



IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL CASE NO. 08 OF 2017

CORAM: D. S. MAJANJA J.

BETWEEN

REPUBLIC.....PROSECUTOR

AND

JOSEPH KENNEDY LUBUTSE.....ACCUSED

JUDGMENT

1. **JOSEPH KENNEDY LUBUTSE** (“the accused”) is charged with the murder of **HELIDA ADHIAMBO GUMBER** contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The incident took place on 5th April 2017 at Ukweli Village, Konya Sub-location within Kisumu County. After pleading not guilty, the prosecution marshalled 9 witnesses to prove its case while the accused gave sworn testimony in his defence. The prosecution case was based on circumstantial evidence and as follows.

2. On the night of 5th April 2017, a resident of Ukweli Village, Nicky Dominic Odhiambo (PW 4), was going home and as he walked along a footpath, he noticed a human body along the way. He ignored it as he thought it was a drunk person. When he went home, he returned with a torch and noticed some blood. He decided to call a member of the Community Policing, Aloice Amoth Omenyo (PW 2), who testified that he was called at the scene where there was body of a female. Both PW 2 and PW 4 observed that she had cuts on the neck and shoulder. Close to the scene was a blood stained sack and a pair of blood stained slippers. PW 2 called police officers from Riat Police Post who came and collected the body.

3. Among the officers who arrived at the scene at about midnight was Sgt Kandawala Mukanda (PW 7) who recalled that PW 2 accompanied by other members of the public had come to the police post to report that a body had been found. Together with other officers, he proceeded to the scene and found a female body with deep cuts wounds on the shoulders. He also noted that there was a blood stained sack at some distance and blood stained slippers closer to the body. PW 7 called the Scenes of Crime Officer, Crispinus Abula (PW 6), who came from Kisumu to take photographs which he produced in court. PW 5 organised for the body to be taken to Jaramogi Odinga Oginga Teaching and Referral Hospital (“JOOTRH”).

4. After the deceased’s body had been collected, word of the death spread around the village. The Chief of West Kajulu Location, Tobias Oyieko Omollo (PW 5) recalled that he was informed of the death by his Assistant Chief. By that time, the identity of the deceased had become known. He proceeded to the place where the body was found and was able to see some blood drops a small distance, about 10 metres, from where the body was. As he was on the scene with the Assistant Chief and PW 2, they intercepted some youths going to the home of Thomas Rabuor Otieno (PW 1), who was the accused’s employer, as the accused was believed to be a suspect.

5. PW 2, PW 5, Assistant Chief and the deceased’s father, Tobias Amolo Ohama (PW 3) proceeded to PW 1’s house. PW 1 recalled that when the visitors arrived, the accused called him to come and meet them. They informed him that a girl had been murdered in the village. Since he did not know the identity of the girl, he called the accused who was in the compound. When questioned, the accused told them that he had a relationship with the girl but they had since parted sometime back. After interrogating the accused, the group then proceeded to the accused house within the compound near the gate. When they entered the house, they found blood stains on the floor, a blood stained sheet that was dividing the room into two and a blood stained handkerchief. They also found a blood stained panga. As the group was in the accused’s house, a crowd was gathering outside. The irate crowd threatened to lynch the accused forcing the PW 1 and PW 5 to try and intervene but to no avail. PW 5 called police officers to come and save the situation.

6. PW 7 was one of the officers who came and found the irate crowd. When he arrived, he was led to the accused’s house. He testified that the house was made of iron sheets and had a steel door that had been broken. When he entered the one-roomed house, he saw a blood stained sheet dividing the room. He also noted that there was a lot of blood on the floor. He collected the blood stained handkerchief and panga. As the crowd became more agitated, the officers present secured the accused, lobbed teargas to disperse the crowd and drove off to Kondele Police Station.

7. On 6th April 2017 at about 7.00am, Corporal David Walubengo (PW 9) of Kondele Police Station was directed by his in-charge to investigate the case. He contacted PW 7 about the matter and when he did, PW 7 handed over the blood stained handkerchief and panga. Later in the morning, his in-charge informed him that the area chief had confirmed that the suspect was in custody and was about to be lynched by the members of the public. He quickly proceeded to the home of PW 1 where he found the accused's house already on fire. PW 7, who was at the scene, handed over to him the blood stained panga and handkerchief. He commenced investigations by interrogating those at the scene including PW 1, PW 2 and PW 5.

8. While at PW 1's home, PW 7 and PW 9 decided to re-examine the scene. PW 9 decided to go back where the deceased's body was recovered. He did not find any blood at the scene but as he went back to PW 1's home he could see a few drops of blood that ended up there. He recalled that he continued to look around and at the adjoining plot, he was able to find a pit which was about 20 metres from PW 1's house along the boundary. PW 1 told him that they used the pit to dispose of house and animal waste. PW 9 saw some blood stained shrubs and when he asked one of the villagers to go into the pit with a torch and see what could be recovered, the person recovered a green T-shirt with a lot of fresh blood, a blood stained sack and a pair of white blood stained shoes which he took as exhibits.

9. PW 9 forwarded the exhibits he had collected to the Government Chemist by an exhibit memo form dated 12th April 2017. These items were the blood stained sack found within the vicinity of the deceased's body, the blood stained panga, the blood stained handkerchief, green blood stained T-shirt, a blood stained sack found in the pit, a blood stained white pair of shoes, a blood stained pair of slippers, cartilage and fingers nails taken from the deceased at the autopsy and a buccal swab taken from the accused. PW 9 instructed the Government Analyst, Robert Lang'at (PW 8) to examine the items and determine the genetic relationship of the blood on the items. He conducted a DNA analysis on the blood in each of the items and compared it with the DNA from the deceased's cartilage and the accused's buccal swab. He documented his findings in his report dated 8th March 2018 where stated that the DNA profiles generated from the blood stains from the sacks, the panga, the handkerchief, the green t-shirt, the pair of shoes and the pair of slippers matched the DNA profile of the deceased.

10. When put on his defence, the accused denied killing the deceased. He also denied that he knew the deceased and that the only girl he knew was called Tindi who was a student but was not attending school. He recalled that on the material day, he was at home attending to his normal chores and that on that night, he was at home alone with PW 1 and nothing remarkable took place. He told the court that there was a rubbish pit in the neighbouring plot but that it was used by other neighbours and that the footpath through that plot was public and used by other people.

11. The offence of murder is defined by **section 203** of the **Penal Code** follows, "*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*" The prosecution must prove beyond reasonable doubt the following three ingredients; first, it must prove the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

12. The fact and cause of death is not disputed. PW 9 organised for the post-mortem which was done by Dr C. S. Otieno at JOOTRH on 12th April 2017 after the body was identified by PW 3. He observed several injuries as follows; a wound on the right side of the neck approximately 5 X 1 cm and about 4 cm deep, a wound on the left side of the neck approximately 4 X 1 cm about 2 cm deep, a right wound on the right front of the mandible about 8 X 1 cm, wound on the left wrist about 4 X 1 cm, wound on the left front forearm about 4 X 1 cm, wound on the right wrist about 8 X 1 cm, wound on the left shoulder 13 X 1 cm, wound on the right shoulder 6 X 1 cm and abrasion on the right lateral thigh. The jugular vein was severed on the right side hence Dr Otieno concluded that the deceased died as a result of excessive bleeding from the jugular vein due to stab wound injury on the right side of the neck. These injuries were consistent with those observed and described by PW 2, PW 3, PW 4, PW 6, PW 7 and PW 9.

13. The issue for consideration is whether the accused caused the unlawful act that resulted in the death of the deceased. In this case there is no direct evidence that the accused assaulted the deceased hence the case is grounded on circumstantial evidence. The principle applicable in considering this kind of evidence was articulated by the Court of Appeal in **Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR)**, where the Court observed that:

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those 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.

14. What then is the cogent evidence against the accused? It is not in dispute that the accused was employed by PW 1 as a caretaker and he was living in a one-room iron sheet house close to the gate. It is in this house that on the morning after the deceased's body was found, that the blood stained panga and handkerchief were recovered. The testimony of PW 1, PW 2, PW 5 and PW 6 is that when they went to the accused's house they found a blood stained sheet separating the sleeping and sitting area in the room, blood stains and the blood stained panga and handkerchief. Although the blood stained panga and handkerchief were recovered and subjected to DNA analysis, the other items were destroyed when the irate crowd set the house of fire. The sum total of the evidence of the blood stained items recovered in the accused's house, point to the fact that the deceased was in the accused's house on that night and that she bled profusely. Likewise, the finding of panga with the deceased's blood puts the accused in the line of suspicion. In his defence, the accused admitted that he was at home on the material night and nothing remarkable took place. In these circumstances, I am constrained to hold that only the accused could explain how items with the deceased's blood were found in his house.

15. Since the evidence shows that the deceased was in his house on that material night after which she was found dead, the accused shoulders the evidential burden to provide a reasonable explanation what could have taken place in his house that night. **Section 111(1)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which casts the evidential burden 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.

16. The accused's explanation was but a mere denial of his involvement. As the accused failed to offer any reasonable explanation as to how the deceased, who was in his house and whose blood was found on certain items including a weapon, came to be found dead a short distance away from his house, the court is entitled to presume certain facts under **section 119** of the *Evidence Act* which states as follows:

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.

17. Although no one saw the accused and the deceased together, the cumulative effect of each piece of evidence gives a complete picture as to what happened to the deceased on that night. The deceased visited the accused in his one-roomed house. A quarrel or argument must have ensued between the two of them. Whatever happened between the two of them, the evidence points to the fact that the accused took the panga and began assaulting the deceased. The deceased attempted to defend herself, as evidenced by the injuries on her hands and shoulder but with one blow, the accused swung the panga and cut the deceased's jugular vein causing her to start bleeding profusely. This maelstrom of violence caused blood to spill all over the room; on the floor, on the walls and on the bed sheet dividing the room. After the deceased died, the accused decided to dispose of the deceased's body. Using the first sack, he tried to carry the deceased's body but because of initial heavy bleeding the accused, he left the first sack and got another one to carry the deceased's body. In order to create a ruse to draw public attention from himself, he dumped the deceased's body along a public pathway. He left the sack in the area while the deceased's blood stained slippers dropped near the body. The accused then returned home, removed his blood stained t-shirt and shoes and dumped them together with the first sack in the pit in the neighbouring plot.

18. Before I consider the final issue of malice aforethought, I will deal with two issues raised by counsel for the accused in submissions. There was evidence from PW 5 that he had gone through the accused's mobile phone which disclosed that he had spoken to the deceased on the night prior to her death. PW 9 did not produce the phone records from the mobile provider hence, counsel submitted, that the court was entitled to draw an adverse inference in favour of the accused. The second issue is that despite DNA examination of the various exhibits, the accused blood or anything connected to him was not detected. Counsel submitted that as long as the accused handled any item, his DNA would have been found on the item, hence there was nothing connecting the accused to the deceased.

19. The two issues raised by counsel for the accused must be viewed against the background of the entirety of the evidence. The phone evidence would have connected the accused to the deceased and even if it did not, the evidence of the blood in the accused's house together with the blood stained panga and handkerchief point to the fact that the deceased was in the accused's house. The fact that the accused admitted that he was at home the whole night, it is only him who can explain why none of his DNA could be found on any of his items. As I stated the totality of the evidence leaves no doubt that it is only the accused who killed the deceased. There is no other co-existing explanation that would lead to any other conclusion.

20. In determining whether there was malice aforethought, the court is entitled to consider factors such as the part of the body that was targeted, the type of weapon used, if any, and the type of injuries inflicted upon the deceased are considered (see *Rex v Tubere s/o Ochen [1945] 12 EACA 63*). It is evident that the deceased sustained multiple and serious cuts inflicted by a panga. These injuries could only have been inflicted with intent to cause grievous harm or in fact death. Further, the accused's act of disposing of the deceased's body in the manner he did only cements his felonious intent. I therefore find and hold that the prosecution proved malice aforethought beyond reasonable doubt within the meaning of **section 206(a)** of the *Penal Code*.

21. Consequently, I find the accused, **JOSEPH KENNEDY LUBUTSE**, guilty of the murder of **HELIDA ADHIAMBO GUMBE** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 30th day April of 2018.

D.S. MAJANJA

JUDGE

Mr Osodo, Advocate for the accused.

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