



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 4 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

FAITH AUMA ARWINGS.....ACCUSED

JUDGMENT

1. **Faith Auma Arwings**, the Accused person herein, was charged with the murder of **Pamela Adhiambo Omondi** (hereinafter referred to as **'the deceased'**) on 21/02/2018 at Kasere village, Kabuor Sub-Location, Central Kamagambo Location in Rongo Sub-County within Migori County. The accused person and the deceased were both married in the same homestead and their husbands were brothers.

2. The circumstances under which the deceased died and what followed thereafter were brought out by the ten prosecution witnesses who testified before this Court. The witnesses were one **Malachi Okoth Orodi**, a neighbour, who testified as **PW1**, **Dennis Ochieng Ogutu (PW2)** who was the husband to **Winnie Awuor (PW6)**. PW2 was a brother to the husband of the deceased and also a brother to the husband of the accused person. The owner of the home where the deceased, accused person, PW6 among others were married by his sons testified as **PW3**. He was **Slyvester Ogutu Olala** aged around 86 years old. PW3 was married to **Slyvia Adhiambo Ogutu** who testified as **PW5**. The husband to the deceased was **Michael Omondi Ogutu** who testified as **PW4**. The Chairman of the Local Community Policing was one **Dishon Danga Chiaji** who testified as **PW7**.

3. The Investigating Officer **No. 45466 Sgt. Patrick Wandera** attached at the DCI – Rongo testified as **PW8**. **PW9** was a Government Analyst stationed at the Kisumu Government Chemist Offices one **Polycarp Lutta Kweyu** and the Doctor who conducted the post mortem examination on the deceased one **Dr. David Mwita Keboyi** testified as **PW10**. In this judgment I will refer to the witness in the sequence in which they testified.

4. The foregone witnesses tendered their evidences and at the close of the prosecution's case the accused person was placed on her defence. She opted to give a sworn defence and called two witnesses; **George Arwings Ogutu (DW1)** who was her husband and a village elder one **Michael Ogola Oracha** who testified as **DW2**. In her defence the accused person admitted stabbing the deceased, but contended that it so happened in self-defence hence it was purely unintentional.

5. Due to the centrality of that defence I will reiterate how the accused person presented it. The accused person testified that she was at her home on 21/02/2018. That, she was a businesswoman engaged in selling *omena* (a small type of fish) at the local market. That, at around 10:30 am she prepared her wares to go to the market and was assisted by her husband DW1 to carry some firewood and the frying pan. When she reached the market DW1 left as she returned home to collect some more firewood. As the accused person was leaving home, the deceased appeared while shouting at her. The deceased demanded that the accused person returns her pair of trousers. According to the accused person, she was married into the home of PW3 earlier than the deceased and when the deceased was married her husband, PW4, did not want his wife to put on trousers and that is when the deceased exchanged her pair of trousers with the accused person's skirt. It was that trouser which the deceased wanted. The accused person told the deceased to give back her skirt and as the deceased was already angry she held the accused person by the neck and began strangling her telling the accused person that she will know what she was made of.

6. It was the accused person's further testimony that she asked the deceased to leave her, but the deceased refused. That, by then the accused person carried a child on her back and a basin full of some wares she usually used in her business at the market which included a knife, which she held it as she carried the basin. That, a scuffle then ensued and the basin and the child fell. That, the knife she had remained in her hand and accidentally cut the deceased during the fight. That, the accused person then proceeded to her business place only to be alerted that a group of *boda boda* riders were pursuing her and she was advised to escape. That, she ran to the stage a boarded a vehicle and headed to Mbita in Homa Bay County. She also stated that she was by then one month pregnant.

7. On cross-examination, the accused person stated that the deceased stayed away from the communal village where the accused person lived with the rest of the family members. That, the deceased went to the accused person's home on 10/02/2018 and returned on 15/02/2018 but the accused person did not know what the deceased wanted. That, on the 15/02/2018 the accused person and the deceased differed and were

separated by another woman not PW5. The accused person further testified that when she met the deceased on 21/02/2018 the deceased was in the company of PW6 and that PW6 had a small child. She further stated that when the deceased was injured she still pursued the accused person to attack her and that is why she ran away. The accused person admitted that as she was running away from the motor cyclists she passed several police stations but did not report the incident. The accused person only learnt that her husband had been arrested over her disappearance. DW1 and DW2 testified on the accused person's good behaviour.

8. It is the foregone defence that must be juxtaposed against the prosecution's evidence on how the incident occurred. The incident was partially witnessed by PW6 and PW1. PW6 stated that she was inside PW5's house when she heard the deceased ask the accused person outside the house why the accused person was killing the deceased. That, she rushed outside only to see the deceased bleeding from an injury on the neck as the accused person began running away towards the market. That, PW6 raised alarm as the deceased chased the accused person. The deceased was staggering and collapsed on the way. She then passed on. Villagers gathered as PW6 went to look for a phone to call and inform PW5 from the local church. PW6 then met the accused person at the market standing with her husband DW1 and noted that the accused person's clothes were blood-stained.

9. PW1 mainly testified of meeting the accused person with DW1 at the market as DW1 asked her whether it was true she had stabbed the deceased and the accused person said that she could not even explain what had happened.

10. PW6 did not testify that the accused person carried some utensils and a child which both fell. She did not either mention seeing any items or the accused person's child on the ground. PW6 also did not hear of any verbal exchanges between the deceased and the accused person over the alleged pair of trousers and skirt. PW6 was inside the house of PW5 as the incident occurred just outside. She only heard the deceased asking why the accused person was killing her. PW6 would therefore have heard of any confrontation between the deceased and the accused person. The attack on the deceased must therefore have been abrupt. Without shifting the burden of proof and of importance is to note that PW4 was not examined on whether he had restrained his wife, the deceased, from wearing trousers and whether he was aware that the deceased had exchanged her pair of trousers with the accused person's skirt. Further, none of the witnesses were examined of any items that were found at the place the deceased and the accused person allegedly had a scuffle and further none of them talked of the accused person having been with her child at the time the incident took place or soon thereafter.

11. It was also confirmed that the deceased was around 6 months pregnant at death. A question that now lingers is whether the deceased in such a state would have confronted and fought the accused person.

12. Can the accused person be said to have acted in self-defence in such circumstances? In dealing with the issue I will first start with a look at the law. **Section 17 of the Penal Code Chapter 63** of the Laws of Kenya states as follows:

17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

13. The common law position has evolved with time from an objective approach to a subjective one. The Court of Appeal in **Ahmed Mohammed Omar & 5 others vs. Republic (2014) eKLR** dealt with the aspect of self-defence in great detail. I fully concur with the analysis in that decision not only because the decision is binding upon this Court but also given that the legal position was rightly and clearly settled. I will herein below reproduce how the Court of Appeal expressed itself in allowing the appeal on the ground that the Appellants acted in self-defence thus: -

The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP v. MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v MORGAN (supra) it was held that:

".....if the appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant."

In BECKFORD v R (supra) it was also held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.

In R. v WILLIAMS [1987] 3 ALL ER 411, Lord Lane, C.J. held:

"In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistaken was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it."

It is acknowledged that the case of DPP v MORGAN (supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also SMITH AND HOGAN'S CRIMINAL LAW, 13TH Edition, Page 331.

Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test.

14. By applying the subjective test and in taking the particular circumstances of this case into account, this Court is not convinced that the accused person acted in self-defence. There is no iota of evidence to suggest that the accused person was attacked by the deceased and believed that she was in any danger that called her to defend herself. There was no evidence of any confrontation at all between the deceased and the accused person for the accused person to allude to defend herself. The defence does not therefore come to the aid of the accused person as it is not well grounded, its so remote and far fetched in the circumstances of this case. I now echo the holding in the case of **Palmer v. Regina (1971) All ER 1077** where the Court stated that:

Where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence.

15. I therefore find that it was the accused person, who by an unlawful act, caused the death of the deceased and did not act in self-defence.

16. Having found that the defence had no legal leg to stand on, I will now deal with the issue of whether the accused person acted with malice aforethought or in other words whether the attack was premeditated. **Section 206** of the **Penal Code** defines '**malice aforethought**' as follows: -

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.

17. The way the accused person related with the rest of the family members was narrated by several witnesses. PW2 described the relationship between the deceased and accused person as at its lowest, that they did not relate well and used to fight and the the last such incident had occurred three days before the death of the deceased. That, PW2 had previously witnessed them fighting. PW2 also stated that the accused person was his good friend before he married PW6, but soon thereafter the accused person changed and became so quarrelsome and differed frequently with PW6. The owner of the home, PW3, also testified that the deceased and the accused person did not relate well although he did not really know why. The husband of the deceased, PW4, also confirmed that the deceased and the accused person severally differed and quarrelled.

18. The answer to why the accused person differed with the other women who were married into the family seemed to have been availed by PW5. PW5 stated that she was not in good terms with the accused person since the accused person did not want any of the wives of PW5's sons to assist her. That, she would quarrel any one who attempted to do so. PW5 stated that she had severally witnessed and intervened in such scuffles involving the accused person and the rest of her sons' wives. PW5's position was corroborated by among others PW7 who was the Village Community Policing Chairman. He stated that he had received complaints from the family of PW3 that the accused person was not in good terms with PW5 and that he directed that the matter be dealt with by the village elders.

19. PW6 also buttressed PW5's position. She narrated an incident where she had gone to fetch water for PW5. That, the accused person did not want her to do so and fought her. That, the accused person bit PW6 all over her body and had to go to the hospital.

20. The accused person also stated that she had differed with the deceased at one time and that she reported the matter to PW4 and PW5. The husband to the accused person however described his wife as a very disciplined and hardworking person who was deeply involved in church matters. DW2 who was the village elder stated that he had never handled any issue involving the accused person.

21. Having carefully considered the rival positions, I find that most of the family members contended that the accused person did not relate well with the others and did not want any one to assist PW5. That position was not outweighed by the defence which even alluded to a dispute between the accused person and the deceased. I hence find and hold that the accused person did not relate well with PW5 and was not at peace with any one in the family who would attempt to assist PW5.

22. There was as well the aspect of the attack. As I have found above, the attack on the deceased seemed to have been sudden and according to PW6 mostly happened outside the house of PW5. The deceased did not live in the homestead of PW3 and PW5. The accused person and PW6 did. The deceased and the accused person had fought over the issue of assisting PW5 around three days ago. As the deceased approached the house of PW5 the accused person must have thought that the deceased was going to assist PW5 and since she did not so want she had to stop her. The accused person then attacked the deceased with a knife (which was produced as Prosecution's Exhibit 2) and aimed at the neck. Although it was a single stab the place of injury matters alot. The accused person aimed the delicate neck area. It is obvious that the neck region houses very vital blood vessels and organs and that any serious injury to the neck highly results to loss of life. This Court saw the knife and it was not a small knife. It was a sizeable kitchen knife and by the accused person aiming such a knife on the neck of the deceased, it left no doubt that the accused person intended the worst.

23. Another issue worth consideration is the fact that the accused person disappeared after the attack. Whereas the accused person may have been right in avoiding the wrath of the *boda boda* riders, she went all the way to Mbita in Homa Bay County. She then moved swiftly to K'Otieno in Siaya County and then fled to Misori Island. PW8 and his team of police officers spent considerable time and resources in pursuing her until her arrest at the Island. It was clear that the accused person was not intent on reporting the matter or surrendering to the police. The accused person went into hiding to avoid any arrest and possible prosecution. It hence means that the accused person was clear that she had committed an inexcusable wrong.

24. By taking the totality of the foregoing, it comes out clearly that the accused person was resolute that none of the wives of the sons of PW5 would assist PW5 and that any one who otherwise attempted stood on her way. The accused person ensured that she differed and fought any one who supported PW5. In the African family set up, one of the duties of the wives of the sons in the family (when the wives are mainly housewives and not in formal engagements) is to take care of their mother(s)-in-law. It is very surprising that the accused person took such a hardline and contrary stand in this matter. Such a person cannot be described as disciplined and hardworking. She was not. Infact she acted with impunity, was indisciplined and intentionally worked against the family unity.

25. Therefore, by taking into account the behaviour of the accused person, the fact that the accused person stabbed the deceased on the neck and the acts of disappearance, I find and hold that the prosecution tendered evidence which demonstrated malice on the part of the accused person. The accused person acted with malice aforethought in this case.

26. Consequently, I find **Faith Auma Argwings** guilty of the murder of **Pamela Adhiambo Omondi** as charged and do convict her under **Section 322(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya. The Accused person was however lucky not to be charged with the murder of the unborn.

27. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of APRIL 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Miss. Apondi Counsel 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