



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 8 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

BENSON OTIENO OBUYA.....ACCUSED

JUDGMENT

1. **Vincintia Adhiambo Otieno** (hereinafter referred to as '**the deceased**') died on 05/04/2018. Her husband one **Benson Otieno Obuya**, the accused person herein, was charged with the murder of the deceased. The particulars of the information were that on the said date the accused person murdered the deceased at Ogango village, Dedee Division, Awendo Sub-County of Migori County. The accused person denied the information and a trial was held.

2. Ten prosecution witnesses testified in support of the information. **PW1** was **Kennedy Ochieng Gondi** who was a cousin to the accused person. The father of **PW1** who was an uncle to the accused person testified as **PW3**. He was **Joseph Gondi Obala**. Another uncle to the accused person one **Simion Onyango Okidi** testified as **PW4**. **PW2** was **Mikwaya Michael Otieno** who was a neighbour to the accused person. Another cousin to the accused person testified as **PW5**. He was **Jared Onyango Orwa**. **Dr. Ian Omum** who conducted the post mortem examination on the body of the deceased testified as **PW6** and a Government Analyst **Mr. R.K. Langat** based at the Government Chemist Laboratory in Kisumu City testified as **PW8**. **No. 91276 Corp. Pamela Adhiambo** and **No. 66286 PC David Karim** both attached at Awendo Police Station testified as **PW7** and **PW9** respectively. The investigating officer one **No. 82782 PC John Bilal** attached to the DCI Awendo testified as **PW10**. I will refer to the witnesses in the sequence in which they testified before Court.

3. The accused person had allowed the deceased to go to her parents' home for a funeral. As a good husband, the accused person organized for all the necessities on his wife's journey. He also gave her return fare. Some days later, the accused person was called by the father to the deceased who is his father-in-law. He was accompanied by **PW1**.

4. The accused person arrived at his father-in-law's home in the afternoon of 05/04/2018. Several elders had assembled. The father-in-law to the accused person later called the meeting into order and explained why he had asked the accused person to attend. The deceased and her mother also attended the meeting. The father-in-law stated that he wanted to warn the deceased of her unbecoming behaviour of leaving his home without his permission. The deceased also addressed the meeting. She complained that she had been suffering in her marriage for long since the accused person was not satisfying her sexually. The deceased further stated that she had shared the issued severally with the accused person but to no avail. The deceased decried the embarrassing times that she had to endure for 7 years in a marriage without children with the accused person. The meeting learnt that the deceased had another man at Ranen Centre and that is where she frequented.

5. After lengthy discussions the deceased was warned of her unbecoming behaviour and she was formally released to the accused person. The accused person, the deceased and **PW1** were ridden back by a brother to the deceased.

6. When they reached home the accused person rushed to take care of the cows in their adjoining farm while the deceased went into their house. **PW1** returned to his home.

7. **PW2** was working in his garden at around 05:00pm. The garden was about 150 metres from the accused person's house. The garden as well as the house of the accused person were on a hill which descended to a nearby river. **PW2** heard a shrill loud voice from the house of the accused person. The voice went out only once and it disappeared. **PW2** was called by **PW1** who lived downhill towards the river and was asked if he had heard the strange voice. **PW2** answered in the affirmative. **PW1** had also been told by some women in the village that there were screams from the house of the accused person.

8. **PW1** rushed to the house of the accused person. He met **PW2** staring intently into the accused person's house. They both wondered what the matter could be. **PW1** told **PW2** of what had transpired between the deceased and the accused person. As they were still standing they saw the accused person going into his house carrying a club and a jembe. He walked towards the gate. On seeing **PW1** and **PW2** the accused person said in Dholuo language that whoever had gone there to rescue will see fire as he will either kill that person or that person will kill the accused person. The accused person further said that he had been disturbed for a long time. **PW1** and **PW2** were shocked to hear the accused person say so. They both knew him as a very humble and non-violent person. **PW1** and **PW2** nevertheless followed the accused person

towards the gate, but at a short and safe distance. They however clearly saw all what the accused person was doing.

9. They saw the accused person remove a key from one of his trouser pockets and he opened the door to his house from outside. The door had been locked from outside using a padlock. The accused person entered the house. He shortly came out and was talking to himself. PW2 heard the accused person saying ‘...Oooh ...what am I seeing? Is my dear dead?’ By then the accused person was so fearful and trembling.

10. PW1 and PW2 decided to go into the house. PW1 was the first one to get inside and called PW2. The house was dark and they used a phone light to see around. They saw the deceased with a rope around her neck tied to the ceiling. The deceased was however squatting next to a wall. PW1 and PW2 then went out of the house. They advised the accused person to report the matter by calling the Area Chief. PW1 and PW2 called and informed their people about the incident. PW1 in particular called and informed his father PW3. Villagers began gathering at the homestead. There was wailing and crying. PW2 left to organize for some lighting as it was getting dark.

11. PW3 was among those who went to the homestead of the accused person. He however did not view the body inside the house as customs would not allow him to get into a son's house. He saw the deceased when she was removed from the house by the police.

12. As advised, the accused person walked towards the Assistant Chief's Office to report the incident. He walked very fast. PW4 sat with PW5 outside PW4's main gate to his homestead. PW5 had visited PW4. PW4 who was an uncle to the accused person wondered what the matter could be. He asked the accused person if there was anything wrong. The accused person told him that the deceased had committed suicide and he was rushing to report the matter to the Assistant Chief. PW4 joined the accused person and they walked towards the Chief's Office. PW5 rushed to the home of the accused person. The Assistant Chief was not at home. The accused person and PW4 decided to report to the Dedee AP Camp. On reaching there the accused person reported that his wife had committed suicide. As they were still there PW5 appeared. He instead informed the police that he had seen the deceased and it was unlikely that she had committed suicide. PW5 doubted the theory of suicide as the rope around the neck of the deceased was loose and the deceased was in a squatting position, there was a visible head injury and blood was oozing from the nose. The accused person was arrested and placed in custody.

13. While at the scene PW3 called the Assistant Chief. He informed him of the incident and the Assistant Chief readily came. Upon viewing the body, the Chief called and informed the OCS Awendo Police Station. The OCS was accompanied by among other officers PW7 and PW9 visited the scene. The police arrived at around 08:00pm. They found many people gathered, the Assistant Chief and some police officers from Dedee AP Camp.

14. The police were led to the house where the body of the deceased was by the Chief. It was a semi-permanent house. It had a single bedroom and a small sitting room. The sitting room was disorganized. There was a table and chairs at the sitting room. The police saw bloodstains on the table. There was a blood trail that led to the bedroom. The police followed the trail and found a woman in the bedroom. They carefully observed the body. The body was leaning on the wall that partitioned the sitting and bedrooms. It had a rope around the neck. The rope was tied to the roof, but it was loose. Her both legs were firmly on the floor. She bled from a serious head injury. Her T-Shirt was full of blood. The hands were swollen and had urinated on herself as her clothes were wet. There was a club just beside the body. It had bloodstains. They recovered the club.

15. The scene was photographed and the body taken to Rapcom Mortuary. The police passed over the Dedee AP Camp and collected the accused person.

16. PW10 was informed of the incident by his Deputy DCIO in the morning of 06/04/2018. He was asked to take up the investigations. He was given the background of the matter as well. PW10 in company of one PC Mutegi proceeded to the scene. They found many people gathered. They interrogated them and were informed of how the deceased died. They also entered inside the house where the deceased was found dead. There was blood on the table at the sitting room. They also found bloodstained clothes in a polythene bag in the bedroom. They collected part of the clothes in the polythene bag. They then went and met the officers from Dedee AP Camp who were the ones who first responded to the scene.

17. PW10 and his colleague proceeded to Awendo Police Station where they recovered the bloodstained club. PW10 recorded several statements from possible witnesses. They also collected the accused person for further interrogation.

18. PW10 organized for a post mortem examination of the body of the deceased and PW6 conducted it on 09/04/2018 at Rapcom Medical Centre Mortuary in Awendo. PW6 confirmed several injuries on the body. They included a severe head injury with a cut wound extending to the back, strangulation marks around the neck from a rope measuring around 6cm, foam in the mouth, blood clots on the left ear, the right ankle was injured and there were scratch marks on the left leg. There was trauma to the left temporal region with contusion of the brain tissues. There was a depressed skull fracture, massive cyanosis of the brain tissues due to lack of oxygen in the tissues to the brain was noted. The cause of death was opined to be asphyxia secondary to strangulation. PW6 filed in a Post Mortem Report and produced it as an exhibit.

19. During the post mortem examination, PW10 obtained blood samples together with fingernails of the deceased for further analysis. He also later collected blood samples from the accused person. PW10 prepared an Exhibit Memo Form and forwarded the samples together with the club, the blood in the polythene bag and a Certificate of Xiphoid process of the deceased to the Government Chemist in Kisumu for analysis.

20. It was PW8 who conducted the analysis at Kisumu. PW8 successfully generated DNA profiles from all the items received from PW10. The profiles were subjected them to a DNA Analyzer where the DNA profiles generated from the club and the blood in the polythene bag matched the DNA profile of the deceased. PW8 concluded that the club had the blood of the deceased. PW8 prepared a Report which he produced as an exhibit.

21. PW10 processed the accused person by escorting him for mental examination at the Rongo Sub-County Referral Hospital on 08/04/2018 where he was found fit to stand trial. PW10 then formally charged the accused person with the murder of the deceased and produced the Mental Assessment Report, the club, the polythene paper and the Exhibit Memo Form as exhibits.

22. At the close of the prosecution's case, the accused person was placed on his defence and elected to give sworn evidence without calling any witness.

23. The accused person denied committing the offence and explained in detail his relationship with the deceased and what happened on 05/04/2018. His evidence was alike to that of PW1 on how he related with the deceased. The accused person admitted that he had undergone serious humiliation from the deceased who kept on running away to other men. At one time the deceased ran away and lived with a man in Kisumu. The accused person went for her and they reconciled. He also reiterated the events of the day at his father-in-law's home until they returned home.

24. The accused person left the deceased in their house and went to take care of their cows. On return he saw the deceased parking her clothes. The accused person asked her what she was doing and the deceased answered that she was free to go and live with whoever she chose. She told the accused person that she had another man at Ranen and she had decided to go and live with him. The response angered the accused person. As the accused person had a stick on his head he hit the deceased on the head. She bled. The accused person then locked the house from outside and went to the Centre to buy some food.

25. On return the accused person found the house locked from inside. He called the deceased to open but there was no response. He then called PW1, PW2 and one **Paul Odhiambo** (not a witness) who assisted him break the door. They then found the deceased hanging on a rope in the bedroom. He then rushed to the Assistant Chief to report the incident. He met PW4 and PW5 on the way.

26. The accused person admitted that indeed the deceased was strangled, but denied that he was the one who did so. On cross-examination the accused person insisted that the deceased hanged herself. The accused person reiterated that he did not intend to injure the deceased at all and that he acted in anger.

27. At the close of the defence case, Learned Counsels left the matter for this Court's judgment. 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 of the offence of murder. As the accused person 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.

28. There is no doubt that the deceased died. All the witnesses so confirmed except PW8. As to the cause of death, PW6 took this Court through the Post Mortem Report which he personally prepared and opined that the cause of death was asphyxia secondary to strangulation. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence and finds that the deceased was fatally strangled.

29. As to who caused the fatal injuries on the deceased, the prosecution relies on circumstantial evidence since although the accused person admitted hitting the deceased with a stick on the head he denied strangling her. This Court is hence 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.

30. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (1949) EACA 135** 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.

31. 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.'

32. According to the accused person he only inflicted the deceased with a single injury. It was on the head. He saw the deceased bleeding before he locked the house and left. According to the Post Mortem Report the injury on the head was not the cause of the death. The deceased was instead strangled.

33. The accused person found the door to his house still locked from outside on return. When he opened from outside he however realized that the door had been locked from inside. It therefore means that the door was not opened from outside during the time the accused person was away. Chances that someone entered the house during the time the accused person was away are not likely.

34. There are hence only two options on how the deceased met her death. Either the deceased locked the door from inside and hanged herself or the deceased was strangled. That is firmly settled by the evidence of PW6. The Doctor confirmed that the deceased did not hang herself but she was strangled. There was evidence of strangulation marks around the neck.

35. The evidence of PW6 is buttressed by the evidence of the other prosecution witnesses who saw the body of the deceased before it was removed by the police from the scene. The body was not hanging from the roof but was firmly on the ground. The most probable thing that happened could highly be that the '*hanging theory*' was just used to cover the strangulation. That did not luckily succeed.

36. The prosecution witnesses variously narrated what transpired. The prosecution evidence was well corroborated. This Court carefully observed the demeanors of the prosecution witnesses. They were candid and forthright. They remained firm during examinations. Some testified of even talking to the accused persons at the scene. I did not find anything to doubt their testimonies. I believed their testimonies. The prosecution evidence did not further support the averment by the accused person that PW1 and PW2 aided the accused person to break the door into his house. Infact the accused person threatened anyone who dared to assist the deceased with dire consequences. PW1 and PW2 only followed at a safe distance.

37. On the other hand, the effect of the defence was that the accused person did not know how the deceased met her death. However, the evidence of the prosecution squarely placed the accused person as the person who was last with the deceased. His explanation of whatever happened was outweighed by the gross prosecution evidence. It is not likely that the accused person did not know what caused the death of the deceased.

38. Looking at the whole body of evidence, this Court is convinced that the events in this case taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the deceased was fatally wounded by the accused person and no one else. I equally find that there are no other co-existing circumstances which would weaken or destroy that inference. The second ingredient of the offence of murder is therefore proved.

39. As to whether there was malice aforethought in the accused person causing the death of the deceased, the starting point is the law. **Section 206** of the Penal Code defines '*malice aforethought*' as follows:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

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(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 fight or escape from custody of any person who has committed or attempted to commit a felony.

40. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions (1975) AC 55*". (emphasis added).

41. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him

with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the conviction of murder with manslaughter observed: -

There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

42. In this case there was no other evidence of what exactly transpired leading to the accused person strangling the deceased save what the accused person stated. Going by the version of the accused person I find that the accused person was truly angered by the response from the deceased. It was a spontaneous reaction. In fact the defence of provocation fits in well.

43. The defence of provocation is provided for in **Sections 207 and 208** of the **Penal Code**. The provisions state as follows: -

207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

208. (1) The term 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or affected by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

44. In his sworn testimony, the accused person stated that was angered by the revelation that the deceased was intending to go back and live with another man. It was probable that the accused person was deprived of the power of self-control and was induced to commit the assault. The defence of provocation is therefore applicable. However, the accused person overreacted. In those circumstances I find no evidence of any motive on the part of the accused person and the third ingredient fails.

45. The foregoing analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

46. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analyzed hereinabove, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and is hereby convicted accordingly.

47. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of December, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Bryan Mboya, Counsel for the Accused person.

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

