



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL CASE NO. 20 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ALICE ATIENO OPUDO.....ACCUSED**

**JUDGMENT**

1. TA (hereinafter referred to as **'the deceased'**) was two and a half months old when she cruelly met her death on 28/07/2016. Following police investigations, the accused person herein, **Alice Atieno Opudo**, was charged with the murder of the deceased. The accused person was a co-wife to the mother of the deceased one **Grace Akinyi Opudo** and the second wife of **Peter Opudo Opiyo** whereas Grace Akinyi Opudo was the first wife of Peter Opudo Opiyo.

2. The particulars of the offence were that the accused person murdered the deceased on 28/07/2016 at Kanyimach Location, South West Kamagambo in Rongo within Migori County in the Republic of Kenya.

3. The accused person denied the offence and a trial was ordered. The prosecution availed eight witnesses in a bid to prove the charge. **PW1** was the father of the deceased one **Peter Opudo Opiyo** (hereinafter referred to as **'Peter'**) whereas **PW2** was the mother of the deceased. She was **Grace Akinyi Opudo** (hereinafter referred to as **'Grace'**). A neighbour to the accused person, Peter, Grace and the deceased one **Lilian Achieng** (hereinafter referred to as **'Lilian'**) testified as **PW3**. A brother to Peter one **Philemon Oluoch Owuor** (hereinafter referred to as **'Philemon'**) testified as **PW4** whose wife was Lilian. The Chief of South West Kamagambo Location one **Michael Morice Ayieko** (hereinafter referred to as **'the Chief'**) testified as **PW5**. **Dr. Sammy Ruwa Mwatela** (hereinafter referred to as **'the Doctor'**) who conducted the post mortem examination for the deceased testified as **PW6** whereas the investigating officer one **No. 52451 Corp. William Kiptoo** attached at Okumba Poice Post as the In-Charge testified as **PW7** (hereinafter referred to as **'the Investigating Officer'**). **PW8** was the Government Analyst one **Richard Kimutai Langat** (hereinafter referred to as **'the Analyst'**).

4. The prosecution's case was centered on circumstantial evidence. Leading the evidence was Peter, Grace and Lilian. Grace testified that she woke up early on the fateful day to work in a neighbour's home. She had been contracted to fetch water from the river by the neighbour who was making some building blocks. Grace left behind Peter and the deceased still asleep. She also left behind the accused person who was in her house which house was adjacent to her house and whose roofs had been enjoined. Grace worked until around 08:00am when she heard Peter calling her and Philemon in a loud voice. She rushed home only to find Peter holding the deceased who was foaming in the mouth and nose. She also saw Lilian, Philemon and other villagers.

5. Peter testified that he also left Grace's house and went to harvest some maize at their nearby farm. Peter left the deceased still asleep in the bedroom. He could clearly see the houses of Grace and the accused person from the farm as the farm was just adjoining. At around 08:30am Peter returned home to pick a sack so as to carry the maize he had harvested. As he approached the home, Peter saw the accused person rushing out of the house of Grace. He was so shocked since Grace and the accused person were not in good terms and did not talk to one another. Further, none used to enter into the house of the other.

6. Reaching home, Peter found the accused person standing by the door of her kitchen house and asked her what she had gone to do in the house of Grace. The accused person kept quiet. Peter then told her that she will be held personally responsible for any lost items from the house of Grace. Peter entered Grace's house and was shocked by what he saw; the deceased whom he left sleeping in the bedroom had been moved and placed on a seat at the sitting room and she was foaming and had passed loose stool. Peter harshly called the accused person by her name and asked her what she had done to the deceased. By that time the accused person was sweeping her kitchen using a broom and immediately dropped the broom and disappeared into the sugarcane plantation which was about 40 metres away. It then happened that Peter carried the deceased and rushed out of Grace's house and loudly called Philemon and Grace. When Grace responded and rushed home she took the deceased from Peter and began crying as villagers gathered.

7. Lilian also had an encounter with the accused person. She testified that her home was about 200 metres from the river that served the village whereas the home of Peter about 50 metres from the river. That, for her to access the river she had to pass through the homestead of Peter. She described the homestead of Peter with precision by stating that the two houses for Grace and the accused person were so near one another that their roofs had been enjoined. She estimated the distance between the houses as 5 metres apart.

8. Lilian further testified that as she passed the homestead of Peter to the river to fetch some water she saw the door to the house of Grace open and on looking inside she saw the accused person at the sitting room. Lilian had severally entered in the house of Grace and knew it so well. The accused person was bent over a chair and Lilian stopped to watch what the accused person was doing inside the house of Grace as Lilian knew too well that Grace and the accused person were not in talking terms and none even dared enter the house of the other. Shortly, the accused person turned and rushed outside the house of Grace and met Lilian face to face and the accused person was utterly shocked. That, by that time Peter was approaching the home and he also saw the accused person coming out of the house of Grace and asked the accused person what she had gone to do in the house. Lilian stood about 30 metres and watched Peter talking to the accused person. She testified to have heard and seen all what transpired. Lilian heard Peter telling the accused person that she will be held personally responsible for any lost items from the house of Grace. Peter then entered inside the house of Grace and came out carrying the deceased and asked the accused person what she had done to the deceased who was foaming from the mouth and nose. At that point in time, Lilian saw the accused person run away into the sugar cane plantation which was behind the house of the accused person. Peter then called Philemon and Grace.

9. As family members and villagers gathered at the home of Peter, the deceased was rushed to Awendo Sub-County Hospital by among others Grace. The deceased was attended to at the hospital but unfortunately died two hours later. One of those who had accompanied Grace to the hospital called and informed Peter of the death of the deceased. Peter rushed to the hospital with Philemon and so confirmed. He was given a document to take to the police. Peter formally reported the matter at the Okumba Police Post.

10. The Investigating Officer and his colleagues visited Peter's home that afternoon. He saw the two houses at the home and was informed which belong to Grace and the accused person. He noted that the houses were very near. He entered the house of Grace and Peter showed him where he found the deceased at the sitting room. The investigating officer recovered a black plastic cup. He then proceeded to the house of the accused person and recovered a bottle of Battery Water written '*Chloride Exide*' which was almost full but open. He also recovered two bottles containing red liquids and a yellow jerrican with some liquid.

11. The Investigating Officer then proceeded to the hospital and viewed the body of the deceased. He obtained documents on how the deceased had been handled and then moved the body to Rapcom Mortuary for preservation awaiting further police action. The investigating officer also facilitated the taking of photographs at the home of Peter and at the mortuary.

12. As the investigating officer returned to his station, he was called by the Chief at around 06:00pm and informed that the accused person had been arrested by members of public and that the Chief was taking her to the station. The Chief narrated how he had rescued the accused person at the sugar cane plantation from the wrath of the members of public who were baying for blood. The Chief escorted the accused person to the station and handed her over to the investigating officer.

13. The investigating officer commenced investigations. He recorded statements from several witnesses and was satisfied that the accused person was involved with the death of the deceased. He also organized for and a post mortem examination was conducted by the Doctor who preliminarily opined that the deceased might have been poisoned. He collected samples at the post mortem examination and handed them over to the investigating officer for onward transmission to the Government Chemist for further analysis. The investigating officer processed the accused person by escorting her for a mental checkup where she was found to be mentally-fit to stand trial. The accused person was then formally charged with the murder of the deceased.

14. The Analyst testified before Court. He stated that he received various samples from the investigating officer under an Exhibit Memo for analysis to confirm whether there was the presence of poison. The samples were the deceased's vomit contents, stomach contents, piece of kidney, a piece of liver and blood. On subjecting the samples to layer chromatography and a U.V. Spectrometer machine, the vomit and stomach contents were found with highest concentration of an unidentified organophosphate pesticide which was fatal if orally consumed.

15. The Analyst's Report, the Exhibit Memo, the hospital notes, the Post Mortem Report, the items recovered in the houses of Grace and the accused person and the Mental Assessment Report were all produced as exhibits.

16. At the close of the prosecution's case, this Court found that the prosecution had established a *prima-facie* case and placed the accused person on her defence. The accused person elected to give sworn evidence and called two witnesses namely her daughter one **MAO (DW1)** and **Stephen Ouma Obala (DW2)** who was a brother to the accused person.

17. The accused person denied committing the offence. She testified that on the material day she went to her farm early in the morning and harvested maize upto around 07:00am when she returned home to find Peter coming out of the house of Grace and asked her if she had finished carrying the maize from the farm. That, Peter also asked the accused person to prepare porridge for him. The accused person instead asked DW1 who had been sent home from school on account of non-payment of school fees to prepare the porridge. The accused person denied that Peter went to the farm and also denied that PW3 was ever at the home of Peter or at all. She however agreed that any one who came into the homestead of Peter must pass through the door to Grace's house. The accused person further denied any bad relations with Grace. She contended that they were very good friends and had no problem with each other at all and that the day before the incident occurred they had taken supper together in the house of Grace.

18. The accused person produced the Statements recorded by Peter and Grace with the police as exhibits and urged the Court to consider that sometimes in April 2012 Grace left behind her children and stayed away from the home of Peter up to January 2015 and during that time it was the accused person who took care of all the children in the family including four of Grace's children and wondered that if she did not harm any of them by then then the prosecution's version of how the deceased met her death cannot be true. The accused person explained that the reason why she ran away from her home was that Peter beat her for asking DW1 to instead prepare the porridge for him and that she went to her Aunt and on return in the evening members of public attacked her alleging that she had poisoned the deceased. It was also the accused person's position that Peter and Grace used to sell the local illicit brew commonly known as *chang'aa*.

19. The accused person denied storing any poison in her house neither did she have any battery therein. She stated that Peter had a battery which he kept in Grace's house. The accused person also testified that on 17/11/2005 she left her 2-year-old child with Peter and went out and on return she found the child (**CO**) unwell. That, she took him to hospital in the company of Peter and the Doctor diagnosed poisoning

and referred them to Migori, but the child died on the way. Peter then prevailed on her against reporting the matter to the police and she obliged. The accused person then saw a replica of the death of her son in the death of the deceased who were both in the care of Peter. To her, it was Peter who knew what happened to the deceased just like how he knew how her son C died.

20. DW1 reiterated the accused person's testimony. According to DW1 it was Peter who was behind the death of the deceased as further to the mysterious death of her brother in 2005 Peter had at one time put poison in the drinking water and was arrested by the Assistant Chief. DW1 stated that she wanted to give her version to the police but Peter restrained her until when the accused person asked her to tell the Court what truly took place. She described her father as a very violent person. DW1 also brought up an issue that related to Peter's relationship with Grace. That, Peter suspected that the deceased was not his child as she got pregnant when she left the home and had vowed to terminate the life of the deceased. DW1 left home the day the incident occurred and had all along lived with her maternal grandfather.

21. DW2 testified generally on the marriage between the accused person and Peter and that he intervened twice when there were problems between the two. To him, the accused person whom he had lived with since birth could not kill anyone.

22. At the close of the defence case the Defence Counsel, **Mr. Jura**, filed written submissions in urging this Court to find that the accused person was not the killer of the deceased as the circumstantial evidence did not meet the legal threshold to sustain a conviction of any offence relating to the demise of the deceased. The State urged this Court to find that the charge had been proved and to convict the accused person.

23. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether the accused person is guilty as charged.

24. As the accused is charged with the offence of murder, the prosecution must prove the following three ingredients: -

***(a) Proof of the fact and the cause of death of the deceased;***

***(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;***

***(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.***

25. There is no doubt that the deceased died. All the witnesses (except the Analyst) and the accused person as well so confirmed. As to the cause of death, the Doctor took this Court through the Post Mortem Report he had personally prepared and suspected that the cause of death was multiple organ failure due to poisoning. The Analyst as well confirmed poison in the deceased's vomit and stomach contents. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

26. On the second ingredient as to whether the accused caused the death of the deceased, since there is no eye-witness account on how the deceased died, reliance is now on the circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

***(i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;***

***(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

***(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.***

27. The foregone principles were set out in the *locus classicus* case of ***R -vs- Kipkering arap Koske & Another (supra)*** and have repeatedly been used in subsequent cases including the Court of Appeal cases of ***GMI -vs- Republic (2013) eKLR***, ***Musii Tulo vs. Republic (2014) eKLR*** among many others.

28. The Court of Appeal in the case of ***Musii Tulo (supra)*** in expounding the above principles expressed itself as follows:-

***4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus: -***

*'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'*

29. The Doctor further testified that he took six samples during the post mortem examination and handed them over to the investigating officer for onward transmission to the Government Analyst for further analysis.

30. The Investigating officer and the Analyst testified on the samples. The Analyst stated that he received an Exhibit Memo Form from Kamagambo Police Station which forwarded five samples for analysis. That, the samples were a piece of the liver of the deceased, a piece of the kidney of the deceased, deceased's vomit, deceased's stomach contents and the deceased's blood. On analysis the Analyst found that the vomit and the stomach contents contained very high concentration of organophosphate pesticides which were poisonous if consumed orally.

31. The Analyst having so well found, the prosecution was still under a duty to prove that the poison found in the deceased's vomit and the stomach contents was as a result of the deceased's willful and deliberate actions or omissions. The Investigating Officer recovered several items at the homestead of Peter. From the house of Grace, he recovered a black plastic cup which he produced as an exhibit. From the house of the accused person the investigating officer recovered a bottle of battery water written 'Chloride Exide', two bottles containing red liquids and a yellow jerrican containing some liquid. PW7 produced them as exhibits as well. The Investigating Officer however did not forward these items and/or their contents to the Analyst alongside the five samples for analysis. **But was such necessary?** I think so. The contents in the cup, those in the bottle written 'Chloride Exide', the two red liquids and the liquid in the yellow jerrican were to be certified to be containing any of the poisons found in the vomit and the stomach contents of the deceased. That would have then found a nexus between the poison in the vomit and the stomach contents of the deceased and the liquids recovered by investigating officer.

32. As matters stand now, it cannot be said with certainty whether any of the liquids recovered by investigating officer were poisons and if so, whether those are the same poisons found in the deceased's stomach contents and vomit. There was therefore need for the investigating officer to forward all the liquids he recovered from the home of Peter alongside the five samples collected by the Doctor during the post mortem examination for further chemical analysis by the Analyst. The liquids recovered by the investigating officer could hence be any liquid be it poisonous or not. Having not done so, there lingers a doubt as to whether the liquids recovered by the investigating officer were the same poisons as those found in the deceased's stomach contents and the vomit. That lacuna is incurable.

33. It now turns out that the prosecution left out such crucial evidence thereby rendering the evidence not reach the required legal bar that the circumstances taken cumulatively formed a chain so complete that there was no escape from the conclusion that within all human probability the crime was committed by the accused person and none else. The doubt must be resolved in favour of the accused person.

34. I must however state that save for the foregone lacuna there was very strong suspicion of the possible involvement of the accused person in the death of the deceased. I however remain alive to the truism that suspicion however strong cannot be a basis of a conviction in a criminal case. Further, I must state that the defence put forth by the accused person and her two witnesses was not holding. It was so easy for one dismantle it more so from the evidence of DW1 which was outrightly fabricated and so exaggerated. DW1 was a student and ought to know the need of speaking the truth. She appeared to me to have been couched, untruthful and her demeanor highly questionable. I however do not need to venture into that arena and say much in view of the state of the prosecution's evidence.

35. The long and short of it all is that the prosecution failed to prove the second ingredient of the offence of murder. The accused person is hence found **NOT GUILTY** of the murder of **TA**. The accused person shall be forthwith set at liberty unless otherwise lawfully held.

36. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of March 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Jura**, Counsel instructed by Messrs. Nelson Jura & Company Advocates for the Accused person.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** – Court Assistant