REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL CASE NO. 1 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

LAMECK OGANGO MISUDI.....ACCUSED

JUDGMENT

1. Lameck Ogango Misudi 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 15th day of August, 2014, at Kachieng location in Ndhiwa District of Homa Bay County, murdered Quinter Aoko alias Nancy.

3. The prosecution case is that the deceased and the accused were cohabiting with each other. On the night the deceased disappeared, the accused alleged that she had gone to do some shopping but did not return.

4. Lameck Ogango Misudi, the accused, denied the offence. He contended that at the time the deceased met her death, they were not cohabiting.

5. The issues for determination are:

a) Whether the accused and the deceased were cohabiting at the time when she met her death;

b) Whether the accused was involved in the death of the deceased; and

c) Whether the offence of murder was established.

6. The relationship of the accused and the deceased was very strange. It would appear fate had brought them together and try as much as they could, were unable to overcome the force that pulled them to each other.

7. The deceased had left another marriage to Ja-Kamagambo where there were four issues on allegations that Ja-Kamagambo was a drunkard. The accused paid dowry for her but when the two felt the marriage was not working, the dowry was returned.

8. Even after the return of the dowry, it would appear that that the flame of the love was not quenched for they continued to cohabit though intermittently as was testified to.

9. According to the prosecution evidence, by the time of her death, the deceased was cohabiting with the accused. This was testified to by Esther Yiewa Anyango (PW1), her mother. This witness testified that in August 2014 the two were staying together. By this time, according to her, they had resolved the differences they used to have.

10. In August 2014, the accused took the deceased to her parents' home and went for her after 4 days. This is what Esther Yiewa Anyango (PW1) testified to. While going back to the accused, she left with a child aged one year and two months. She went on to testify that on the following day after she had left, the accused went to her home with his brother Amon at 4 a.m. Ogango (the accused) was carrying the child of the deceased.

11. Esther Yiewa Anyango (PW1) further told the court that the accused told her that when he went with the deceased to visit one Lwanda, the deceased asked for some money to go and buy some milk but did not return.

12. Peterson Yiewa Jela (PW2) is the husband of Esther Yiewa Anyango (PW1). He testified like her on the events of 16th August, 2014.

13. On the night of 14th August. 2014 the accused and Aoko (the deceased herein) spent the night in the house of Jane Achieng Otieno (PW3). This is what she testified to. Certainly either this date is incorrect or the date given by the mother and the father of the deceased is not correct.

14. Jane Achieng Otieno (PW3) testified that when the two had breakfast the following morning, they left and indicated that they were going to a rented house at Oria. On 16th August, 2014 the accused returned and informed her that his wife had disappeared on the way. He told her that he had reported to the chief. When she met the area chief, he denied that the accused had made such a report to him.

15. Dick Ogilo Were (PW5) a livestock trader like the accused testified that in August 2014 at about 3 a.m. the accused went to his home and was with a child. The accused told him that while coming from Migori on a motor cycle he had crashed and his wife got injured and that he had taken her to a traditional healer. He requested him to escort him on his motor cycle to his home and he obliged.

16. The accused in his defence contended that by the time the deceased was discovered dead, they had long parted ways and that he had returned the dowry he had paid. He denied any involvement in her death. He said he was arrested in Mombasa where he went on 18th December, 2014. Incidentally this was a day before the recovery of the deceased.

17. There is no direct evidence to connect the accused with the offence. All we have is circumstantial evidence. Circumstantial evidence was restated in the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** 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.**

18. The Court of Appeal in the case of **Sawe vs. Republic [2003] KLR 354,** held as follows:

> **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.**

19. In the instant case, there are several facts that displace the defence of the accused.

> a) There is evidence from the girl's parents that the accused and the deceased were at the time of the reported disappearance, cohabiting. This evidence was not controverted by any evidence on record.
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> b) The evidence of PW1, PW2 & PW3 is that the accused and the deceased were together on the night of 15th & 16th August, 2014.
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> c) According to the evidence of PW1, PW2 & PW3, the accused reported to them that the deceased had disappeared as she went to buy some milk.
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> d) The evidence of Jane Achieng Otieno (PW3) is that the accused had informed her that he had reported to the chief about the disappearance of the deceased. This however turned out to be untrue.
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> e) Dick Ogilo Were (PW5) testified that in August 2014 at about 3 a.m. the accused went to his home and was with a child. The accused sought help from him on allegation that he was involved in an accident and had taken his wife to traditional healer. This evidence gave credence to the evidence of PW1, PW2 & PW3.
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> f) The evidence of PC Shadrack Meli (PW6) is that while they were investigating the issue that the deceased was missing, they summoned the accused but he failed to present himself at the station. After the recovery of the body of the deceased, he said that they received information that he had fled to Mombasa from where he was arrested.

20. All these pieces of evidence taken together point to the accused as the perpetrator of the death of the deceased. The evidence is incompatible with his innocence and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

21. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th 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).**

22. 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.**

23. From the evidence on record, no evidence of malice aforethought has been adduced. I therefore find that the prosecution has not proved the offence of murder against the accused. I acquit him of the charge of murder. 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 find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED and **SIGNED** at **HOMA BAY** this **22nd day** of **June, 2021**

KIARIE WAWERU KIARIE

JUDGE