



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 40 OF 2015**

**BETWEEN**

**REPUBLIC .....PROSECUTOR**

**AND**

**DAVID OCHIENG OLOO .....ACCUSED**

**JUDGMENT**

1. **DAVID OCHIENG OLOO** (“the accused”) was charged with the offence of murder 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 that 6<sup>th</sup> August 2015 at Manyatta Estate, Kisumu East Sub-county within Kisumu County he murdered **CLEMENTINA AUMA OWENGA** (hereinafter “the deceased”).

2. The prosecution case was that on the material night, the accused, who was the deceased’s boyfriend, arrived at their shared room at Kona Mbuta, Manyatta Estate, whereupon a fight ensued. The parties went outside as they fought. The accused assaulted the deceased and she succumbed to her injuries 4 days later. The prosecution called 6 witnesses while the accused gave sworn testimony.

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

4. The fact and cause of death was confirmed by the autopsy performed on the deceased’s body on 18<sup>th</sup> August 2015 at Kisumu East District Hospital by Dr Dixon Mchana after the body was identified by her brother, Joseph Owenga (PW 3). The significant observations by the pathologist was that the deceased had several facial abrasions and lacerations in different stages of healing. On the head, there was a depressed skull fracture on the left orbit, 6 cm deep. There was mild bleeding into the brain covering with bruises on the left forebrain. The brain matter was pushing towards the spinal cord which was evidence of increased pressure in the skull. Dr Mchana concluded that the cause of death was severe head injury due to blunt trauma due to assault.

5. To prove that the accused killed the deceased, the prosecution relied on the testimony of A A A (PW 3), the deceased’s 13-year-old nephew, who was residing with the deceased. After a *voire dire*, he gave sworn testimony in which he narrated what happened on the evening of 6<sup>th</sup> August 2015. He told the court that he lived with his aunt, the deceased, and the accused, who was the deceased’s boyfriend, in the house. On that evening, the accused mother called and told the deceased to leave her son alone as she was too old for him. PW 3 could hear the conversation because the deceased put the conversation on speaker

phone. After a while, the accused came into the house and the deceased told him to take his clothes and go to his home. The accused took his clothes and those of the deceased and went outside to burn them. The deceased followed him outside and tried to persuade him not to burn the clothes. PW 3 recalled that he was still in the house when he heard someone falling and the deceased screaming. He went out and found the accused with a knife with blood on it. The accused threatened him and told him to go back to the house. The accused dragged the deceased back into the house and thereafter proceeded to eat. After eating he took a DVD player, his cloths and placed them in a bag and left.

6. After the accused left, PW 3 called a neighbour and asked him to accompany him to his uncle's place. He found his uncle, Bernard Omondi (PW 1) and told him what happened. PW 1 recalled that he was woken up by PW 3 at about 4.30am. PW 3 told him that his step-mother, the deceased, had been beaten by the accused. He went to the deceased's home with PW 3 where he found her lying on the floor. With the assistance of neighbour, they put her on PW 1's Tuk Tuk and took her to Jaramogi Odinga Oginga District Hospital for treatment. PW 3 testified that the deceased was discharged later that evening but since her condition worsened she was taken back to hospital where she died on 15<sup>th</sup> August 2015.

7. The investigating officer, PC Peter Ooyi (PW 6) confirmed that PW 1 reported to Kondele Police Station on 7<sup>th</sup> August 2015 that the deceased had been assaulted. PW 1 further reported on 16<sup>th</sup> August 2015, that the deceased had passed away the previous day while undergoing treatment. When police officers visited the deceased's home, they recovered a blood stained red jacket and a blood-stained curtain separating. These items were taken to the Government Chemist for analysis. The Government Analyst, Richard Kimutai Langat (PW 5) confirmed that the blood on the items was that of the deceased and the accused's DNA did not match any of the profiles on the items. PW 6 further testified that the accused was arrested by members of the public and brought to the police station on 27<sup>th</sup> August 2015 and subsequently charged with murder.

8. The accused elected to give sworn testimony. He testified that he was a taxi driver and that the deceased was his wife and they had two children. On the material day, he testified that he had been at work and when he arrived home at about 11.00pm, the deceased confronted him about leaving the car at the petrol station rather than parking it in the compound. He tried to avoid her and as he entered the house, she pushed him and as he was going to fall, he held her and they fell together. He told the court that the deceased hit her head facing down. The deceased got up and said she was sorry and they went into the house. He later noted that she was bleeding. He decided to call a Tuk Tuk which took her to Kisumu District Hospital. She was discharged at about 4.30pm and returned home. He further testified that the deceased was not feeling well so he took her back to hospital on 7<sup>th</sup> August 2015. Although she as to be discharged on 14<sup>th</sup> August 2015, the accused stated that he could not come as he was working in Siaya. He kept in touch with her but he could not reach her. Someone picked the call later and told him to come to hospital urgently. When he returned, he was informed that his wife had died.

9. The accused testified that he could not bury the deceased immediately because PW 1 raised objection. He subsequently resolved the matter when the elders sat and PW 2 stated that he had no objection to him burying the deceased. He proceeded to plan for the funeral and after leaving a funeral meeting on the evening of 26<sup>th</sup> August 2015, he was arrested and later arraigned in court for murder of the deceased.

10. In his defence, the accused admitted that he was at the deceased home on the material night. His defence suggested that the deceased fall was accidental as it is the deceased who pushed him and he held onto her and they both fell together resulting in her injuries. Is this defence tenable or plausible? I must bear in mind that accused does not bear the burden of proving his innocence but rather the prosecution must prove the elements of the offence beyond reasonable doubt.

11. I am convinced that the accused was not truthful in his testimony. First, the testimony of PW 1 and PW 3 was that the accused was a boyfriend of the deceased and not a husband. Nothing was suggested to the witnesses in cross-examination that he was anything other than a boyfriend. Second, after the deceased was injured, it is PW 3 who went to call PW 1 to take the deceased to the hospital as the accused had taken off after the incident. Third, the deceased's conduct of disappearing after the incident was

inconsistent with the status of a husband he was asserting. There is no evidence that he even took care of her during her the time she was in hospital. Finally, the post-mortem conducted by PW 6 revealed that the deceased had several other injuries on her face and body. This was not just a single fall but an assault caused by several vicious blows on the body and finally a blow on the head causing the deceased to fall. I also reject his defence that the deceased fell after she pushed him and he held on to her. This is implausible because, if the deceased pushed she would have to be facing him and if he held and her and they fell together, she would have hit the backside of the head. The accused's defence is a litany of lies and an afterthought.

12. Nor do I find the lack of any DNA evidence on the deceased's jacket exculpatory when considered alongside the fact that the accused assaulted the deceased. It only means that either the accused was not injured or that his blood did not spill on the jacket or curtain. The jacket confirms the deceased bled because of the assault.

13. Assaulting someone resulting in a skull fracture leaves no doubt that the accused intended to cause grievous harm. I therefore find and hold that prosecution proved that the accused was actuated by malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

14. I therefore find **DAVID OCHIENG OLOO** guilty of the murder of **CLEMENTIAN AUMA OWENGA** and I convict him accordingly.

**DATED and DELIVERED at KISUMU this 22<sup>nd</sup> day of May 2017.**

**D. S. MAJANJA**

**JUDGE**

Ms Kagoya, Advocate for the accused.

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