



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 26 OF 2014

BETWEEN

REPUBLIC.....PROSECUTION

AND

KEVIN OUMA OTIENO.....ACCUSED

JUDGMENT

1. On 1st April 2014, this court was informed that the accused, **KEVIN OUMA OTIENO**, had murdered **LILIAN AUMA OWUOR** (“the deceased”) contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. It was alleged that he murdered the deceased on the night on 21st and 22nd March 2014 at Nyang’ungu Village, Ramunde Sub-location in Ugenya District within Siaya County. After the accused pleaded not guilty, Chemitei J., heard the matter in part and I completed it.

2. The accused and deceased were cohabiting after the death of the deceased’s husband. The prosecution case was based on circumstantial evidence and it was that the accused assaulted the deceased resulting in her death. The prosecution marshalled 6 witnesses while the accused gave sworn testimony and called one witness.

3. The accused’s aunt, Everlyn Owuor (PW 1), recalled that on the morning of 22nd March 2014 at about 5.00am, she heard children crying from the deceased’s house which was in the same compound about 10 metres away. She went to the house and found the accused standing there with a rungu. He stopped her from getting into the house. The deceased’s son told her that the accused had been beating him and the deceased. She immediately went to call her mother in law, Christine Akoth Awino (PW 2).

4. PW 2 accompanied PW 1 back to the deceased’s house where they found the deceased lying on a mattress covered with a bed sheet. When they called her, she did not respond. PW 1 noted that the deceased had a bruise on the right side of the face and ear. PW 1 called a motorbike rider and they took the deceased to St. Mary’s Hospital but due to the nature of the injuries, she was referred to Busia District Hospital. PW 1 further testified that since they did not have money, they took her back home where she died.

5. A village elder from Nyang’ungu Village, William Tago (PW 4), told the court that on same day at about 8.30am, a girl from PW 1’s home came to inform him that the accused had assaulted the deceased. He went to the scene and found her already dead. He called the Chief of North Ugenya Location, John Okelo Mboti (PW 2). PW 2 also called the police and proceeded to the scene where he found the deceased and a rungu next to her body. PW 2 testified that after being told that the accused was a suspect,

he started searching for him and found him a bar at Sega Market at about 2.00pm.

6. One of the police officers who arrived at the scene after being called by PW 2 was the investigating officer, Sergeant Richard Machasio (PW 6). He testified that he found the deceased lying on a mattress in a one roomed house. He observed that she had multiple injuries all over the body. Following investigations, PW 6 went to look for the accused at his home about half a kilometre away but he was not there. PW 2 called him and told him that the accused had been seen at Sega. By the time he arrived there, other officers had already arrested him.

7. Dr Patson Kubuta conducted the post-mortem on the deceased's body on 26th March 2014 at Busia County Hospital after it was identified by PW 1 and Fredrick Otieno Obudo. He observed that there were extensive lesions on the left lateral orbital area, multiple small lacerations on the left forearm and elbow, thighs and abdomen. Internal examination revealed extensive blood clots underneath the scalp and extensive blood clots on the left temporal and occipital lobes with subsequent brain death in the corresponding area. He concluded that the cause of death was the result of severe head injury due to assault. The report was produced by Dr Jane Ambuchi (PW 5), the medical Superintendent of Busia County Referral Hospital under **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*.

8. The accused elected to give sworn testimony. He told the court that he knew the deceased as she was running and staying in a chang'aa den which he would visit. He denied he was at the deceased's home on the night of 21st and 22nd March 2014 and that during that week he was working at Sega Market where he was plastering a house. He recalled that when he went for lunch at about 1.00pm on 23rd March 2013, he was arrested by police officers. Kizito Aluoyo Odhiambo (DW 2) testified that he knew the accused as they worked together at Sega building a house for a local councillor. He recalled that on 23rd March 2014, the accused had left for lunch at about 1.00pm but did not return. When he and fellow workers set out to look for the accused they were informed that he had been arrested. He also testified that he started working with the accused on 18th March 2015 upto the date he was arrested and that they would start work at 8.00am and leave at 5.00pm.

9. 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*.

10. As regards the cause of death, all the prosecution witnesses who visited the scene and saw the deceased observed that she had head injuries. These injuries were consistent those established after the post mortem was done by Dr Kubuta. I therefore find and hold that the deceased died and he died because of severe head injuries following an assault.

11. The next line of inquiry is whether the accused assaulted the deceased. Counsel for the accused submitted that there was no direct evidence showing that the accused assaulted the deceased as the only witness, PW 1 only saw him on the material morning but she did not see him assault deceased. He further submitted that the accused and his witness gave credible testimony supporting his alibi that during the whole week he was working at Sega. Counsel noted that a key witness, Brian Otieno, who was in the house at the time of the alleged assault, was not called as a witness hence the court should draw an adverse inference against the prosecution. He also noted there was no forensic evidence connecting the accused to the rungu which is alleged to have been used to assault the deceased.

12. It is true that PW 1 did not see the accused assault the deceased but that alone does not mean that he did not assault the deceased. The case against him is grounded on circumstantial evidence, it is also important to recall that the principle that has been restated by our court on many occasions that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt. That it is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing

circumstances which would weaken or destroy the inference (see *Rex v Kipkering Arap Koske & Another* [1949] 16 EACA 135 and *Mwangi & Another v Republic* [2004] 2 KLR 32).

13. On the material morning, PW 1 saw the accused standing with a rungu at the deceased's house after being alerted by commotion that morning. PW 2 also told the court that she also heard commotion that morning. After the accused left, the accused was found with severe head injuries. The evidence is that the accused was living with the deceased in the house with two children. Since he was seen at the deceased's house in such circumstances, only he could explain what could have happened to the deceased while he was there.

14. The accused's alibi, when considered alongside the prosecution evidence, is like a house built on quicksand. The accused does not deny that he knew the deceased or that he went to her house from time to time albeit to drink chang'aa. His alibi does not negate the positive proof that PW 1 saw him armed at the deceased's house early morning prior to the deceased's death. Likewise the fact that he was working at Sega does not diminish the fact that after assaulting the deceased, he left to go to work that morning. DW 2 testified that work at Sega would begin at 8.00am and he did not know about the accused's personal life as they came from different places. Lastly, the accused own testimony confirms that he was arrested at Sega as testified by PW 2 and PW 6.

15. The law does not require the prosecution to call all or any witnesses but where it fails to call a specific witness the court may draw adverse an inference against the prosecution (see *Bukenya and Others v Uganda* [1972] EA 549). In this case, I do not think the failure to call Brian Otieno would undermine the prosecution case. He was the deceased's son and one of the two children living with the accused and deceased. According to PW 6, he was aged 3 years old and at that age, I doubt very much that he would add value to the proceedings. I also do not think that failure to do forensic tests on the rungu undermined the prosecution case. PW 1 saw the accused carry it in the house where the deceased was assaulted. He is the only one who could have used it to assault the deceased.

16. From the time, PW 1 saw the accused at about 5.00am, standing with a rungu to the time PW 1 reported to PW 2, there was no opportunity nor was it suggested that any other person could have assaulted the deceased. By the time the PW 1 arrived at the house, the deceased had already been assaulted and the accused had already taken off. The incident took place in the one roomed thatched house where the accused was staying with the deceased and two children and he alone assaulted the deceased. As the deceased's lover, his behaviour of leaving the deceased in distress after assaulting her is inconsistent with his innocence. I therefore find and hold the prosecution proved beyond reasonable doubt that it is the accused who assaulted the deceased.

17. Hitting the deceased on the head with a rungu cannot be expected to draw harmless results. The intent is clear, and it is to inflict maximum injury which would ordinarily result in severe head injuries as those described by Dr Kubuta in the post mortem form. I have no doubt that the intent was to inflict grievous harm or kill the deceased. In this respect, I find and hold that the prosecution proved malice aforethought beyond reasonable doubt within the meaning of **section 206(a)** of the *Penal Code*.

18. I therefore find the accused, **KEVIN OUMA OTIENO** guilty of the murder of **LILIAN AUMA OWUOR** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 24th day of April 2017.

D. S. MAJANJA

JUDGE

Mr R. Otieno, Advocate for the accused.

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