



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE NO. 28 OF 2017

CORAM: D. S. MAJANJA J.

BETWEEN

REPUBLIC.....PROSECUTOR

AND

STEPHEN OWINO OKUMU.....ACCUSED

JUDGMENT

1. **STEPHEN OWINO OKUMU** (“the accused”) is charged with the murder of **M N O** 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 24th September 2017 in Muhoroni Sub-county of Kisumu County. After the accused pleaded not guilty, the prosecution marshalled 6 witnesses to prove its case. The accused gave sworn testimony in his defence. The prosecution case was as follows.
2. On the night of 23rd and 24th September 2017, Fanuel Mbola (PW 2) was at home when he heard a lot of noise. Since it was near the trading centre, he ignored it but when it persisted, he decided to go out and find out what the problem was. Together with his brother, Christopher Odero, they walked up to the road going to the home of Rebecca Ogada (PW 1). PW 2 recalled as they walked along the road they could hear someone shouting for help and as they proceeded they met the accused who was staggering. When they asked him to identify himself, he told them that he was from PW 1’s home and that his friend had had been killed. He went back with them to PW 1’s homestead, opened the gate, calmed the barking dog and led them into the house.
3. PW 1 testified that when he was leading them to the house, the accused had a blood stained t-shirt. The accused opened for them the door and they entered into the house where the lights were on. They went into the sitting room where they found a woman lying face up on the floor. Her clothes had been pulled up to her chest and a panty had been partly pulled down her left leg. PW 1 observed that close by the body, there was a twisted metal bar, two mobile phones, a blood stained kitchen knife on the sofa set, a bottle of whisky with some alcohol, two glasses and a bottle of water on the table.
4. PW 1 told the court that when he arrived at PW 1’s homestead, he asked whether there was anyone else in the homestead, the accused told him that someone by the name *Maasai* was residing in a separate house in the compound. They went to the house and knocked the door. *Maasai* woke up and they went back to the main house. When *Maasai* saw the deceased’s body, he ran out and raised alarm. PW 2 testified that he called the Assistant Chief who then alerted the police.
5. On the material night, PW 1 testified that she had been catering at a funeral in God Abuoro when she was called received information from one of her cateresses that there was an incident in her house. She woke up her driver, Samuel Otieno Nyateng’ (PW 3), and they proceeded to her homestead. When they arrived there, they found many people in the compound. PW 1 recalled that she found the accused lying outside in the compound. She was restrained from going into the house but was nevertheless informed that deceased, who was her househelp, had been murdered. On his part, PW 3 recalled that the accused was lying near the gate and when he went to look at him, he noted that he was drunk. He went into the house and identified the deceased, who was lying on the floor, as PW 1’s househelp.
6. Corporal John Kenji (PW 5), the Investigating Officer from Koru Police Station, recalled that his Commanding Officer informed him of the incident and instructed him to investigate the matter. He proceeded to PW 1’s homestead in the company of other police officers. When he entered the house, he found a woman lying face up in a pool of blood. She had stab wound on the forehead, left arm and cheek and when he turned the body, there was also a stab wound on the back. Her panties were hanging on the left leg. He collected several items that were near the body and which included a twisted metal bar, a blood stained knife which was on the sofa, a bottle of Best Whisky with some alcohol left in it and two mobile phones; an Itel and Techno.
7. PW 5 also testified that he found the accused lying outside. He could not speak and appeared to be drunk. He noticed that the T-shirt he was wearing was stained with fresh blood. He arrested the accused, took him to the police station and secured the T-shirt. He also organised

for the body to be taken to Rachar Sub-County Nursing Home Mortuary where the post-mortem was done by Dr Dixon Mchana on 26th September 2017.

8. PW 5 prepared an exhibit memo dated 24th September 2014 and forwarded the following items to the Government Chemist, Kisumu; the blood stained kitchen knife, blood stained clothes from the deceased, blood stained clothes from the accused, a blood sample from the accused, buccal swab from the accused, corstal cartilage and a high vaginal swab taken from the deceased at the post-mortem. The Government Analyst was required to examine the items submitted and determine the origin and genetic relationship of the blood stains. The Government Analyst, Richard Lang'at (PW 6) confirmed that he received the exhibit memo form forwarded by PW 6 and proceed to examine all the items submitted. After conducting a DNA analysis of the blood stained items, he prepared a report dated 5th March 2018. He concluded that the DNA profiles generated by the blood stains from the accused's shorts and shirt, kitchen knife, deceased's clothes and High Vaginal Swab matched the DNA profile of the deceased.

9. Based on the evidence I have outlined, I put the accused on his defence. In his sworn testimony he confirmed that he was employed by PW 1 and on material day he did his chores around the homestead as usual. After work, he went to PW 1's house to watch 7.00pm news. He found the deceased who brought food which they ate together. He recalled that as they were eating, she received a phone call and it appeared that she was quarrelling with the person. She even went outside to talk to the person. When she returned, she went to the cupboard, retrieved a bottle of whisky and they both started drinking. The accused testified that he had never drank before and that they both became very drunk. He recovered at about 10.00pm when he heard someone crying. When he stood up, he saw the deceased lying in a pool of blood. He touched her and as he tried to talk while bending down, his clothes became blood stained. He then decided to call the neighbours for help. When the neighbours came and he directed to the house thereafter he could not recall what happened until he recovered at the police station.

10. 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, 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*.

11. The fact and cause of death is not disputed. All the witnesses who saw the deceased's body observed she had sustained injuries and was lying in pool of blood. These observations were consistent with the findings of Dr Dixon Mchana who conducted the post-mortem on the deceased's body after it was identified by George Otieno Onyango (PW 4). Dr Mchana observed several injuries including two lacerations on the mid forehead, a longitudinal laceration on the cheek, five stab wounds on the upper chest penetrating into the chest and a bleeding at the back of the skull. He certified that the deceased died as a result of severe blood loss following mixed force trauma following assault.

12. The issue in this case is whether the accused caused the unlawful act that resulted in the death of the deceased. As no one saw the accused assault the deceased, the case against him 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.

13. The prosecution case was that the accused was the only person in the company of the deceased on the material night and the only one who could have killed her. The prosecution established that the accused and the deceased were both employed by PW 1. PW 1 testified that only the accused, deceased and one *Maasai* were residing in her homestead and on the material day, PW 1 had left all of them at her home as she went on her catering business. The accused confirmed as much and that he was with the deceased on the material night when they had dined and took alcohol. The DNA tests on the accused's clothing confirmed that they were stained with deceased blood thus putting him at the scene where the deceased's body was found.

14. In these circumstances, it is incumbent for the accused to give a reasonable explanation as to what could have happened to the deceased. The burden on him is an evidential burden and he need only raise doubt that he was not the one who killed the deceased. This is provided for under **section 111(1)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which states:

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.

15. The issue then is whether the between the time the accused started drinking and he recovered, a third party could have killed the deceased. There was a suggestion that *Masaai* could have killed the deceased. In my view, his culpability is excluded by the testimony of PW 2 who testified that when they went to wake him up, he was asleep and when he went to view the deceased's body he ran out and raised alarm. His conduct was inconsistent with that of a guilty person and clearly at the time the incident took place he was asleep and could not have known what had taken place. The fact that he was not called as a witness does not undermine the prosecution case as he would not have

shed any light on the incident other than state that he was asleep in his house and was only woken up by PW 2.

16. Since the evidence excludes Masaai as the only other person who could have killed the deceased, I find that the evidence points exclusively to the accused who, admittedly, was alone with her. There was no sign of a break in the house by any third party. Further, the accused's behaviour is inconsistent with his innocence. Although he stated he was drunk, he was able to lead PW 2 back to the house, open the gate for him, calm the dog and then show him *Masaai's* house. The testimony of PW 2 and PW 5 is that there were two glasses and a bottle of Best Whisky on the table which was a prelude to the orgy of violence that was to follow. Having established that the accused and the deceased were the only ones in the house, the court is entitled to presume certain facts by reason of **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. The totality of the evidence is that the accused and deceased sat PW 1's sitting room and started drinking. In the course of drinking, an argument ensued between the two. From the manner in which the deceased's body was found, her clothes pulled up to her chest and her panty hanging the left leg, it is clear that the accused attempted to have sexual intercourse with her. This must have been rebuffed. This led to a fight with the deceased using knife to stab the deceased causing her death. Upon realising the gravity of his act, the accused went outside shouting that his friend had been killed to deflect attention from himself. I therefore find and hold that it is the accused who assaulted the deceased causing her death.

18. I now turn to the issue of malice aforethought. In determining the question of malice aforethought, the court is entitled to take into account the surrounding circumstances including 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 (see *Rex v Tubere s/o Ochen [1945] 12 EACA 63*). In this case one of the surrounding circumstances to be considered is whether the accused was so intoxicated as to lack a specific intent to commit the offence. The witnesses testified that the accused was reeking of alcohol when they found him and the circumstantial evidence of the whisky bottle and the two glasses point to the fact that the accused and deceased had been drinking.

19. **Section 13** of the *Penal Code* deals with the issue of intoxication as follows;

13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs. [Emphasis mine]

20. While intoxication is not in itself a defence, it may be taken into account in determining whether the accused had a specific intent to cause death or grievous harm. In the case of *Manyara v R [1955] 22 EACA 502*, the court noted that;

It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing the defence rests on him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this on the accused.

21. In determining whether the accused was intoxicated to the extent that the intent was negated, the court must have regard to all the facts. In *Richard Kamindu Ndungu v Republic NRB CA Criminal Appeal No. 194 of 2004 [2012] eKLR* the Court of Appeal gave such consideration as follows;

[20] *It was not disputed that the appellant had taken some alcohol. By section 13(4) of the Penal Code, intoxication is a factor to be taken into account in determining in this case whether the appellant had formed an intention to kill. The alcohol may not have been so excessive as to interfere with the appellant's mental faculties. Nonetheless, the alcohol appears to have been enough to produce in the appellant some element of aggression. We come to the conclusion that although the deceased died as a result of the appellant's action, the appellant did not have the intention to kill her. We find that the superior court erred in convicting the appellant of the offence of murder when no malice aforethought was established.*

22. While I accept that the accused may have been drunk, I have already found that his behaviour after the incident was not like that of an innocent person. He stabbed the deceased five times with a knife on the chest and these could not have been merely because he was drunk. The manner in which the deceased was found with her clothes pulled up to the chest and her panty half removed indicate points to an attempt

by the accused to have sexual intercourse with the deceased but which must have been rebuffed with fatal consequences for the deceased. I am therefore satisfied that the prosecution proved malice aforethought.

23. I find the accused **STEPHEN OWINO OKUMU** guilty of the murder of **M N O** and I convict him accordingly.

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

D.S. MAJANJA

JUDGE

Mr Maua, Advocate for the accused.

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