



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL CASE NO. 21 OF 2015**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**EDWARD OKOTH OTIENO.....ACCUSED**

**JUDGMENT**

1. **Edward Okoth Otiemo**, the accused person herein, was charged with the murder of **Benedeta Okumu Mwai** (hereinafter referred to as '**the deceased**') on 15/06/2015. The particulars of the information of murder were that the accused person murdered the deceased on 30/11/2014 at Kitere village in Rongo District within Migori County in the Republic of Kenya. He denied the information and a trial was held.

2. A total of seven witnesses testified in support of the information. **PW1** was **John Odongo Daudi** who was a neighbour of the deceased. **Dorothy Achieng Okeyo** testified as **PW2**. The deceased was her mother-in-law. **Dorine Anyango** was a grand daughter to the deceased and testified as **PW3**. A son to the deceased one **Joseph Otiemo Mwai** testified as **PW4** and another son to the deceased one **Lazarus Ochieng Mwai** testified as **PW5**. **No. 60296 Cpl. Damianus Onyango** attached to Kamagambo Police Station and who was the investigating officer testified as **PW6** and **Dr. Dennis Obuon** who conducted a mental assessment for the deceased person testified as **PW7**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case was that in the morning of 30/11/2014 **PW1** and one **Paul Omondi Ogutu** ('**Paul**' now dead) went to repair the house of the deceased which was in a homestead. As they continued working the deceased began preparing food for them. Suddenly a lady known by the name of **Nyar Mumbo** (not a witness) also came to the house of the deceased and began assisting her moreso that the deceased was quite aged. The deceased sent Nyar Mumbo to buy some onions and tomatoes.

4. The accused person then also came to the house of the deceased and on seeing **PW1** and **Paul** asked them who had allowed them to do the repairs and they informed him that it was the deceased. The accused person then entered the house of the deceased and sat down. On seeing **Nyar Mumbo** returning from the shop the accused person rose and harshly asked her what she had gone to do there. He then advanced towards **Nyar Mumbo** and the woman dropped the items she had bought and began running. The accused person chased her and caught up with her, he grabbed her neck as **Nyar Mumbo** screamed for help. **PW1** and **Paul** rushed and separated the accused from **Nyar Mumbo**. When **Nyar Mumbo** was freed she ran away as **PW1** and **Paul** returned to their work.

5. **PW1** and **Paul** then became very watchful of the accused person. After a short while the accused person pounced on the deceased and grabbed her by the neck and asked her why she had sent police officers to arrest his brother **Ben** and him. The deceased pleaded with him as she struggled to free herself. **PW1** and **Paul** then intervened and separated them. The accused person then picked a piece of timber and aimed to hit **Paul** on the head but **Paul** neutralized the attack. The deceased then pleaded with **PW1** and **Paul** to leave her house before they were all killed by then accused person. The two left as the accused person was mumbling something to the deceased.

6. **PW2** had gone to wash some clothes at the nearby well when a boy called **Gordon Opiyo** (not a witness) ran and told her to rush and assist the deceased at home. **PW2** rushed home and as she was nearing the house of the deceased she heard the deceased wailing. On entering in the house **PW2** found the deceased lying on the floor and on observing her she realized that the deceased was not breathing. As the accused person was also inside the house **PW2** asked him what had happened to the deceased and the accused person replied that the deceased had fallen down as she was going out to chase some hens at the backyard. **PW2** began calling the family members who immediately gathered as well as the neighbours.

7. There were screams and wailing in that homestead as all mourned the deceased. **PW3**, **PW4** and **PW5** being family members were also informed and came to the house of the deceased. They also confirmed that indeed the deceased was dead and that the body had no visible injuries. It was **PW4** who organized and took the body to **Rapcom Mortuary** for preservation pending burial.

8. PW6 learnt of the death of the deceased through a police informer. The police then visited the home of the deceased a day after her death and found people gathered as they mourned the deceased. The police interrogated the people but with no break-through. Since the body of the deceased had been taken to the Mortuary PW5 led the police thereto and identified the body. The police observed it. PW6 was convinced that the deceased did not die a natural death as according to him he saw some strangulation marks on the neck.

9. PW6 carried out further investigations. He recorded statements from various witnesses and attended a post mortem examination which was conducted by **Dr. D. Marita** on 09/12/2014. PW6 then kept the duly filled in Post Mortem Report. On completion of the investigations PW6 forwarded his file to the Office of the Director of Public Prosecutions for further directions where he was directed to charge the accused person with the murder of the deceased. He then organized for and had the accused person arrested by the Area Chief and brought to the station. PW6 then accompanied the accused person for mental assessment at Rongo Sub-County Hospital on 12/06/2015 and thereafter charged the accused person with the murder of the deceased.

10. As Paul had died, PW6 produced the written statement of the said Paul as an exhibit as PW7 produced the Mental Assessment Report for the accused person as an exhibit. The prosecution and the defence also agreed to produce the Post Mortem Report as an exhibit without calling the maker.

11. At the close of the prosecution's case, the accused person was placed on his defence and opted to give sworn testimony without calling any witness. The accused person recalled how he went to see her grandmother, the deceased, at her home in the morning of 30/11/2014. That, when he arrived there he entered the house and called her. Although the deceased responded she took around 30 minutes before she came out of her bedroom and as she walked towards him the deceased fell. The accused person ran to her aid and called her but she did not respond. He then called out the wife of his uncle whom she thought was within the homestead but in vain. He then asked his cousin to rush and call one of his aunts as he also ran to his other uncle's homestead to inform him. That, the accused person returned with his only to find the deceased lifeless.

12. When the family members finally confirmed that the deceased was dead the body was taken to the Mortuary and the burial was organized. That, all went on well until 26/05/2015 when he was arrested at the Centre by the Area Chief and led to the police station where he was later charged with an offence he did not commit. To the accused person, the deceased naturally died and out of her advanced age of 73 years. The defence case was then closed.

13. The Defence Counsel relied upon the submissions made at the close of the prosecution's case in urging this Court to acquit the accused person.

14. From the above evidence, this Court is now called to find if the ingredients of the offence of murder have been proved in this case. The offence of murder carries three ingredients which are: -

***(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.***

15. On the first issue, there is no doubt that the deceased died. That was attested to by PW1, PW2, PW3, PW4, PW5 and PW6 who saw the lifeless body of the deceased. In fact PW4 witnessed the post mortem examination conducted on the body of the deceased. The first limb is hence answered in the affirmative.

16. As to the cause of the death of the deceased, there is no doubt that a post mortem examination was conducted on the deceased. A Post Mortem Report was prepared by Dr. Marita who conducted the autopsy and handed it over to PW6. That report was however produced without the advantage of calling and examining the maker. According to the report there were multiple bruises around the neck and a fresh bruise on the left leg. The lungs had features of a chronic lung disease probably due to smoking. The heart was enlarged and there was a blood clot in the pericardium. There was also some bleeding on the head into the skin at the occipital region. The cause of death was opined to be cardiovascular arrest due to severe blood loss due to ruptured right ventricle.

17. According to PW6, the deceased died out of strangulation. That position is however not supported by the medical report. As said, this Court did not have the advantage of the maker of the report or any other Doctor to clarify whether the rupture of the ventricle that caused the cardiovascular arrest could have been caused by injuries noted in the report. There was as well the issue of the chronic lung disease which the Doctor suggested it could have been caused by smoking. There is evidence that the deceased used to prepare and sell the local illicit brew called *chang'aa*. Could such a lung infection result from working under such an environment? Could such an infection cause a cardiovascular arrest? What of the advanced age of the deceased? And the questions seem endless.

18. There is therefore no cogent evidence that the death of the deceased was not a natural one. There are chances that the deceased died from a natural cause and not necessarily out of foul-play. The prosecution must always endeavour to avail all its witnesses especially the expert witnesses to testify before the Court so that the Court can have a good insight and expert understanding of the matter under investigation and subsequently come up with an informed finding which is not contrary to settled expert procedures, principles and findings in a certain field. In a case where such crucial expert witnesses do not testify then the Courts find themselves in a very uncomfortable position of being called upon to examine expert documents and come up with a finding. That, respectfully, is outside the ambit of a trial Court lest the Court turns itself into a witness. As such, this Court is not in a position to rule out natural attrition as the possible cause of the death of the deceased in this case. I hence find the second limb in the negative.

19. Whereas there may have been a disagreement between the deceased and the accused person, that alone cannot sustain a suspicion that the accused person killed the deceased. Criminal cases are proved by evidence and not otherwise. As stated by the Court of Appeal in the case of **James Tinega Omwenga v. Republic (2014) eKLR**: -

*“20. Based on the evidence on record, we find that the only thing that connects the appellant to the offence is suspicion...*

*It is trite law that suspicion alone cannot be the basis for inferring guilty. In Mary Wanjiku Gichira vs. Republic -Criminal Appeal No. 17 of 1998, the court held,*

*'suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.'*

*See also this Court's decision in Sawe vs. Republic (2003) eKLR 364.”*

20. It is therefore the finding of this Court that the prosecution has failed to establish that the accused person caused the death of the deceased having failed to prove the ingredients as required in law.

21. I now come to the conclusion that the information of murder facing the accused person has not been proved. The accused person herein, **Edward Okoth Otieno** is found **NOT GUILTY** of the murder of **Benedeta Okumu Mwai** and he is hereby acquitted accordingly. He is therefore set at liberty unless otherwise lawfully held.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of June 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Mr. Omonde Kisera** Counsel instructed by the firm of Messrs. Omonde Kisera & Company Advocates for the Accused person.

**Miss Atieno**, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Evelyn Nyauke** – Court Assistant