

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 46 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

DIANA MORAA OMITI.....ACCUSED

RULING

Diana Moraa Omiti, hereinafter called “the accused”, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of this offence are that on the night of 3rd and 4th May 2015 at Moi Estate, Otiende in Langata within Nairobi County she murdered Dickson Moseti Omwenga, hereinafter called “the deceased”.

After taking evidence of ten (10) prosecution witnesses, the prosecution closed its case after which parties were allowed time to file their written submissions on or before 23rd June 2016. As at the time of writing this ruling, 1st August 2017, no submissions had been filed. I will therefore proceed to make a ruling irrespective of failure to file submissions.

The law and procedure requires this court to analyze the evidence presented by the prosecution and determine whether a prima facie case has been made out against the accused person. If so, the accused shall be placed on her defense and if not, she shall be acquitted (see Section 306 of the Criminal Procedure Code).

I have carefully read and analyzed all the evidence of the ten (10) prosecution witnesses. James Moseti Makori (PW1), an uncle to the deceased, was not present when the incident leading to the death of the deceased took place. He received information of the death of the deceased and went to the home of the deceased. He found the deceased lying on the bed dead. He later, on 6th May 2015, identified the body to Doctor Peter Muriuki Ndegwa (PW9) who examined it at the Chiromo Mortuary in Nairobi.

Duke Nyakundi (PW2), brother to the deceased, and Josephine Moseti (PW7), mother to the deceased, travelled to Nairobi from Kisii after receiving information about the death of the deceased. Their evidence on the date they travelled to Nairobi and what they found upon entering the house of the deceased does not agree. I will get back to that in the course of this ruling.

CPL Jacob Mong’are (PW3), IP Charles Otieno (PW5), SGT George Odhiambo (PW6) and CPL Kennedy Musyoki (PW8) are police officers who visited the scene on 4th May 2015. The evidence from these police officers is about what they observed at the scene and the information given to them by the witnesses and the accused person. Their evidence is that they found the deceased lying on his bed face down. They said they saw a jug of water and a glass in the bedroom where the deceased was and that the bedroom was not disturbed indicating that there had been no struggle in the bedroom. They however said that the items in the sitting room were disturbed and that this was indicative that a struggle had taken place in the sitting room. They told the court that from the accused and the other witnesses they gathered that the deceased had come home drunk and that after the family had had supper a quarrel between the accused and the deceased started after the accused asked for money from the deceased to prepare their daughter B. N. O (PW10) for school; that in the course of that quarrel a television set placed on a shelf which was about six feet high fell on the deceased who was seated on a chair and injured him; that the deceased said that he had been injured and went to the bedroom where he locked himself; that he asked for water from his daughter B. N. O; that the family retired to sleep with deceased in the bedroom alone

and the rest of the family members and their guest Joyce Nyaboke Mogaka (PW4) and her little baby slept in the sitting room and that the deceased was found dead the following morning and a report made to the police. The scene was photographed by SGT Odhiambo and the body removed from the scene.

Dr. Ndegwa found a wound on the deceased's hairline; haemorrhage in the eye; bruises on anterior chest wall and contusions on left and right (bilateral) of neck and haemorrhage on the surface of the brain. He formed the opinion that the deceased died due to manual strangulation and chest compression.

B. N. O and Joyce were inside the house with the deceased and the accused when the accused and the deceased started quarrelling and fighting. Both said it is the deceased who started assaulting the accused. Both said that the television set fell on the deceased in the course of that fighting and injured him. The two witnesses also told the court that the deceased had locked the door to their house and no one could go out or come in. Joyce told the court that she tried to bang on their locked door to attract neighbours to help but no one came to help. The two witnesses also told the court that the accused slept in the sitting room with them and that the deceased was the only one who spent the night in the bedroom. B. N. O also confirmed the evidence that her father asked her to take drinking water to him and she did it. Both Joyce and B. N. O told the court that they did not hear any movements at night and that in the morning when the deceased failed to wake up, it was B. N. O who was asked by the accused to go and wake the deceased up.

In my considered view, there is no doubt that the deceased and the accused argued and fought over the issue of money. I found strong evidence that a television set, produced in court as exhibit 1, fell on the deceased and injured him on the chest. I have carefully examined the evidence of the doctor especially on cross examination. This is what he told the court:

Both manual strangulation and chest compression caused death. Both, not individually, caused the death. Both sides of the neck had bruises. These were on the skin. No bone was broken. To cause death the bone of the neck need not be broken. For strangulation to cause death one need not have been lying down. A blunt object caused the injuries on neck. The falling TV could have caused compressed chest and neck. It is possible the TV falling on him could have hurt his chest and neck. I did not have the history that a TV had fallen on him. It is possible circumstantially that the injuries were caused by a TV falling on him.

It is obvious to me that the evidence from the doctor on the cause of death is inconclusive. Although he had concluded that manual strangulation and chest compression were the cause of death, doubts on these findings have been created during the cross examination of the doctor. It is during cross examination that the doctor admitted that a television set falling on the deceased could have caused the injuries found on his neck and which the doctor at first thought were strangulation marks. The doctor clarified that death was not caused by chest compression alone or manual strangulation alone but by both. Given his evidence in cross examination that the injuries on the neck could have been caused by a falling television set, it is my view that this caused the marks the doctor thought were manual strangulation marks on the neck of the deceased.

I have considered the evidence of Duke Nyakundi and Josephine. They introduced another angle to this case. Duke said they found a knife and blood stained seat covers thrown in the jericin with water. Josephine said they found pillow covers, T-shirts, black sock and navy blue pair of trousers belonging to the deceased, all bloodstained, thrown in a jericin with water. Dr. Ndegwa told the court that he found the body of the deceased dressed in blood stained clothes. I am not able to understand the evidence by Duke and Josephine. They seem to have attempted to implicate someone for having thrown a knife and blood stained clothes in the jericin of water perhaps to conceal some evidence. There is no indication that a knife was ever used on the deceased and it is not clear how the alleged recovered clothes were stained with blood. Mind you, the only bloodstains mentioned in evidence by the police were those found on the beddings where the head of deceased lay and in his mouth.

In my considered view and having carefully examined and analyzed the evidence doctor on the cause of death and which evidence I have found inconclusive, and having considered the evidence of Joyce and B.

N. O, it is my finding that the evidence against the accused does not make out a case on which this a reasonable court, properly directing its mind to the law and the evidence, could convict if no explanation is offered by the defence. If this court were to place the accused on her defense basing that decision on the available evidence, it would be tantamount to expecting her to fill in the gaps left by the prosecution. I will act as the law dictates under Section 306 (1) of the Criminal Procedure Code that if at the close of the prosecution case the court considers that there is no evidence that the accused committed the offence, it shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty. I so find in this case and order that the accused Diana Moraa Omiti has no case to answer and shall be free to go home unless for any other lawful cause she is held in custody. It is so ordered.

Delivered, signed and dated this 20th September 2017.

S. N. Mutuku

Judge