



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 44 OF 2015

BETWEEN

REPUBLICPROSECUTOR

AND

SYLVESTER OMONDI OWAKACCUSED

JUDGMENT

1. **SYLVESTER OMONDI OWAK** (“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 on the night of 25th and 26th July 2015 at East Reru Sub-Location, Seme Sub-County within Kisumu County he murdered **JUDITH AKEYO** (hereinafter “the deceased”). The prosecution called 6 witnesses while the accused gave sworn testimony. The prosecution case was the accused strangled the deceased who was his sister in law.

2. 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*.

3. The fact and cause of death was confirmed by the autopsy performed on the deceased’s body on 3rd August 2015 at Jaramogi Odinga Oginga Teaching and Referral Hospital by Dr Omondi Mboya after the body was identified by her husband, David Okeyo Owak (PW 3). The post mortem form was produced by Dr Kevin Ochieng (PW 6) under **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. The significant observations by the doctor were that bruises were noted on the front side of both knees. There was darkening of the tissues due to lack of oxygen (cyanosis). He noted bruises and lacerations on the anterior part of the neck and a collection of body fluid in the face and gross facial oedema. A dissection of the neck revealed excessive fluid (oedema) of the subcutaneous tissues. The lungs had expanded in excess of their capacity and a cross section of the lungs appeared frothy with blood. The skull has bilateral cerebral oedema. Dr Mboya concluded that the cause of death was lack of oxygen due to strangulation.

4. As to whether the accused committed the unlawful act that led to the deceased’s death, the key prosecution witness was V O (PW 4), the deceased’s 10-year-old nephew, who was residing with the deceased. After a *voire dire*, he gave unsworn testimony in which he narrated what happened on the night of 25th July 2015. He testified as follows;

Ford (the accused) wanted a phone from Judith but Judith refused. He wanted to go with the phone. They started fighting even the pot fell and poured water. They were fighting in the sitting

room. I was sleeping in the sitting room I was watching. I was lying on the floor. The lights were on. It was a tin lamp. My eyes were open. Ford strangled Achieng and she fell down. Ford held the neck of Judith, twisted the head and she fell down. Ford took the phone with the money she had. Achieng used to have money on her body. He placed the phone and money somewhere. He pulled her and took her to the bedroom. He dragged her on the floor. He pulled her with her hands. He took the phone and money and left. I just slept after this. I did not see Ford again.

5. On 26th July 2015, the deceased did not wake up and word started to go around the village that the deceased had died. Walter Akiru (PW 2) received information at about 1.00pm and proceeded to the deceased's home where he found her body in the bedroom on the bed. He did not notice any injuries. Likewise, Apollo Muga Ndhare (PW 1), a village elder, who also received the news, proceeded to the deceased's house. By the time PW 1 and PW 2 arrived at the scene, the police were already there.

6. One of the police officers who attended to the scene was Corporal Antony Ole Mutukei (PW 5) who recalled that the deceased was lying on her bed. He observed bruises on the knees, neck and blood stains on the nose. He secured the deceased's body and took it mortuary where a post mortem was done. PW 5 told the court that the accused disappeared from the homestead, where he was residing, after the incident. He was later traced and arrested in Sori, Nyatike on 31st August 2014.

7. The accused elected to give sworn testimony. He told the court that on the material day before he left for work in the morning, he gave the deceased his phone to charge for him and told her that he would collect it in the evening as he needed to go and do some work that night. When he came to collect the phone, she declined to give to him telling him that it was dangerous to go out with the phone as he would be attacked and the phone taken. The accused tried to take the phone from her physically but she refused. He pushed her, she fell and then he took the phone. She did not get up so he took her to her bedroom and covered her before leaving. On the next day, he went to work as usual. He told the court that he learnt of her death in court and never intended to kill her as he treated her like his mother.

8. The case against the accused is founded on the direct unsworn testimony of a child. The law on this issue is that the court can only convict the accused based on unsworn testimony of a child if it is corroborated in material particulars. **Section 124** of the *Evidence Act* states:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

9. The law was summarised by the Court of Appeal in **Johnson Muiruri v Republic [1983] KLR 445** where it held that:

Where, in any proceedings before any Court, a child of tender years is called as a witness, the Court is required to form an opinion, on a voire dire examination, Whether the child understands the nature of an oath in which event unsworn evidence may be received. If the Court is not so satisfied, his unsworn evidence may be received if in the opinion of the Court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him. [Emphasis mine]

10. Likewise, in **Bernard Kungu Kariuki v Republic NRB No. 362 of 2012[2014] eKLR** the Court observed that:

The fact that the evidence of the three children was unsworn does not in our mind render it valueless. The said evidence was admissible and credible....it is a settled principle of law that where a child of tender years gives unsworn testimony then that evidence ought to be corroborated before the trial court can rely on it to sustain a conviction.

11. In addition, the incident took place at night in circumstances that are ordinarily difficult for identification. In ***Cleopas Otieno Wamunga v Republic [1989] KLR 424***, the Court of Appeal sounded a word of caution in matters of identification of suspects at night so as to avoid possible miscarriage of justice through mistaken identity. The Court urged careful examination of evidence in order to minimize risk of error which is possible even in the case of relatives or friends. In ***Anjononi & Others v Republic [1980] KLR 59***, the Court of Appeal noted that the evidence of recognition of a suspect is more assuring and reliable than the identification of a stranger but it nevertheless must be examined because mistakes can also be made.

12. I am satisfied the accused was well known to PW 4. The accused also admitted that PW 4 was in the room when the incident took place and I have no doubt that in the closed space of the room he was able to see what transpired between the accused and deceased. In any case, PW 4 described very clearly how the accused strangled the deceased and his evidence remained unshaken on cross-examination.

13. The accused did not deny that he had some altercation with the deceased. His position is that he merely pushed the deceased and she fell. His version of events is inconsistent with the cause of death. Had the deceased died from a fall perhaps she would have sustained some injury consistent with blunt force trauma. But the evidence is clear that she was strangled. I therefore reject his defence that he merely pushed her. I also find that the cogent testimony of PW 4 that the deceased was strangled was corroborated by the post-mortem report produced by PW 6 which confirmed that the deceased was strangled.

14. On the issue of malice aforethought, the accused stated that he did not intend to kill the deceased. While the evidence shows that there was an altercation between the accused and deceased over a mobile phone, the act of strangulation cannot be unintentional, it is a deliberate act of suffocation by exerting pressure on the neck until the supply of oxygen cut off while the deceased was struggling on her knees as evidenced by the bruises on both knee joints. The action by the accused of dragging the deceased body to the bed and covering her as if nothing happened then proceeding to disappear from the village for a period of four days goes to show that the accused had a felonious intent. I therefore find and hold that the unlawful killing of the deceased was actuated by malice aforethought within the meaning of **section 206(a) of the Penal Code**.

15. I therefore find **SYLVESTER OMONDI OWAK** guilty of the murder of **JUDITH AKEYO** and I convict him accordingly.

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

D.S. MAJANJA

JUDGE

Mr Nyamweya, Advocate for the accused.

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