



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 52 OF 2010

BETWEEN

REPUBLIC.....PROSECUTION

AND

JOEL OCHIENG OTIENO.....ACCUSED

JUDGMENT

1. The accused, **JOEL OCHIENG OTIENO** is charged with the murder of his wife, **LINDA ACHIENG OCHIENG** (“the deceased”) contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)** on 26th December 2010 at Yiro East Sub-location, South Ugenya Location, Ugunja Division within Siaya County. After the accused pleaded not guilty, Ali-Aroni J., took the testimony of 4 witnesses then Chemitei J., heard 1 witness and I finally completed the hearing after complying with **section 200** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

2. To prove murder the prosecution must establish three key ingredients beyond reasonable doubt: first, the prosecution 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*.

3. The circumstances leading to the deceased’s death were narrated by his mother, Jeniffer Mugune (PW 1). She recalled that on 26th December 2010 she was at home and between 2.00pm and 3.00pm, the accused came home and demanded that the deceased, his wife, cook for him. She did not answer and got into the house, the accused followed her and a fight ensued. PW 1 explained that while the accused was hitting the deceased, she tried to intervene without success. The deceased began running away towards an open field with deceased following her with a slasher with which he cut her. In cross-examination, PW 1 stated that when she arrived at the field, she found the deceased had already died and the accused was walking away.

4. At about the same time, the accused’s father, James Otieno Wambani (PW 2) told the court that he was herding cattle when he heard PW 1 screaming. He later found out that the deceased had been killed. In a short while, police officers came to the scene. Among the officers who went to the scene was Inspector Muthei Nyagah (PW 4) who responded to a call informing him of an incident of murder. By the time he was informed on the incident, the accused had been arrested and was in the custody of the Administration Police at Ukwala AP Post where, according to Sergeant Stephen Omongin (PW 4), the accused had been brought by a village elder at about 4.00pm on the material date. The village elder also delivered to him the slasher which he handed over to PW 4.

5. PW 4 proceeded to the scene and found the deceased body covered with a mat. He observed that she had cuts on the neck and hand. He conducted preliminary investigations, re-arrested the accused and took the body to Busia District Hospital where the post-mortem was done by Dr Kisilu on 30th December 2010 after the body had been identified by PW 2 and Clement Okoth Rabuor (PW 3).

6. In his sworn testimony, the accused denied murdering the deceased. He told the court that on the material morning, he left home to visit his uncle who was in hospital at Butere. He testified that he did not return home on that day as he was arrested by Administration Police Officers who were conducting a swoop at Okwako market at about 4.30pm. He was shocked to learn that he was accused of murdering his wife yet he had a good relationship with her. He further testified that PW 1 was not his biological mother and that he did not have a good relationship with her.

7. The first issue is whether the prosecution established the fact and cause of death. PW 1 and PW 2 testified that the deceased died. Her body was the subject of a post-mortem conducted by Dr Kisilu on 30th December 2010 and the report prepared by him was produced by consent of the parties. According to the post mortem, the doctor concluded that the deceased died from head injury and haemorrhage from cut wounds. The doctor observed several injuries on the body. There was a deep cut wound on the left side of the face, 3 cut wounds on the left temporal area going through the skull, a cut wound on the right temporal area, a cut wound on the right wrist with cut wound and fracture of 3 fingers, 4 deep cut wounds on the left forearm and fracture of the ulna and radial bones. The doctor also observed a fracture on the left side of the skull exposing brain tissue. The injuries found Dr Kisilu are consistent with cuts wounds described by PW 4 who observed the body at the scene. I therefore find and hold that the deceased died and that she died from a head injury and excessive bleeding from cut wounds.

8. The issue of whether the accused did the unlawful act that led to the deceased death is grounded on the testimony of one witness, PW 1. She described what happened and how the a fight ensued after the accused demanded food, how she tried to intervene and how the accused chased the deceased with a slasher with which he assaulted her. When confronted with this evidence, the accused gave an alibi defence which must now be considered alongside the prosecution evidence. He also accused PW 1 lying by suggesting that she did not have a good relationship with him.

9. The incident happened in broad daylight and I have no reason to doubt that PW 1 was telling the truth. She was close to the parties when they fought and her testimony is corroborated by PW 2 who heard her screaming and when he arrived at the scene, the deceased was already dead. The fact of the so-called grudge and whether he was away on that day was not suggested to either PW 1 or PW 2 in cross-examination and was only an afterthought. I find the testimony of PW 1 credible as the evidence does not admit the possibility that any other person in the homestead could have committed the felonious act from the time he was seen fighting with the deceased to the time she was found dead and the accused seen walking away. The injuries were consistent with continuous beating as described by PW 1 including beating with a slasher. I therefore find and hold that the accused assaulted the deceased causing her to suffer injuries which led to her death.

10. I now turn to the issue of malice aforethought. The accused hit the deceased with a slasher on the head causing the skull to fracture to the extent of exposing brain matter. The severe injury inflicted on the deceased's head and deep cuts on the other parts of the body point to the fact that the assault was intended to cause grievous injury if not death. The injuries were consistent with the unlawful killing of the deceased actuated by malice aforethought within the meaning of **Section 206(a)** of the *Penal Code*.

11. I therefore find the accused, **JOEL OCHIENG OTIENO** guilty of the murder of **LINDAH ACHIENG OCHIENG** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 28th day of March 2017.

D.S. MAJANJA

JUDGE

Mr Ouma, Advocate for the accused.

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