



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE NO. 43 OF 2010

BETWEEN

REPUBLIC.....PROSECUTOR

AND

VINCENT OKEDI ETYANG.....1ST ACCUSED

MESHACK NYANGOKO MOKAYA.....2ND ACCUSED

CORNEL ORAMISI BARASA.....3RD ACCUSED

JUDGMENT

1. **VINCENT OKEDI ETYANG, MESHACK NYANGOKO MOKAYA and CORNEL ORAMISI BARASA** were 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)*. According to the information, they jointly murdered **HANSABEN JITENDRA PATEL** ("the deceased") on the 15th day of September 2010 at Milimani Estate in Kisumu East Sub-County within Kisumu County.

2. The 1st and 2nd accused were initially charged and as the trial proceeded before Ali-Aroni J., the 3rd accused was also charged. By the time I took over the matter, 5 witnesses had testified but I took over and started the matter afresh. The prosecution called 10 witnesses. At the conclusion of the prosecution case, I put the 3rd accused on his defence but entered a verdict of not guilty against the 1st and 2nd accused. This judgment is therefore in respect of 3rd accused who I shall refer to as the accused. The case against him based on circumstantial evidence. The accused elected to give sworn testimony in his defence.

3. The deceased's husband, Jitendra Patel (PW 4), recalled that on the morning of 15th September 2010, he left the house for work few minutes to 8:00am. He left the deceased in the house and as he drove off, the accused open the gate for him and closed it. He told the court that the accused was their night guard provided by JRS Security, a security firm. PW 1 testified that although the accused was supposed to leave at 6:00am every morning, he would stay on and assist the deceased with household chores such as washing clothes and cleaning the compound for extra money as the deceased would also prepare breakfast for him.

4. PW 4 further testified that when he came home for lunch at about 1:00pm, he found the main gate unlocked which was unusual because the deceased always locked the gate after the accused left. He went into the house through the rear door and into the dining room found that his lunch had not been set as usual. PW 4 went outside to look for her as he thought she was gardening but he only found two

carpenters who had been working on 1st floor of his house seated outside. When he went to the kitchen, he found the deceased lying on the floor with her limbs tied with ropes, a towel stuffed in her mouth and a knife on the floor. He rushed outside and called the two carpenters who came and assisted him to place his wife on the couch. PW 4 also went to the bedroom and found the cupboards open and his clothes scattered. His camera, the deceased's jewellery and Kshs. 100,000.00 in cash had been stolen. PW 4 called JRS Security and his brother and informed them what had happened and they arrived shortly.

5. The Operations Managers of JRS Security at the time, Newton Aineah Ombima (PW 5) recalled that at about 1:00pm on the material day, he received a phone call from Mr Rafiq, the firm's director informing him that there was a problem at PW 4's residence. He drove to there and found PW 4 with his brother in the house. He recalled that the deceased was lying on the floor with her hand tied and a towel stuffed in her mouth. With the help of some guards he put the deceased in the vehicle and ordered John Ojiambo Were (PW 3) to rush her to Aga Khan Hospital, Kisumu but she pronounced dead on arrival.

6. Since he was aware that the accused had been guarding PW 4's house, PW 5 tried to call him but his phone was switched off. In the company of PW 3, PW 5 decided to go and look for the accused in house at Nyalenda Estate. On arrival they were informed by a neighbour that on the same day, the accused had left with his belongings in a hurry. The accused's landlord, Henry Okoth Chore (PW 1), confirmed that when he returned home from work on the material day, one of his tenants gave him the key to the accused's house and informed him that the accused had left it at around 11:00am.

7. At any rate, when PW 3 reported to Mr Rafiq that the accused had left, PW 5 was instructed to go and look for the accused at his home in Adungosi, Busia. They sought the help of Charles Etyang Engalu (PW 8) who took them to the accused's house accompanied by police officers from Adungosi Police Station. They did not find him but in cross-examination, PW 5 stated that they found the accused wife who told them that the accused had not been seen at home.

8. Adams Ben (PW 7) was one of the persons who had been doing some construction work at PW 4's house. He told the court that he was working with Sunday James Opondo who was now deceased. He recalled that on the material day, they arrived at 7.30am and found PW 4 and the deceased while the accused was sweeping outside. Since he had been working there for four days, PW 7 had been seeing the accused although he did not know his name. He testified that the accused would leave after sweeping. On the material day, they found the accused sweeping the compound, they greeted each other and then they headed straight for the 1st floor of PW 4's house where they proceeded to work until lunchtime.

9. PW 7 testified that at lunch time, they came downstairs and called the deceased to open the door for them as she is the one who usually opened the door and allowed them to go out. When she did not answer, PW 7 tried to open the door but it was not locked. They went outside and into the compound and called their supervisor who was in turn supposed to call the deceased who would let them out. As they waited, PW 4 arrived and went into the house and after sometime he called them. PW 7 testified that as they worked on the 1st floor they did not hear any noises on the ground floor and did not realise what had taken place until PW 4 called them into the house where they found the deceased and assisted PW 4 to carry her to the sitting room.

10. The Investigating Officer, Corporal Lawson Shuma (PW 10), testified that upon receiving information of the murder, he visited the scene in the company of Corporal Antony Egesa (PW 9) but by that time the deceased body had been taken away. PW 9 took pictures of the scene and they collected the exhibits which included ropes, an orange towel and a knife which he produced in evidence. They proceeded to Aga Khan Hospital Mortuary where PW 9 also took photographs of the deceased's body.

11. PW 10 further testified that he interviewed several witnesses and recorded their statements. On 16th September 2010, he attended the post mortem done by Dr Charles Muturi at Jaramogi Oginga Odinga Teaching and Referral Hospital. PW 10 told the court that he tried to trace the accused immediately after the murder but he had disappeared and was nowhere to be found. Two years after the incident, in 2012, he received information that the accused had returned to his village in Amukura. He sent Senior Sergeant

Johnson Ogola Martin (PW 6) who arrested him on 9th April 2012. After the investigations, PW 10 decided to charge the accused.

12. In his sworn testimony, the accused denied any involvement in the deceased's death. He testified that he worked with JRS Security as a guard and was assigned to PW 4's home where he would report to work at 6:00pm and leave at 6:00am. On the material day, he left his place of work at around 8:00am in the morning and by the time he was leaving, the accused stated that the deceased was in the house with the two carpenters who were doing some repair work and outside there were two truck drivers.

13. The accused further explained that he received a phone call from Busia while on his way to Nyalenda. He was informed that his child was sick so he decided to leave for Busia. He did not bother to ask for some time off from work as he knew that his employer would deny him permission. The accused left at around 10:00am and left his house key with a neighbour. He did not reach his village on the same night as he slept at his cousin's house in Busia. He remained in Teso from 16th to 20th September 2010 after which he left to take a new job in Nairobi. He worked in Nairobi until 1st April 2012 and then went to visit his family. The accused stated that it is while he was visiting his family that he was arrested.

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

15. The fact and cause of the deceased's death was not contested. The post-mortem form was produced by PW 10 without objection. The autopsy on the deceased's body was done by Dr Muturi on 16th September 2010 at the Aga Khan Hospital Mortuary after the body was identified by Devendra Patel (PW 2). The key observations by the were that there was cyanosis of the face, ears and upper neck anteriorly, periorbital swelling and petechial haemorrhages, bruises on the face, right lower lip, mandible and neck and upper chest anteriorly, bruises on both forearms and abrasions on the wrists and left antecubital fossa. Internal examination revealed that the lungs were congested and neck had haematomas upon dissection while the hyoid bone was fractured with haematoma at the fracture site. Dr Muturi concluded that the deceased died as a result of asphyxia resulting from strangulation.

16. The key issue in this case is whether the accused committed the unlawful act that caused the deceased's death. The prosecution case is founded on circumstantial evidence as none of the prosecution witnesses saw the accused murder the deceased. In the seminal case of ***Rex v Kipkering Arap Koskei and Another [1949] 16 EACA 135***, the East Africa Court of Appeal distilled that principle that;

In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses other than that of his guilt.

17. I now turn to consider the evidence in light of this principle. From the evidence I have outlined, the question for the court to answer is whether the accused was the only person who had access to the house at the time the deceased is estimated to have been killed and therefore the person who murdered the deceased. Counsel for the accused suggested that the deceased could have been murdered by PW 4, the two carpenters who working at the house or the lorry drivers who were within the compound in the morning. It was thus the duty of the prosecution exclude the possibility that these any of these people could have murdered the deceased and that the evidence points exclusively to the accused.

18. The unchallenged evidence is that the accused was a night guard employed by JRS Security to guard PW 4 and the deceased's home at Milimani, Kisumu where he would, according to his terms of service work from 6.00pm upto 6.00am. This confirmed by the JRS Duty Roster which shows that he signed in to work on the evening of 14th September 2010. There is also evidence that after finishing his shift at 6:00am, the accused would remain at the deceased's home to help her with household chores for extra money. This is supported by the testimony of PW 4 and buttressed by that of PW 7 who had seen him

working at the compound on previous days. I therefore reject the accused testimony that he used to leave his post at 6:00am except on the material day when he left at 8.00am.

19. When PW 4 left for work at about 8.00am, he left behind, the deceased, PW 7 and his colleague and the accused. There is no evidence that PW 4 came back home from that time to the time he returned at lunch hour. As regards PW 7 and his colleague, PW 7 told the court once the deceased let them in, they would go and work on the 1st floor where they remained there until lunch time. When they came down, the deceased would open the door for them. On the material day, the deceased was nowhere to open for them. They found the door open and went out. PW 7 also recalled that by the time they went upstairs to work, the accused was still in the compound.

20. The conduct of PW 7 and his colleague is consistent with their innocence. When they broke for lunch, they remained on the premises until PW 4 arrived. Why would they remain at the premises, if they had murdered the deceased? Likewise, the conduct of PW 4 when he arrived as described by PW 7 is consistent with his innocence. I accept that when he arrived home for lunch and did not find his wife, he started looking for her until he found her dead in the kitchen. This evidence taken together with the fact that the deceased and PW 4 were the only ones living in the house excludes the possibility that PW 4, PW 7 and his colleague murdered the deceased.

21. There is also other evidence that points to the accused culpability. When PW 4 returned at lunchtime, he found the tea the deceased would prepare for accused still on the counter, the house door and the main gate which she would lock after the accused left was unlocked and the clothes he was supposed to wash were untouched. Why would the accused fail to take his tea or complete the chores he was allocated? Why would the deceased fail to lock the door and the gate as she always did after the deceased had left?

22. The accused went to his house in Nyalenda, cleared it of his personal effects and left the key with the neighbour. After he left Kisumu, he disappeared for 2 years before he was arrested. I reject his testimony that he rushed home because his child was sick and that he did not inform his employer because he would be denied permission. Even if I accept that his child was sick, why would he just abandon his job and residence without reference to his former employer and residence as if he was going away for good? All the evidence taken together including his disappearing from Kisumu from the date of the murder for 2 years is inconsistent with innocence particularly given that his brother, the 1st accused, had been arrested for an offence that was committed at the place he was guarding. Since he knew of the incident, nothing would have stopped him from coming back to Kisumu and explaining himself. That he did nothing of the sort for two years leaves no other inference apart from guilt.

23. This brings me to the last point regarding the other lorries that were in the compound that morning being loaded with mattresses. The testimony of PW 4 and PW 7 points to the accused as the last person who would ordinarily have access to the deceased in her house. He was the last person left by them and in his defence, he said nothing about leaving any other people in the compound. This evidence taken together with his inculpatory conduct after the incident excludes the possibility that lorry drivers and turnboys could have committed the murder.

24. All the evidence taken together points to none other than the accused as the person who killed the deceased person. The killing was premeditated and deliberate and was done with malice aforethought within the meaning of **section 206(a)** of the *Penal Code*. The accused waited for PW 4 and the truck drivers and their turnboys to leave the compound and while the carpenters were busy working on the 1st floor, he assaulted and strangled the deceased. He made sure that she did not make any noise by stuffing the orange towel in her mouth. After she died, the accused went upstairs and ransacked the master bedroom and stole the camera, money and jewellery. He knew that PW 7 and his colleagues were in the house and hoped they would be blamed for the murder. He hurriedly left, went to his house in Nyalenda, collected his belongings, left the house key behind then disappeared until he was arrested after two years.

25. I find the accused **CORNEL ORAMISI OBARASA** guilty of the murder of **HANSABEN JITENDRA PATEL** and I convict each of them accordingly.

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

D.S. MAJANJA

JUDGE

Mr P. D. Onyango, Advocate for the 1st and 2nd accused.

Mr C. Ouma, Advocate for the 2nd accused.

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