



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 67 OF 2011

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH OWUOR ODUOR ACCUSED

JUDGMENT

1. The accused, **JOSEPH OWUOR ODUOR** was charged with the murder of his mother, **MARGARET AKUMU ORODO** contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The murder took place on 9th November 2011 at Rang'ala Sub-location, South Ugenya location in Ugunja District within Siaya County.

2. After pleading not guilty, the prosecution called 8 witnesses who were heard by Chemitei J. He placed the accused on his defence. I heard the accused's defence after complying with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.

3. The deceased's husband and father to the accused, Peter Oduor Orodo (PW 1), testified that on the night of 8th November 2011 he was asleep in his house after having drunk changaa. At about 9.00pm, the accused woke him up, dragged him from his bed to the main door while telling him to go and see his wife who was lying outside. He was able to see his wife and since it was raining outside, he pulled her into the house and left her on the floor since he thought that she was drunk. When he woke up at about 5.00am, PW 1 decided to check on the deceased. He found her lying dead with a bruise on her forehead above her left eye. He covered her body with lesa and went to inform his brother and the village elder.

4. One of the people who came to the deceased's home that morning was the deceased's sister in law, Gaudencia Aoko Orodo (PW 2). She confirmed that PW 1 came to her home and informed her that the deceased had passed away. She went to the homestead and found the deceased lying on the ground with a scar on the forehead. Eventually the police came and took the deceased's body to the mortuary. William Abonyo Abonyo (PW 3) recalled that on the material morning, PW 1 came to his home at about 7.30am and informed him that the deceased had died. He informed the Assistant Chief and decided to go to PW 1's homestead. He found the deceased lying dead. He looked around and noted a jembe and a black pair of trousers that was said to belong to the accused. Together with another elder they started looking for the accused whom they found at a neighbour's homestead. They escorted the accused to the Chief's office. When the police came and he showed the officers the jembe and accused's clothes. In the meantime, the accused was taken to Ugenya Police Station by the Chief, South East Ugenya Location, Christopher Otieno Muliro (PW 4).

5. Jackline Atieno Omondi (PW 7) testified that on the material night, at around midnight, the accused came to her house, banged the door and requested to buy cigarettes. She handed the cigarettes to him through an opening on the door. The accused then sat down on her doorstep and loudly complained that he bought food worth Kshs. 600 and then found “dogs” had eaten it. He also spoke about ‘*finishing*’ his mother. PW 2 recalled that in the morning she found blood stains at her doorstep where the accused had been sitting.

6. PC Erick Kipchoge Kipruto (PW 5) and Inspector Muthee Nyaga (PW 6) testified that they went to the deceased homestead on 9th November 2011 after being called by PW 4. They found the deceased’s body lying on the floor. PW 5 noted that the deceased was bleeding on the forehead. They were shown the jembe and the accused clothes which they collected. They also collected the deceased’s body and took it to the mortuary.

7. The postmortem on the deceased’s body was done by Dr Rapenda on 17th November 2017 at Siaya District Hospital mortuary after the body was identified by PW 1. The postmortem form was produce by Dr Belinda Akinyi (PW 8). The notable observation by the doctor was that there was a single laceration on the anterior forehead about 8 cm leading to intracranial haemorrhage. Dr Rapenda concluded that the deceased died as a result of a severe head injury caused by a large blunt object blow to the forehead.

8. In his sworn testimony, the accused denied that he murdered the deceased. He stated that on the material night he came home at about 9.00pm using the back gate. He saw someone lying on the ground and when he shone his mobile phone torch, he realized it was his mother, who was drunk, lying in the rain. He proceeded to wake up his father and told him to pick up her up. He then proceeded to his house. He testified that in the morning, while working in the shamba, he was called by a young boy and informed that he was required by a village elder. He was taken by the village elder to the Chief’s Office from where he was taken to the police station and later charged.

9. In order to prove murder, the prosecution must establish three key ingredients beyond reasonable doubt: first, the fact and cause of *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*.

10. The fact and cause of death is not in dispute. The witnesses who saw the deceased on the material morning, PW 1, PW 2, PW 3, PW 5 and PW 6 testified that they saw the deceased with an injury on the forehead. The post-mortem conducted by Dr Rapenda confirmed that laceration on the forehead and the fact that she had sustained internal bleeding. I therefore find and hold that the deceased died and that she died as a result of an injury inflicted on the forehead by a blunt injury.

11. As to whether the accused is the person who caused the unlawful act that led to the deceased’s death, the evidence against him is circumstantial. The prosecution relied on evidence putting him at the scene of the incident and his inculpatory statements to PW 7. Counsel submitted that the confession made to PW 7 was inadmissible as it was contrary to **section 25(A)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which stated as follows:

A confession or any admission of fact tending to the proof of guilt made by an accused person is not admissible and shall not be admissible and shall not be proved as against such person unless it is made in court before, a magistrate or before a police officer (other than an investigating officer), before an officer not below the rank of Inspector of Police and a third party of the person’s choice.

12. The statements made to PW 7 did not amount to a confession within the meaning of **section 25(A)** of the ***Evidence Act*** because at the time the accused spoke to PW 7, he was not an accused but they nevertheless amounted to an admission of guilt. In ***Sango Mohamed Sango & Another v Republic MLD CA Criminal Appeal No. 1 of 2013 [2015] eKLR***) the Court of Appeal observed the following in regard to such statements;

*We do not see anything in the Evidence Act as amended that prohibits an accused person **voluntarily** making a confession to a private citizen. Indeed, if the intention was to*

introduce a general prohibition of confessions even to private citizens as the appellant's claim, there would have been no need to retain the provision in section 26 of the Evidence Act which specifically prohibits confessions made to persons in authority.

Peter Murphy, in his book, ***A Practical Approach to Evidence***, Blackstone Press, 2nd Edition, 1985, page 201, states as follows regarding confessions:

A confession, like any other admission, may be made orally, in writing, by conduct or in any way from which a proper inference may be drawn adverse to the maker. Usually, confessions are made to police officers or other investigators as a result of interrogation, but may equally be made to the victim of an offence, a friend or relative or any other person.

The real issue in the appellants' alleged confessions is whether they should, in the circumstances of this appeal, have been admitted, because the trial court must be convinced first about the voluntary nature of the confession and secondly that the confession has the ring of truth.

13. It is for this court to consider the import of such statements in light of all the other evidence to consider whether the accused is guilty. In this case, PW 7 was not a stranger to the accused as he was her brother in law. The accused went to her home voluntarily and he spoke to her for a period of time thereby reducing the opportunity for mistaken identity. The accused narrated to her how he had bought food worth about Kshs. 600 which was eaten by dogs. He told her that he had *finished* his mother and he left. Noteworthy is the fact that PW 7 found blood where there accused was sitting on the next morning. In his defence, the accused denied that PW 7 was related to him or that he was at her home on that night. I find this assertion an afterthought as nothing of the sort was put to PW 7 in cross-examination to suggest that she was not a relative or that there was bad blood between her and the accused. I therefore accept the evidence of PW 7 when he told PW 7 that he had finished his mother.

14. By informing PW 7 that he had finished his mother, the accused had essentially admitted to PW 7 that he had assaulted his mother. The other evidence puts him in the vicinity at the time of the incident and does not point to any other person who would have committed the act. I therefore find and hold that accused is the one who assaulted the deceased.

15. I now turn to the issue of malice aforethought. Both PW 1 and the accused admitted that the deceased used to drink changaa and indeed on the material night she was had been drinking. The accused himself admitted that on the material night he had also been drinking and the fact that he had been drinking is confirmed by the conversation he had with PW 7. Under **section 13(4)** of the **Penal Code**, the fact of intoxication may be taken into account in determining whether the accused formed a specific intent in the absence of which he would not be guilty of the offence (see **Anthony Ndegwa Ngari v Republic NYR CA Criminal Appeal No. 352 of 2012 [2014]eKLR**). The totality of the evidence is that the accused came home drunk and had a quarrel with his mother over some money he had given her to buy food. The fact that there may have been a quarrel where both the accused and deceased were drunk and the accused hit the deceased once with the jembe negatives malice aforethought.

16. I therefore find the accused, **JOSEPH OWUOR ODUOR** guilty of manslaughter for the unlawful killing of **MARGARET AKUMU ORODO** contrary to **section 202** of the **Penal Code** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 31st day of October 2017.

D.S. MAJANJA

JUDGE

Mr Olel, Advocate for the accused.

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