22. In the instant case, we do not know what happened between husband and wife and what led the accused to inflict the fatal injury to the deceased. I therefore, find that the prosecution has not proved the offence of murder against the accused. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit her of the charge of murder. I find her guilty and convict her for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED AND SIGNED AT HOMA BAY THIS 29<sup>TH</sup> DAY OF JUNE, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**