



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL CASE NO.3 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**PETER OTIENO MARIANGA.....1<sup>ST</sup> ACCUSED**

**PAMELA ADHIAMBO ONYANGO.....2<sup>ND</sup> ACCUSED**

**BELINDA ACHIENG OCHIENG.....3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The three accused, **Peter Otieno Marianga, Pamela Adhiambo Onyango** and **Belinda Achieng Ochieng**, are charged with murder, contrary to **Section 203** read with **Section 204** of the Penal Code, in that on the night of the 6<sup>th</sup>/7<sup>th</sup> January 2019 at Ufira village, Rusinga West in Mbita-HomaBay county, they jointly murdered the deceased David Ochieng Owino alias Atoti.
2. It was the case for the prosecution that on the material night between ten(10) to eleven(11)pm, **Margaret Achieng Ochieng(PW1)**, mother to the deceased, was alone in her house when she heard loud bangs on the door of a nearby house occupied by the deceased and his family. She ventured outside her house to make enquiries thinking that the deceased had picked up a fight with the wife of one Sammy.
3. On arrival at the deceased's house she met her other son called Dan and his wife. They told her that Peter (**first accused**) was inside the house making noise. She then spotted and recognized Peter standing at the door of the house holding a torch and stick. The bright moonlight at the time enabled her to recognize Peter. Some villagers were attracted to the scene. She recognized one Rodi and Belinda (third accused) being among the people at the scene.
4. She(PW1) left the scene leaving behind Peter, Belinda and Atoti(deceased) and after having heard Peter shouting that he must whip the deceased for sleeping with his sisters daughter on several occasions despite several warnings, given to him(deceased) to desist. At about 2.00am, she was awakened from her sleep by her son Dan and informed that the deceased had committed suicide by hanging himself. She rushed back to the scene and found a crowd of villagers gathered there with the deceased hanging from a rope suspended from the roof of the house which consisted of three rooms. She noticed that a synthetic or manila rope was tied around the neck of the deceased who was in an upright position with one leg touching a stool and the other touching the ground floor.
5. Hellen Adhiambo Dan(PW2), was with her husband when they were attracted to the scene by noises. They were joined by her mother-in-law(PW1) and all proceeded to the house of the deceased where they found Peter standing at the door. Belinda was also there. Peter demanded that a girl called Sharon come out of the house. She (PW2) knew that the deceased had expressed an intention of marrying the girl as his second wife while Belinda remained his first wife. She and her husband left the scene together with her mother-in-law having Peter and Belinda standing outside the house. She was later awakened at about 2.00am by one Baba Omondi with news that the deceased had committed suicide.
6. David Ochieng Okunya(PW3, and his brother Bob Onyango Ndara(PW4), both fishermen by occupation were on the material night fishing in Lake Victoria at Ruta beach and at about midnight having finished their task they passed through the deceased's house to collect their bicycle which they had earlier left there as was the norm. they found it strange and unusual that the front door of the house was locked. They then went to the back door and found it damaged and half open. They flashed their phone torch towards the inside of the house and were shocked to find the deceased hanging on a nylon (manila) rope from the roof. They ran away from the scene and reported the matter to Baba Omondi who proceeded to the scene and confirmed that the deceased was dead and his body was hanging from the roof before reporting the matter to the area chief.
7. A neighbor of the deceased, Stephen Omondi Ayaa(PW5) was among the villagers who proceeded to the scene after being attracted by screams. On arrival, they found the first accused holding a machete (panga) on one hand and a broken door frame. The first accused was at the time calling the deceased by his name and saying that his niece was inside the house. He (PW5) and his brother left the scene leaving the first accused and others behind and on the following morning they received information that the deceased had committed suicide. They

rushed back to the scene and found the dead body of the deceased dangling on a rope tied to the roof.

8. One Dr. Mark Ogundo, carried out a post mortem examination on the body of the deceased on the 11<sup>th</sup> January 2017 and compiled the necessary post mortem report (PEX3) which showed that the cause of death was blood loss secondary to ruptured liver and failure to breathe due to hanging from a rope tied around the neck.

The report (PEX3) was however produced by Dr. Mary Amuko (PW6), on behalf of her colleague.

9. Sgt. William Kabue(PW7), received the necessary report while attached to Mbita police station and carried out the necessary investigations after which the present charge was preferred against the three accused.

P.C. Raphael Baraka Ngumbao (PW8) of the Directorate of Criminal Investigations(DCI) produced the sticks and rope string(PEX1 & 2) recovered at the scene of the offence.

10. The defence case for all the three accused was a denial and a contention that like everybody else in the village they were away at home from the scene when they learnt that the deceased had committed suicide.

Accused one and three(i.e Peter and Belinda) indicated that they were earlier at the scene but later left only to be notified much later that the deceased had hanged himself.

11. Accused one indicated that he was at the material time heading home from a fishing trip and on passing through the homestead of the third accused who is his sister-in-law heard her crying. He enquired and found that she was holding her child while crying. She informed him that her husband (deceased) had locked her out of the house. He(accused one) then pleaded with the deceased in vain to open the door. In the process, accused one heavily banged the door of the house and this attracted a group of villagers to the scene. They told him to cool down and wait for the following day to get an explanation from the deceased.

12. Among the said villagers there was Margaret(PW1) and Pamela(accused two). The first accused went on to state that he left the scene and proceeded to his nearby home only to be awakened at 3.00am by screams. He learnt thereafter that the deceased had committed suicide.

Accused two, indicated that the third accused was her sister and had gone to her homestead to purchase milk and shortly after returning to her nearby home the (accused two) heard noises from that home and rushed there. She found the first accused knocking at the window of the third accused's house while the third accused was nearly crying and lamenting that her husband (deceased) had locked her out of the house. Accused two took the third accused's child from her and instructed her to follow her to her (accused's two) homestead to await the following day.

13. At about 2.00am, the second accused was called by a person called Okoth and informed that "Atoti" (deceased) had hanged himself. She did not return to the scene but remained at her home with the third accused until the following day when police officers came to the home and took them to the local police station to record statements.

Accused three, more or less associated herself with what was stated by the second accused. She said that she heard earlier left her home for her sister's (accused two) to buy milk and upon her return she found that her husband (deceased) had locked the door from inside and refused to open for her. She then remained outside the house holding her child and crying until the first accused arrived there and attempted to intercede on her behalf but all in vain. She left the scene and proceeded to the second accused's homestead after neighbors appeared there and asked that the deceased be left alone.

14. Having considered the foregoing evidence from both the prosecution and the defence, what emerged as the basic issue for determination was whether the deceased was murdered and if so, whether the three accused or any one of them was responsible for the act.

Murder is defined under Section 203 of the penal code as causing the death of another person by an unlawful act or omission by a person acting of malice aforethought which under Section 206 of the Penal code is deemed to be established by evidence proving inter alia an intention to cause the death of or to do grievous harm to any person whether that person is the person actually involved or not.

15. Herein, the big question was whether the undisputed death of the deceased was as a result of an unlawful act of another person or persons or was a result of the deceased having committed suicide by hanging himself with a rope or string of a rope. "Dead men tell no tale". Therefore, the answer to the riddle or as it were, mystery lay in the evidence, gathered by the prosecution against the accused.

16. The accused, it would appear, were suspected on account of the fact that they were at the scene either as onlookers or participants in a commotion arising there pertaining to the deceased and his wife, the third accused and another lady called Sharon who was said to be a niece of the first accused and a potential second wife of the deceased much to the chagrin of her uncle (first accused).

17. The accused had no obligations to prove their innocence but that defence suggested that the deceased may have been driven to his own death by the apparent domestic squabble revolving around his intention to marry a second wife. They suggested that he may have hanged himself on realizing that his intentions was under resistance from his wife (accused three) and potential "brother-in-law" (accused one). This is the more reason that they advanced the narrative that the deceased killed himself rather than being killed as alleged by them.

18. The prosecution was therefore obligated to debunk the narrative by necessary credible evidence. In that regard, there was the medical report produced herein by Dr. Amuko(PW6) but was actually compiled by her colleague Dr. Ogundo, who carried out the necessary post mortem on the body of the deceased and seemed to have ruled out suicide as the main cause of death.

19. The medical report strongly indicated that the main cause of death was blood loss due to a ruptured liver and failure to breathe due to hanging by a tight rope around the neck. It does not take a medical expert to know that a person cannot rupture his liver by hanging or rupture his liver before hanging himself. The rupture of the liver would be sufficient enough to cause instant death without a person having even a minimal time to complete and actualize the process of dying by again hanging himself.

20. **Sgt. Kibue(PW7)** in the course of his investigations gathered from one Sharon Otieno who appeared to have declined to testify in court and who is related to the first accused, that a fight occurred at the scene involving the deceased and the three accused over a domestic problem or dispute and in the process the deceased was assaulted and strangled by the first accused with the aid of the second and third accused.

21. Indeed, the investigating officer on arrival at the scene noticed signs of a struggle, a broken window and strings or ropes (PEx2) placed on the deceased to create an impression that he had hanged himself. The first witnesses to arrive at the scene after the fact actually thought that the deceased had hanged himself and committed suicide. There were the two fishermen brothers (PW3 and PW4) and a neighbor(PW5).

22. Margaret (PW1) and Hellen(PW2) heard commotions at the house of the deceased and when they proceeded there they found the first and third accused. They then realized that what was going on was a domestic dispute sparked by the fact that the deceased was inside the house with a niece of the first accused called Sharon while he was already married to the third accused.

23. Margaret and Hellen indicated that the first accused was incensed or extremely angered such that he vowed that he would assault the deceased by whipping him for taking his niece as his second wife. Stephen(PW5) had also arrived at the scene when he first heard screams from there and prior to the deceased being found dead. He confirmed that the first accused was at the scene quite angered.

The three witnesses(PW1, 2 and 5) confirmed that pieces of a broken door were at the scene. They all tried to cool the first accused down before leaving the scene only to be awakened from their sleep much later to be informed that the deceased had hanged himself.

24. The three witnesses also confirmed that they left the first and third accused at the scene as they respectively departed for their homes. Most important, Margaret(PW1) actually saw the first accused holding some stick (PEx7) on that date.

The evidence by these three witnesses (PW1, 2 and 5), coupled with that of the doctor (PW6) was credible and cogent enough to debunk the theory or narrative that the deceased committed suicide.

25. As a whole, the evidence by the prosecution strongly implied that the deceased was assaulted and strangled with some sting or tiny ropes and thereafter placed in such a way to suggest that he had hanged himself. However, the rupture of the liver was more consistent with the fact of assault and indeed overruled the self hanging theory. Clearly, the evidence indicated that the deceased was assaulted and suffered fatal injuries in the process.

26. Most likely than not, those found at the scene prior to the fact and were left behind after the crowd of curious people had left the scene were the assailants or part of the assailants. These were the first and third accused. The two were clearly placed at the scene by the witnesses. In effect their defence that they did not assault the deceased and that he killed himself was disputed by the prosecution's strong and credible evidence against them.

27. The second accused was the only person who was not placed at the crucial time. It was therefore doubtful as to whether she participated in the fatal assault against the deceased. Her presence at the scene seems to have been after the fact and with innocent intentions.

All in all, it is the finding of this court that the deceased did not commit suicide or kill himself. He was killed "nay" murdered for having expressed the intention of taking the girl known as Sharon as his second wife. The murderers were none other than the girl's uncle(first accused) and the deceased's wife (third accused).

28. The two (accused one and three) are therefore found guilty as charged and are hereby convicted accordingly.

Accused two is found not guilty as charged and is hereby acquitted of the charge.

Ordered accordingly.

**Delivered and signed this 17<sup>th</sup> day of November, 2020.**

**J.R. KARANJAH**

**JUDGE OF THE HIGH COURT**