



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRC NO. 23 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOB OCHIENG OWITI.....ACCUSED**

**JUDGMENT**

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 29<sup>th</sup> March 2013 at 1930 Hours at Kombare Sub-location in Siaya County, within Nyanza Province he murdered **Marther Ochieng Awuor**.

He pleaded not guilty to the charge.

At the ensuing trial this court heard that the accused and the deceased lived together as husband and wife and that on the fateful night the deceased had come home from the market. Their children save for Jennifer Akinyi (PW1) were in the kitchen which is separate from the house. Jennifer was in the main house with their father, the accused. Jennifer (PW1) vividly remembered their mother entering the house with food she had brought from the market. She was wet as it had been raining but when Jennifer asked her why she did not shelter herself, the deceased just laughed it off. She put paraffin she had bought in the lamp and Jennifer took the lamp to the kitchen. Jennifer told this court that she left her parents to use a wick lamp. Shortly afterwards she heard her mother cry but when she went to see what was happening the accused chased her with a knife and locked the door. She went and peeped through a hole and saw the accused had beaten their mother then stabbed her with a knife and she was lying on the floor. She screamed and people begun coming to their home. When she finally managed to get into the main house she saw her mother had a stab wound on the throat.

Clinton Onyango Ochieng (PW2), Jennifer's brother, however begun by telling this court that on the material day and time he together with his brothers Byron Otieno and Emmanuel Ouma and their sister Jennifer were in the kitchen preparing dinner. Their father was in the main house. Shortly afterwards their mother returned from the Kambare Market. She went into the main house. It was then that their sister Jennifer joined them in the kitchen to cook. Since it was raining they did not know what was happening in the main house but when the rain subsided they heard a commotion which then stopped and there was total silence. When it stopped raining they went to the main house but found the door locked. The lamp inside was also off. He tried to open the door but it was difficult so he went to call their elder brother Adrian (PW3) from their grandmother's house not too far away. Adrian (PW3) went and broke the door and that is when they discovered their mother was dead and their father had a knife stuck to his collar bone. Adrian (PW3) pulled out the knife then ran to inform their area Chief and afterwards to report the matter to Kambare police post. The area Chief and the police went to the scene and removed their mother's body and took it to the mortuary at Siaya District Hospital while their father was taken to the hospital where he was treated. The police also took the knife with them. The accused was subsequently charged with this offence.

A postmortem performed on the body of the deceased at the Siaya District Hospital morgue on 4<sup>th</sup> April 2013 showed that she had a wound measuring 3 x 7cm above the right knee, a supra umbilical wound measuring 2.5 x 5.2cm and 2 left lumbar wounds measuring 15cm x 7.3cm deep and that the cause of death was massive haemorrhage leading to cardio-respiratory arrest.

A P3 form in respect of the accused showed that he had a stab wound on the anterior-inferior aspect of the neck measuring 3 x 4cm and a penetrative intra-abdominal stab wound measuring

6 x 6cm. These injuries were classified as harm.

When this court put the accused on his defence he testified that his wife arrived late that night and when she entered the house she put the vegetables she had brought from the market on the table and started chopping them. When he asked her why she kept coming home late she started murmuring. Then he asked her to go to the bedroom and that was when she suddenly stabbed him in the stomach. They began struggling and she fell. The lamp also fell and went off. She then stabbed him on the neck. He lost consciousness only to come to at the hospital. He contended that she died because of the struggle which led to her being stabbed by the knife. He denied having stabbed her.

The court heard submissions from the Prosecution Counsel as well as from Mr. K'Opot Advocate who represented the accused.

The issues for determination are first whether the death of the deceased was caused by an unlawful act of the deceased and secondly whether it was of malice aforethought.

As submitted by Mr. K'Opot, Learned Advocate for the accused there are three reasons as to what caused the death of the deceased. Taking the evidence of Jennifer (PW1) on its own one would believe that the accused killed the deceased. Jennifer testified that her mother arrived home just as she was going to cook as she had been told by her father. That her mother put paraffin in the lamp and gave it to her. On her way to the kitchen she heard a cry from her mother but when she went to see what was happening her father, the accused, frightened her away with a knife and locked the door. She peeped through a 5cms hole and saw him stabbing their mother and started screaming and neighbours streamed to their home. Doubt is however cast to her testimony by her brother Clinton (PW2). Clinton began his testimony by saying that Jennifer was also in the kitchen when their mother arrived. He however retracted that and stated that she was in the main house with their father at the time their mother returned but came to the kitchen after their mother arrived. He also stated that while they were in the kitchen they could not hear what was happening in the main house as it was raining outside. It is only once the rain subsided that they heard a commotion which was then followed by total silence. When the rain stopped he went to the main house to check what was going on but the door was locked and there was no light inside. He was emphatic that Jennifer did not leave the kitchen after she joined them there. The question that begs an answer then is whether Jennifer's testimony that she heard a cry as she left the main house, peeped and saw the accused stab their mother and screamed to raise an alarm was true. How come Clinton did not say he heard her screaming? Is it also possible that after seeing her mother being stabbed she went into the kitchen and kept mum about it? At what point did she witness all she says she did if according to Clinton she did not leave the house? If it was before she went to the kitchen then she did not scream as she alleges as Clinton would have heard her. It is also instructive that neither Clinton nor Adrian (PW3) spoke of a hole through which one could peep to see what was happening inside. Jennifer is the only witness who alleges to have witnessed the murder first hand but with this shadow of doubt cast over her evidence by none other than her brother Clinton it is difficult to believe her. What this means therefore is that nobody actually saw what happened in the main house on that fateful day and the accused's version that the deceased attacked him with the knife and that she may have been wounded during the struggle that ensued could be true. The law dictates that where even a shadow of doubt arises the benefit thereof must be given to the accused person. Accordingly I find the accused person not guilty of murder and acquit him. He should be set at liberty forthwith unless otherwise lawfully held.

**Signed, dated and delivered at Kisumu this 21<sup>st</sup> day of December 2017**

**E. N. MAINA**

**JUDGE**