



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 44 OF 2012

BETWEEN

REPUBLICPROSECUTION

AND

ALEX OWUOR ODENY..... ACCUSED

JUDGMENT

1. **ALEX OWUOR ODENY** (“the accused “) was charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars are that on 8th June 2012 at Wadanda Village, South West Nyakach location of Nyakach District within Nyanza Province he murdered **TABITHA AKOTH AUMA** (“the deceased”). The prosecution case is that the accused attacked the deceased as she slept in her parent’s house and stabbed her several times due to a love affair gone sour.

2. The cause of death was established by the post-mortem report prepared by Dr Farida and produced by Dr Eve Koile (PW 6) under **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. Dr. Farida conducted the post mortem on the deceased’s body on 14th June 2016 at New Nyanza Provincial General Hospital after it was identified by her father, James Obuya (PW 4). Dr Farida observed that the deceased had multiple cut wounds all over the body as follows; a 5 cm deep cut wound on the 3rd intercostal area, cut wounds on the right upper limb on the lateral side of the arm and on the medial aspect of the right elbow joint, a deep cut wound on the left upper arm on the lateral side measuring about 4 cm and a deed cut wound on the right chest measuring about 8 cm. Internal examination revealed a cut wound on the left upper lobe of the lung which resulted in internal bleeding. Dr Farida concluded that the cause of the deceased death was cardiovascular arrest secondary to internal bleeding resulting from assault with a sharp object penetrating the lungs.

3. To buttress its case, the prosecution lined up 7 witnesses to prove that the accused murdered the deceased. The key witness, Christine Achieng (PW 1) testified that on the early morning of 8th June 2012, she and the deceased were asleep in their parents’ house in Nyakach. She was slept on the bed while the deceased slept on a couch. At around 5.00am, she was startled by the deceased screaming. She woke up and saw someone stabbing the deceased. The person ran out and she followed him outside whereupon she realised that it was the accused. She testified that she was able to identify the accused as she knew him very well before as he was the deceased’s boyfriend and it was day break and the moon was still shining.

4. The deceased’s mother, Angeline Auma Atieno (PW 2), who was asleep in next room, heard screams coming from the sitting room where her daughters were sleeping. She rushed into the room and heard PW 1 shouting from outside saying, “I have seen you Alex, I have seen you Alex”. The deceased was lying on

the couch and she seemed to be having difficulty breathing. PW 2 lit a chimney lamp and observed stab wounds on the deceased's chest. She then called her son, Geoffrey Otieno Ouma (PW 3), who was asleep in his house and asked him to report the matter to the police.

5. PW 3 testified that when he went to the house, he found the deceased bleeding on the chest. PW 1, who was there, told him that the accused is the one who had stabbed the deceased. He told the court that the accused and deceased were in a relationship and that the accused was from the neighbourhood.

6. Senior Sergeant Joseph Ojune Ekasiba (PW 5) testified that at the material time, he was based at Ongoro Patrol Base, Upper Nyakach. On the fateful morning at about 5:45 am he received a call from PW 3 informing him that his sister had been stabbed while sleeping. He went to the scene in the company of other police officers and found a crowd gathered. PW 1 informed him that she had seen the accused stab the deceased. They collected the body of the deceased and took it to the mortuary. They later tried to look for the accused in the village but he was nowhere to be found. After a few days, the accused was spotted in Kisumu by a member of the public and was arrested by Senior Sergeant Peter Nyabondo (PW 7) and his team at Nyamasaria Estate in Kisumu on 14th June 2012.

7. In his sworn testimony, the accused (DW 1) denied any involvement in the deceased death. He stated that on 8th June 2012, he was in Kisumu where he was living with his aunt at Nyamasaria as he looked for a job. At about 10.00am, he received a call from PW 3 who informed him that the deceased had died and he was therefore required at home as he was her boyfriend. He however did not go as requested because he did not have any money. He told the court that he was arrested by police officers on 14th June 2012 while he was relaxing at his aunt's home.

8. The accused called Joyce Ongele (DW 1) who testified that the accused was living with her in Nyamasaria as he looked for a job. That on the night of 8th June 2012 he went to sleep in her kitchen at around 9:00pm and came to the main house following morning at around 6:00am to wash his face before leaving for work. She testified that the accused had been living with her since May of 2012.

9. As already stated there is no doubt that the deceased were murdered. The next issue is to establish whether the accused caused the felonious act. The prosecution relied on the evidence of identification under difficult circumstances by a single identifying witness while the accused raised an alibi defence. This court must decide whether the evidence of identification was reliable and free from possibility of error so as to found a secure basis for the convicting the accused. Our courts have taken the position that evidence of visual identification particularly in difficult circumstances should always be approached with great care and circumspection. Such evidence must be watertight before a court can return a conviction (see *Abdalla Bin Wendo & Another v R* [1953] 20 EACA166, *Wamunga v Republic* [1989] KLR 42 and *Maitanyi v Republic* [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see *R v Turnbull* [1967] 3 ALL ER 549). This requirement is, however, relaxed when dealing with the case of recognition because, "recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other." (see *Anjononi & Others v Republic* [1980] KLR 59). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

10. PW1 testified that she was able to identify the accused outside the house as she knew him before and because the moon was still shining and it was just about day break. She had known the accused as her sister's boyfriend for more than a year. On cross examination, PW 1 stated that when she came close enough the accused turned to look at her and that when she clearly saw the accused face and recognised him. He testimony was as follows:

When I woke up I only saw a person but when I followed him outside is when I realised it was the accused. I could identify him clearly. I saw him. He was running. He turned back and looked at me.

I saw him very well when he looked. When he was running he was about a metre away.

11. Although there is evidence that the house was dark as confirmed by the fact that PW 2 had to light a chimney lamp to see the deceased, PW 1 told the court that there was sufficient moonlight on that early morning with which she was able to see the accused. Given that she ran after the accused and was near enough when he turned back, I am satisfied that the conditions for identification were free from error. Moreover, this was a case of recognition so that when she saw the accused, she immediately began shouting his name which PW 2 heard. The evidence of identification is fortified by the fact that when her brother, PW 3, and the investigating officer, PW 5, arrived at the scene she did not hesitate to inform them that she had seen the accused.

12. The accused has raised an alibi. The burden of proving a case against an accused person beyond reasonable doubt always rests with the prosecution and never shifts to the accused even in cases of an alibi defence (see *Sekitoleko v Uganda* [1967] EA 531). In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal held that;

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

13. DW 2 testified that on the material night the accused went to sleep at around 9.00pm and came to the main house to wash his face at around 6.00am. She could not account for the whereabouts of the accused between 9.00pm and around 6.00am on the morning of 8th June 2012 when the incident took place. What is clear is that DW 2 was not with the accused around the time the deceased was killed. She only saw him, if at all, an hour or so after the murder. In addition, PW 3 told the court that the accused was living in the village and when PW 5 went to look for him he was not at home. The issue whether he was looking for employment in Kisumu and or that PW 3 called him after the incident to come home was never put to the witnesses in cross-examination leading me to conclude that the whole defence is an afterthought. The alibi cannot withstand the clear and direct evidence of PW 1 who saw him stab the deceased and ran away.

14. In addition, and having heard the witnesses testify, I am satisfied that the prosecution witnesses were truthful and honest and there is no reason why they would implicate the accused. Nothing came out of the evidence to suggest any grudge or ill will that would undermine their testimony.

15. The act of stabbing a person several times on the chest with a sharp object is not an innocent act. It is a deliberate act intended to cause grievous harm if not death. The accused's act of breaking and entering into the deceased's home early in the morning, stabbing not less than 6 times and then running away to a faraway town only to be arrested 6 days after the death of lover leaves no doubt that the accused actions were clothed with malice aforethought within the meaning of **section 209(a)** of the *Penal Code*.

16. I therefore find the accused, **ALEX OWUOR ODENY**, guilty of the murder of **TABITHA AKOTH AUMA** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 27th day of July 2017.

D.S. MAJANJA

JUDGE

Mr Odeny, Advocate for the accused.

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