



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL CASE NO. 44 OF 2014**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MARTHA AUMA NYANGOL ..... ACCUSED**

**JUDGMENT**

1. **MARTHA AUMA NYAGOL** (“the accused”) was charged with the murder of her husband **JARED OCHIENG OTIENO** (“the deceased”) contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that she murdered the deceased on the night of 26<sup>th</sup> and 27<sup>th</sup> May 2014 at Kanyakwar Village in Kisumu East District within Kisumu County. The prosecution case is that the accused strangled the deceased thereby occasioning his death.

2. As regards the fact and cause of death, Dr Makrine Adhiambo Olwala (PW 5), in accordance with **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, produced the post mortem report prepared Dr Dixon Mchana who conducted the autopsy on the deceased’s body on 2<sup>nd</sup> June 2014 at Jaramogi Odinga Oginga Teaching and Referral Hospital Mortuary after it was identified by Manael Odhiambo (PW 3). The doctor observed that there were non-extensive grazes or abrasions on the deceased’s forearms and left cheek and the left shoulder. There was a transverse ligature mark around the neck, 18 mm wide without any knotting and appeared to be circled twice. Internal examination revealed that the hyoid bone was broken and blood was found in the trachea and bronchi. The brain was swollen with trapping of blood within the brain vessels. Dr Mchana concluded that the cause of death was asphyxia secondary to manual strangulation.

3. There is thus no doubt that the deceased died and he died as a result of strangulation. The question the court must answer is whether the accused strangled the deceased. Apart from the doctor, the prosecution called 5 witnesses to support its case against the accused.

4. The accused’s cousin, Maurice Ochieng Opiyo (PW 4), testified that on the evening 26<sup>th</sup> May 2014, the deceased called him and they agreed to meet at United Mall in Kisumu Town. At the meeting, the deceased, who looked sad, told him that he was quarrelling a lot with the accused and that he was tired and wanted to go home to his mother. PW 3 suggested to the deceased that they go to his house but the deceased refused and insisted that had to go to his house. The following morning PW 4 called the deceased but he could not be reached as his phone was off. He also tried to call the accused but her phone was off too and so he decided to go to the deceased’s house at Manyatta Estate.

5. When he arrived at the house, he found the door shut but the windows open. There was no response

when he knocked the door so he pushed the door and went inside. PW 4 recalled that once inside he saw the deceased lying on the floor at corridor with the white belt, which he recognised as belonging to the deceased, around his neck. He tried calling him but he realised that he was dead. PW 4 went to report to Kondele Police and while he was there, the accused and her brother arrived on motorcycle whereupon the accused was arrested on suspicion of murder.

6. The deceased's brother, Jasper Odhiambo (PW 1), testified that on 26<sup>th</sup> May 2014 at around 9:30pm, the deceased called him and they talked for a while about their mother who was ailing. On the following morning he was called by his sister, Winnie Adhiambo, who informed that the deceased had passed away. He went to the deceased's house where he found a crowd already gathered. When he went into the house and he saw the deceased lying on the floor near the bathroom naked with a white belt around his neck. PW 1 proceeded to Kondele Police station where he reported the incident and returned with the police who collected the deceased's body. On cross examination, PW 1 stated that he was very close with the deceased and that on that night when the deceased called him he did not tell him about any fight with the accused but confirmed that the deceased and accused used to fight. He further stated in cross-examination that he found the accused and her brother at the police station.

7. The deceased's neighbour, Beatrice Odhiambo (PW 2), testified that while she was sleeping she was startled by noises at about half past midnight. She testified that the noise came from the deceased's house and when she listened carefully, the noises sounded like a person was being strangled but after sometime the noises died down. PW 2 told the court that the following day she was surprised to learn that the deceased had been strangled. She also stated that the accused and deceased were staying with a young boy.

8. PC Peter Ooyi (PW 6) testified that that he took over the investigations from the PC Kwambai after the investigations were complete. He produced the white belt as an exhibit in this matter. He also recalled that while he was at the police station, the surrendered to the police in presence of her brother.

9. I placed the accused on her defence after close of the prosecution case. In her sworn testimony, she stated that on the material night her husband arrived home at around 9:00pm and asked her to prepare a bath for him. As she prepared, the deceased went out to receive a call from his brother. After the call, the accused went to the bathroom and while he was bathing the accused saw three masked men entered the house. One of the men who held a gun went to where she was and ordered her to keep mum. He took their phones which were on a stool in the bedroom and switched them off. He then took the accused's white belt which hung on the wall. The other two men dragged the deceased out of the bathroom whilst he was naked and brought him to the corridor. The men placed the white belt around the deceased neck and ordered the accused at gunpoint to pull the belt until the deceased was lifeless. The accused stated that the man holding a gun ordered her to pull and stated that, "*you are the one feeding on stolen money*". The men then escorted her to outside and forced her into a saloon car and they drove off with her. In the morning she found herself in a forest and when she asked around and she was informed that she was at Koderia forest in Oyugis. She walked to the main road and found a boda boda rider who took her to Oyugis town to her sister Lilian Ajwang Oloo (DW 2) who worked in a Chemist. The accused stated that she did not know what kind of work her husband did and whenever she asked him about it he became he angry and they would always end up in a fight.

10. Accused narrated her ordeal to DW 2 and she decided to call their brother who lived in Karachuonyo. Their brother found them at Oyugis and they all went to report the matter to Oyugis Police Station. The Commanding Officer advised to report the matter at Kondele Police where the incident took place. DW 2 testified that on 27<sup>th</sup> May 2014 she was at her shop at Oyugis when the accused was brought by a boda boda rider. DW 2 told the court that the accused was barefoot and muddy. She narrated her ordeal and that is when they called their brother. DW 2 confirmed that the accused and the deceased used to quarrel because the deceased refused to inform the accused what sought of work he did for money.

11. The prosecution case was grounded on circumstantial evidence as no one saw the accused murder the deceased. The general principle applicable to this case was stated in ***Rex v Kipkering Arap Koskei and Another [1949] 16 EACA 135***, the East Africa Court of Appeal held that, "*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 other than that of his guilt.”*

12. The prosecution established that the accused and deceased were living together and on the material night when the deceased died, they were together in the house. The totality of the prosecution evidence was that PW 4 was with the deceased on the evening of 26<sup>th</sup> May 2014 and when he went home, PW 2 called him while he was at home and they talked. When PW 2 and PW 4 went to the deceased’s house that morning, the accused who was living at the home was nowhere to be seen. Being the only person with the deceased on the night he died, I called the accused to give an account of what could have taken place. Since what occurred at the house was within her knowledge, the accused bore the evidential burden to provide a reasonable explanation how the deceased was strangled.

13. **Section 111(1)** of the *Evidence Act* which casts the burden of proof on the accused, in certain instances, provides as follows:

***111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:***

***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:***

***Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.***

14. When the accused fails to offer a reasonable explanation, the court is entitled to presume what could have happened under **section 119** of the *Evidence Act* which states:

***119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.***

15. In giving his explanation, the accused did not deny that she strangled the deceased. She stated that she did so under coercion or duress by certain masked men who came into the house and forced her, under threat of violence, to strangle him. **Section 16** of the *Penal Code* provides for the defence of compulsion on the following terms:

***A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence, nor do any threats excuse the causing of, or the attempt to cause, death.***

16. In considering the defence of compulsion, I am aware that the accused does not bear any burden of disproving the charge against her. The question for the court is whether the defence put forth by the accused is believable, reasonable and indeed raises a reasonable doubt.

17. I think in considering the defence, the accused’s conduct after the act is of particular importance. Neither her nor DW 2 informed the police that she had been abducted after being forced to strangle the deceased. This issue was not put to PW 6, who was at the police station at the time she was arrested. In

my view, the accused's conduct of remaining silent about the fact that she been forced to strangle her husband at gunpoint is conduct inconsistent with her innocence. Further, when PW 1 was cross-examined about what happened at the police station, he stated the accused's brother told him that she had gone to his place and he took her to the police station when he heard that about the deceased's death. This piece of evidence tends to undermine the accused and DW 2 evidence that they were in Oyugis.

18. In order to buttress her case, the accused told the court that her husband was involved in nefarious activities. She stated that she had been told that the deceased was part of the gang conning people in Kisii and that the assailants had come to seek revenge. The deceased's alleged antecedents were not put to PW 1 and PW 4, who knew the deceased intimately and would have testified on his antecedents, criminal or otherwise.

19. For the reasons I have stated I find the accused's defence unbelievable and an afterthought. Further, the prosecution case, being founded on circumstantial evidence, is supported by evidence of motive led by the prosecution. In ***Libambula v Republic* [2003] KLR 683** the Court of Appeal observed as follows;

*We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain of presumptive proof especially where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.*

20. PW 1 and PW 4 testified that that the deceased had been having matrimonial problems with the accused which would have led her to murder the deceased. On my evaluation of the evidence, I find and hold that the accused was alone in the house on the material night when on her own admission, she strangled the deceased. I reject her defence that she was under compulsion when she strangled the deceased and may have indeed had the assistance of the three assailants she referred to. The act of strangling a person is cold, calculated and deliberate. It is intended to cause death and accordingly constitutes malice aforethought within the meaning of **section 206(a)** of the ***Penal Code***.

21. I therefore find the accused, **MARTHA AUMA NYANGOL**, guilty of the murder of **JARED OCHIENG OTIENO** contrary to **section 203** as read with **section 204** of the ***Penal Code*** and I convict her accordingly.

**DATED and DELIVERED at KISUMU this 21<sup>st</sup> day of March 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Odumbe, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.