



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**

**HCCRC NO. 15 OF 2015**

**(CORAM: J.A. MAKAU – J.)**

**REPUBLIC.....PROSECUTION**

**VS**

**BENARD OTIENO OCHIENG...ACCUSED**

**J U D G M E N T**

1. The accused **CALEB OTIENO MITO** is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya**. The particulars of the charge are that on the 17<sup>th</sup> day June 2015 at Got Agulu sub-location, Bondo Sub-County within Siaya County murdered one **TRIZZAH VIOLET ANYANGO**.

2. The Prosecution called five (5) prosecution witnesses. The facts of the Prosecution's case are that the accused and deceased were living in one room as man and wife at Uhaya, that on 17/6/2015, the accused killed Trizzah Violet Anyango by strangulation. That the neighbours heard commotion at the deceased's room, saw the accused walking out and padlocked the door from outside. The accused told PW2 that he was going away. That his wife had bothered him for a long time and he did to her what he had to do to her. PW2 informed PW3 and they sought assistance to have the door to deceased and accused room opened but when accused returned, the crowd forced him to open the door and on opening the door they found the deceased dead on the bed. The accused was arrested, police were called and he was re-arrested by police. The deceased's body was taken to Bondo Sub-district Hospital for postmortem. The accused was subsequently charged with this offence.

3. PW1, Domitila Apondo Gor, mother to the deceased stated that on 17/6/2015 at 10.00pm, she received a telephone call to the effect that Trizzah's (deceased) employee, who was operating her motorcycle, strangled her to death. PW1 called her other children and all proceeded to Got Agulu where the deceased was residing, but on the way, she received further information that the deceased's body had been taken to Bondo District Hospital mortuary. PW1 and her children proceeded to Bondo and viewed the deceased body. PW1 observed the deceased, neck had a black mark and that her fingers had cuts. That on 22/6/2015, PW1 identified the deceased body in presence of a police officer to the doctor for postmortem purposes. PW1 identified copy of postmortem report form as MFI-P1. PW1 stated the employee to her daughter were known to her as he used to bring Trizzah Anyango home. That PW1 had seen him twice and stated that the deceased had no other employee and identified the accused in court (pointing at him) at the dock as the employee of her late daughter Trizzah Anyango.

4. During cross-examination, PW1 stated Anyango told her the accused killed her daughter after she was told so by her daughter.

5. PW2, Everlyne Adhiambo Odhiambo, a business lady at Uhaya Market, a neighbour to the accused and the deceased's room stated that on 17/6/2015 between 7.30am-8.00am she was on her way to her place of business at Uhaya market when she found her neighbour Margaret Akongo (PW3) preparing chapatis, and who told her there was an issue at the market and at Caleb's there was a problem as she had heard, he had a fight with his wife who they referred to as "Teri". PW2 stated PW3 also told her that Caleb had told her that his wife had bothered him for a long time and he did to her what he had to do to her; that he rode away in a motorcycle after he closed the door to his house with a padlock. PW2 was shocked as "Teri" was known to be a tough fighter with men. PW2 thought Teri, if she was alive, she could not have been locked inside the house. PW2 tried to call Teri's number but there was no response though they could hear the phone ringing as their room was near that of the deceased. PW2 and PW3 then looked for a welder to break the padlock, who came and told them he could not break the padlock advising them to look for a bicycle repairer who would be able to do so. That they looked for one but before he had broken the padlock, Caleb, the accused returned with the motorcycle, he had left with and by that time, there was a big crowd at the deceased's house. PW2 and members of public demanded that the accused open the door, he opened the door, people entered into the room with him and immediately came out with Caleb telling him "umeuwa Teri", meaning "Caleb had killed Teri". PW2 asked a friend to inform police of Wamba Police Station. The police came after a while and PW2 then entered the room and saw the body of Teri lying on the bed. PW2 identified Caleb as the accused in the dock who she stated was known to her as she had found him at the market when he came to the town. She stated she had known him for a period of less than a year since he found her at the market and that he was known by the nickname of "Pepe" and that she knew him as husband to "Teri", the deceased. She confirmed the accused is the one who opened the door to the room where the deceased was locked dead. PW2 stated she had known the deceased for 3 years as a businesswoman and that she was staying with "Pepe". PW2 stated Teri was murdered by the accused "Pepe".

6. On cross-examination, PW2 confirmed "Teri" and Caleb were staying together as man and wife. That on arrival at their house on the material date, PW2 stated she did not see Teri nor Caleb.

7. PW3, Margaret Akongo Owuor, a businesswoman at Uhaya Market, at Got Agulu, a neighbour to the deceased and the accused, testified that on 17/6/2015 at around 7.30am as she was cooking chapatis outside a room which was about 20 feet from the door to the accused and deceased's room; she heard noises of like people fighting but she continued with her duties, but immediately silence returned, PW3 saw "Pepe", the accused come out from the room and went for his motorcycle and went to where PW3 was sitting and told her Teri had troubled him for a long time and that he did to her what he could do. PW3 did not know what the accused had done but she got shocked by what the accused had told her. She continued with her duties till PW2 came and she explained to her what had happened and what "Pepe" had told her. PW3 and PW2 then started to find how they could help Teri by getting someone to break the padlock. That when "Pepe" left PW3 had gone to call Teri but there was no response and she noted the door had been padlocked from outside. PW3 stated after explaining the incident to PW2. She started looking for someone to break the door. That a fundi came but before he could break the padlock, "Pepe" returned and found a big crowd of people gathered outside the door who forced him to open the door. That people entered the room and PW3 could hear people saying Teri was dead. PW3 entered the house and found Teri's body lying on the bed. The police came from Usege Police Station and took the deceased body to mortuary. PW3 testified she had known the accused for about a year and that he was staying with Teri, the deceased. She stated that the person she referred to as "Pepe" is the accused and identified him at the court. She stated she had known Teri for a long time as her neighbour.

8. During cross-examination, PW3 stated she heard commotion from the room of Teri and Pepe which was brief and that she did not hear Teri scream for help. That after a while Pepe went to PW3 and told her Teri had troubled him many times and he did to her what he could do. She stated she did not see accused close the door but when she went there, she found it padlocked.

9. PW4, No. 216065, C.I. Meshack Ouma was summoned to explain to court why he was not summoning the witnesses. He gave explanation which the court accepted and he undertook to summon witnesses.

10. PW5, No. 72847, Sgt Erick Tokocho was similarly summoned to explain why he appeared before

court and disappeared before giving evidence in this matter. His explanation was accepted and he was released.

11. PW6, No 233823, C.I. Jaboso Okongo, Investigation Officer in this matter, testified that on 17/6/2015 at 10.00am while on duty, he received a telephone call from the Chief of Yimbo West location informing him of a case of murder which had occurred at Uhaya Market. PW6 and PC Owino proceeded to the scene and found many people at the scene. They were led to the room where the door was already open; he found the deceased lying on a bed on her back but dead. He noted injury on the left side of the neck, showing a black mark which was swollen. PW6 came out of the room and at about 20 metres from the room he saw a crowd surrounding a suspect who was lying down near the house. PW3 shot up in the air and the suspect got up. PW6 took a sketch plan of the scene of crime. The plot had 3 different rooms amongst which the deceased and the accused occupied, the 3<sup>rd</sup> room no. 3. PW6 interrogated the people around. PW6 picked the deceased body and the suspect and on the way they left the suspect at Usenge Police Station and took the body to Bondo District Hospital mortuary pending postmortem which was done on 22/6/2015. PW6 later recorded statements from the suspect and later arraigned him before court for this offence. PW6 later returned to the scene and found the cause of case was dispute between the deceased and accused over a motorbike with belonged to the deceased.

12. During cross-examination, PW6 stated the accused told him of the quarrel over the motorbike. PW6 stated on the neck of the deceased, he saw swelling mark and that the deceased and the accused were man and wife.

13. PW7, Doctor Bob Awino performed the postmortem on the body of the deceased and he produced the postmortem report as exhibit P1 dated 22/6/2015. On the external appearance, he noted the body had cyanosed lips and finger nails and horizontal strangulation mark on upper part of the neck 1 cm thick. That as a result of the examination he formed the opinion that the cause of death was asphyxiation from strangulation.

14. During cross-examination, PW7 stated he noted an horizontal strangulation mark. PW7 stated he was specific of the mark of 1cm as is the thickness of a finger adding a strangulation by a shirt collar would cause a different characteristic as it would cause bruises of the wind pipe.

15. When the accused was put on his defence, he stated on oath, that on 17/6/2015, he was residing at Uhaya Market in Got Agulu with his wife by the name Trizzah Violet Anyango, the deceased, in good terms though they had some disputes. That on 17/6/2015 they were in their room, the two of them when at around 6.00am, a dispute arose about the use of the motorbike as the accused was about to go on duty when the deceased told him she wanted to go somewhere and wanted to use the motorbike. DW1 stated by then he had a passenger who he had agreed to take somewhere, that after the accused told her that he had a trip, the deceased got annoyed and got the motorbike keys from the table. That time they started struggling over the keys, pushing one another. The deceased held the accused shirt collar as the accused held hers and pushed her to the bed. He then picked the keys of the motorbike and left for his work as it was getting late. He proceeded to Osieko to carry students after which he returned to the stage, from where one, Wycliffe, a *boda boda* rider, called him and told him he was wanted at his residence. He went and found many people outside his house. He said the people told him Trizzah was found murdered and that he was the one who had murdered her. He stated that he then became unconscious and fell down. He denied having committed the offence. He stated later police came to the scene and he was arrested and taken to Usenge Police Station, whereas the deceased's body was taken to mortuary. That after 1 week his statement was taken. The accused denied talking to PW3, Margaret Akong'o Owuor on the morning of 17/6/2015. He denied murdering the deceased.

16. During cross-examination, DW1 stated he and the deceased were living together in one room on 17/6/2015. He denied having locked the door at the material time stating that he left it open. He stated from the door of Margaret (PW3) one could see clearly his door and what one was doing. DW1 admitted that he held the deceased who was wearing a kitenge with a collar below the neck and strangulated the deceased a little from the front. He denied strangulating her with his fingers but with her cloth. DW1 stated he was in good terms with Everlyne (PW2) as a neighbour. DW1 stated PW3 had been in bad

terms with him and that both PW2 and PW3 lied to the court in their evidence.

17. The accused faces a charge of murder. **Section 203 of the Penal code** defines murder as follows: -

***“203. Any person who of a malice aforethought causes death of another person by unlawful act or omission is guilty of murder.”***

18. For a successful Prosecution of an offence of murder, the prosecution must prove that the accused had formed the necessary intention to cause death or grievous harm to the deceased. Malice aforethought is a very important ingredient for the offence of murder. The Prosecution has to prove facts which establish malice aforethought. **Section 206 of the Penal Code** sets out facts which constitute malice aforethought as follows: -

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

***a. an intention to cause the death 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, by a wish that it may not be cause;***

***c. an intent to commit a felony;***

***d. an intention by the act or omission facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony”.***

19. To prove a charge of murder, the Prosecution has a duty to establish the following ingredients: -

***a. death of the deceased and its cause.***

***b. that the accused caused the death through an unlawful act or omission.***

***c. the accused possessed an intention to cause harm/kill or had malice aforethought.***

**20. Whether the Prosecution proved the death of the deceased and its cause?** PW1, mother to the deceased identified the deceased body on 22/6/2015 at Bondo District Hospital mortuary to Dr. Bob Awino, PW7 for postmortem purposes. PW2 and PW3 saw the deceased body at her room before PW6 in company of other police officers picked it to Bondo District Hospital mortuary. The doctor's evidence did corroborate the evidence of PW1, PW2, PW3 and PW6, who told the court they saw the body of the deceased when it was at the mortuary and at the deceased's room respectively. The death of the deceased is not in dispute. On the cause of death, PW7 stated as a result of his examination of the deceased body he formed the opinion that the cause of death was asphyxiation from strangulation. The death of the deceased and its cause was therefore proved by the Prosecution.

**21. Who caused the death of the deceased?** The accused denied having murdered the deceased and stated he strangled the deceased a little with the collar of her dress. In this case, no one witnessed what happened as the incident took place in the deceased and accused's room early hours in the morning and as such the case is therefore based on circumstantial evidence.

22. In the case of **Elizabeth Gatiri Gachanja and 7 Others V Republic, Criminal Appeal No. 51 of 2004, Court of Appeal** sitting at Nairobi held: -

***a. There had been no eye witness to the death of the deceased. In such a case, the test to be***

***applied was clear: In order to draw inference of guilt from circumstantial evidence, the facts of the case must have been incompatible with the innocence of the accused and the burden of proving facts which justify the drawing of this inference is always on the prosecution and never on the accused.***

***b. It was necessary for the court to be sure that there were no other co-existing circumstance which could have weakened or destroyed the inference of guilt.***

***c. In law, there was no set number of witnesses required to prove a fact. Even the evidence of one witness could have formed the basis for a conviction as long as the court had found the evidence credible. Where such evidence was on the identification of a person who claimed that he was not properly identified, then the court had to examine such evidence with the greatest care.***

23. In the case of **Samuel Karanja Kuria V Republic Criminal Appeal No. 459 of 2007, Court of Appeal** sitting in Nairobi held: -

***“According to section 9(3) of the penal code, motive was generally irrelevant as regards criminal responsibility. The prosecution did not have to prove motive for the commission of any crime and evidence of motive was not sufficient by itself to have proved the commission of a crime by the person who possesses the motive.***

***According to the definition of malice aforethought in section 206(a) and (b) of the penal code, there cannot have been any doubt whatsoever that the appellant had an intention to kill the deceased taking into account that there was evidence that he had chased everyone to the vicinity in order to have the opportunity to commit the crime. In addition, the nature of the injuries sustained by the deceased was further proof of malice aforethought as was clear from the postmortem report.”***

24. In the instant case, PW3 testified the accused after closing the door to his room went to where she was and told her, Teri had troubled her for a long time and he did to her what he had to do. PW3 proceeded to Teri's room and found the door padlocked from outside, called the deceased but there was no response. When PW2 came, she told her what had happened, the two proceeded to make a telephone call while outside the door of the deceased's room, they heard the phone was ringing but no one was picking it, they attempted to get someone to break the door but before they did so, the accused came and the crowd forced him to open the door and the deceased was found dead lying on the bed. The chain of events from the time of the attack of the deceased and the time PW3 heard commotion at the deceased house, upto to the time the accused returned and was forced to open the door by members of public was not broken, the concatenation of events, there is no doubt that the accused was the only person who attacked the deceased. On record, I find that there are no other co-existing circumstances that would weaken or destroy the inference that the accused is the only person who attacked the deceased. The record show that PW3 saw the accused being the last person to leave the deceased room and padlocked the door. He was the next person to open the door. He was arrested at the scene of crime immediately he returned and forced to open the door. The accused told PW3 what he had done to the deceased. PW3 immediately told PW2 with whom they embarked on opening the door to save the deceased. PW2 called police who came to the scene and found the accused having been arrested.

25. The accused in his defence admitted he was with the deceased that morning and had a quarrel with the deceased over the use of the motorbike. That he strangled the deceased by her dress collar. PW7 in his evidence stated the deceased was not strangled by the collar of her dress simply because the strangulations marks were at the top of the neck where collar of the dress could not reach and secondly, the thickness of the strangulation mark was 1 cm thick, thus the thickness of fingers. There was similarly no injuries at the back of the neck. The accused defence was therefore dislodged by the doctor's evidence. The medical report exhibit P1 by PW7 indicated the cause of death was due to asphyxiation from strangulation. In view of the evidence on record, I find the facts of the case are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than

that it was the accused who caused the death of the deceased. I further on consideration of the evidence on record, find no other co-existing circumstances which could weaken or destroy the inference of guilt.

**26. Whether accused had malice aforethought?** PW3 told court the accused after closing the door to the room where the deceased was, he proceeded to where she was and told her, he had been troubled by Teri for a long time and he had done to her what he had to do. PW3 and PW2 went and found the door padlocked from outside and took steps to break the door open so as to save Teri but they were unsuccessful. The accused knew what he had done to the deceased when he padlocked the door from outside and went and told PW3. The accused knew by strangulating the deceased and throwing her to bed, as he stated he did, could cause death and/or do grievous harm to the deceased. He had knowledge that the action could cause death of the deceased and he knew by locking the door and going away no one could save the deceased as he intended to cause her death. His allegation that he had no intention to murder the deceased is no defence as under **Section 9(3) of the Penal Code**, motive is generally irrelevant as regard criminal responsibility. I find the accused defence to be an afterthought as the allegations that PW2 and PW3 had grudge with him and that they lied against his is untenable as the issue was never put to PW2 and PW3 during cross-examination. Indeed, I find PW2 and PW3 to be truthful and credible witnesses whose interest in this matter was to see justice done. I therefore reject the accused defence as an afterthought. I find that there is therefore sufficient evidence that the accused had planned to commit the offence and by the time he walked out of the room, he knew he had accomplished his plan and that is why he told PW3 what he had done. For the above reason, I find that the accused killed the deceased. That malice aforethought is therefore proved.

**27. In view of the conclusion that I have come to, I am satisfied the prosecution has proved the charge of murder against the accused beyond any reasonable doubt. I accordingly find the accused guilty of murder of TRIZZAH VIOLET ANYANGO. I accordingly convict him of murder under Section 203 as read with Section 204 of the Penal Code.**

**DATED AT SIAYA THIS 23RD DAY OF FEBRUARY 2017.**

**J.A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 23RD DAY OF FEBRUARY 2017.**

**In the presence of:**

**Mr. Ooro:** for the Accused

**M/S Odumba:** for State

**Accused - Present**

**Court Assistants:**

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

**J.A. MAKAU**

**JUDGE**