



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 68 OF 2011

BETWEEN

REPUBLIC PROSECUTOR

AND

ANGELINE AWUOR ACCUSED

JUDGMENT

1. **ANGELINE AWOUR** (“the accused”), was charged with murdering her husband, **BONFACE OKINDA OLAL** (“the deceased”) contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are she murdered him on 9th November 2011 at Uwuodhre Village, Umala Sub-location in Siaya District. The prosecution called 7 witnesses while the accused gave sworn testimony.

2. The accused’s daughter in law, Sarah Atieno Ochieng’ (PW 1) testified that on 9th November 2011 at about 10.00am, she was called by children to go and see how the accused had assaulted her father in law. She went to the deceased’s homestead and found him seated on the verandah. He had been cut on the head, lips and right arm and was bleeding profusely. When she asked him what happened, he told her that he had been killed by the accused. She went to report to the village elder, Francisca Atieno Oduol (PW 2), who she met along the way with the accused.

3. PW 2 recalled that the accused came to see that morning looking very annoyed. She requested PW 2 to follow her when PW 2 asked her what the problem was. As they were going to the deceased’s home, the accused told her that the deceased wanted to cut her with a panga but she had killed him. On the way, they met PW 1 and they all proceeded to the deceased’s homestead. They found the deceased who was injured but could not talk. PW 2 called the Assistant Chief of Umala Sub-location, Tobias Ochieng Odiedo (PW 3) who also arrived at the scene. PW 3 testified that the deceased could not talk and was lying in a pool of blood at his verandah. The accused told him that they had quarrelled the previous night and they had fought and in the process she had cut the deceased. He called for vehicle to take the deceased and escorted the accused to his office.

4. The officer in charge of the nearby Ngiya Patrol Base and the investigating officer in this matter, Corporal Cosmas Kaloki (PW 7) testified that PW 3 brought the accused to the Patrol Base and informed him that the accused had killed her husband after a quarrel. He called Inspector Christopher Muraguri (PW 6), the Commanding Officer of Kogelo Police Station. PW 6 went to the base and later that day the accused took them to her house and she showed them a panga which she used to assault the deceased. PW 6 testified that since it had rained, there were no blood stains on the panga. The accused made a statement under caution but it was not admitted in evidence.

5. PW 7 organised for the post-mortem on the deceased's body to ascertain the cause of death. Dr Rapenda did the autopsy at Siaya District Hospital Mortuary on 14th November 2011. According to his report, the deceased had 14 deep cuts on the right side of the face involving the upper lip, cheek, ear and parietum of the scalp. He also had a deep occipital cut on the scalp and nape. Internal examination of the head revealed 14 deep cuts spanning the right side of the face from the upper lip, cheek, ear to the parietal scalp with one fracturing the outer table of the parietal scalp. There were also 6 deep cuts through the dorsum of the right hand, wrist and distal forearm. The doctor concluded that the cause of death was severe acute blood loss due to multiple deep cuts on the right wrist and right side of the face.

6. In her sworn defence, the accused told the court that on the material day, she had gone to the deceased's house to collect dishes she had left there the previous night. She found the deceased sharpening his panga and he started insulting her and threatening to cut her with the panga. She testified that the deceased grabbed her and wanted to cut her and as she ran towards her house, the deceased followed her to the door of her house. He met her there and over-powered her. As she tried to run, he still held her and they began fighting over the panga and as they struggled, she cut him. She told the court that she had no intention to injure him and that she had not seen him that morning before she went to shamba. She tried to run away but he grabbed her.

7. 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*.

8. The fact and cause of death are not in dispute. All the prosecution witnesses who saw the accused on the material morning confirmed that he deceased had cut wounds on his wrists and head. They all described how the deceased had bled profusely. This was confirmed by the post mortem done by Dr Rapenda.

9. The accused, in her testimony, admitted that she is the one who cut the deceased. Apart from her own testimony, PW 1 and PW 2 all confirmed that the accused told them that she had killed her husband in a fight so soon after the incident. PW 1, who was the first adult, at the scene recalled that the deceased told her that the accused had "*killed him.*" There is therefore no doubt that the deceased is the one who committed the unlawful act that led to the deceased's death.

10. The key issue for determination is whether the prosecution proved beyond reasonable doubt that the accused killed the deceased with malice aforethought. The accused raised the defence of self-defence. The accused need only raise reasonable doubt by putting forth an affirmative defence or by raising doubt on the prosecution case as was *elaborated by the Court of Appeal in Benson Mbugua Kariuki v Republic NYR CA Criminal Appeal No. 29 of 1978 [1979]eKLR as follows:*

The correct direction which a judge should give himself and the assessors in a criminal case is that it is for the prosecution to prove that the accused is guilty, such proof being beyond reasonable doubt. There is no onus whatsoever on the accused of establishing his innocence; and if in respect of any matter; the evidence raises a reasonable doubt, then the benefit of that doubt just go to the accused. This applies also to matters of defence such as alibi, provocation, self defence or accident. It is for the prosecution to establish that an accused was present when the crime was committed, or that he was provoked, or that he was not acting in self defence, or that whatever happened was not accidental; and the prosecution must discharge this burden beyond all reasonable doubt. An accused, whether challenging the case put forward by the prosecution or raising matters in his own defence, assumes no onus in these respects; and if any reasonable doubt arises in respect of any matter, the prosecution has failed to discharge the burden which it must discharge.

11. As regards the defence of self-defence, section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In

Ahmed Mohammed Omar & 5 others v Republic NRB CA CRIMINAL APPEAL NO. 414 OF 2012 [2014]eKLR, the Court of Appeal considered the law relating to self-defence and stated as follows;

The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP v Morgan [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v Morgan (Supra) it was held that:

.....if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.

12. Did the accused believe that her life was in imminent danger to the extent that she was entitled to use force to protect herself? The accused contention that the deceased chased her to her house with the panga is not tenable. The witnesses who saw the deceased before his death, PW 1 and PW 3, recalled that they found him outside his house bleeding profusely. Had he been to the accused's house and returned to his house, the trail of blood would have been massive but there was no indication of this.

13. Other than the position of his body, the deceased suffered multiple deep cut injuries that led to severe bleeding. This was not a case of a single blow but 14 deep cuts on the face, 6 deep cuts on the right hand and cuts at the back of the neck. The deep cut on occipital scalp and the nape are evidence that the deceased was facing away when she continued cutting him. All these injuries discount the accused's case that she merely took the panga from the accused and cut him as he was attempting to cut her. The Court of Appeal in **Morris Aluoch v Republic NKU CA Cr. Appeal No. 47 of 1996 [1997]eKLR** stated as follows:

If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late. In the case of Rex v Tubere S/O Ochen [1945] 12 EACA 63 the assault was of a serious nature causing severe injuries from which the victim died shortly afterwards.

14. However, the prosecution did not challenge the fact that the accused and deceased had a quarrel that morning. In fact, the prosecution did not lead any evidence to show that the accused and deceased had such a peaceful relationship putting the incident out of the realm of possibility. The accused told all the people she met that morning that she had quarrelled with the deceased. Further, the prosecution did not prove that the deceased could not have had the panga or that the panga did not belong to him leaving the possibility that the deceased had the panga that morning with which he threatened the accused while they were quarrelling. The fact that the accused went to report what she had done immediately after assaulting the deceased negatives malice aforethought. Since the test for self-defence is subjective, the deceased may have apprehended such violence as would cause her to react in the manner she did and the unreasonableness of her reaction in such circumstances would not diminish the fact that she was defending herself. The use of excessive force in the circumstances would reduce the charge of murder to manslaughter.

15. I therefore find that the accused, **ANGELINE AWUOR**, guilty of manslaughter contrary to **section 202** as read with **section 205** of the **Penal Code** and I convict her accordingly.

DATED and DELIVERED at KISUMU this 22nd day of May 2017.

D.S. MAJANJA

JUDGE

Mr Anyumba, Advocate for the accused.

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