



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO.16 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

WYCLIFFE OPURU OYAKAPEL.....ACCUSED

JUDGMENT

1. On information filed on 16th September 2013, Wycliffe Opuru Oyakapel (The Accused) was charged with the Offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The Particulars being that on 6th September 2013 at Kakemer in Kakemer Sub location Chamasir location of Teso North District within Busia County he murdered Ruth Imachidang Imoo (The Deceased).

2. The body of the Deceased was examined by Dr. Cynthia Chemonges on 11th September 2013. The Doctor noted the following on the External Appearance of the body

Body in supine position. Presence of Petechiae – Anterior Aspect Right thigh; Mammary Regions – bilaterally, right and left lumber regions. No external injuries.

On the internal appearance the Doctor noted that the Deceased had suffered fractured ribs, T8 – T12 on the left side. The Deceased had a ruptured spleen and also a fracture in the Spinal Column (C2-C3). As a result of that examination the Doctor formed an opinion that the cause of death was Exsanguination Secondary to Severe Blunt Force Trauma.

3. It was the evidence of Margaret Imo (PW3) that on 5th September 2013, at about 6.00 p.m. he found the Accused assaulting the Deceased. The Accused held the hand of the Deceased and was kicking her. The incident was on a road leading to the house of the witness. The witness who is an Aunt to the Accused told Court that she attempted to intervene and urged the Accused person to stop beating the Deceased but the Accused was hostile and threatened to turn on her. It was the evidence of PW3 that she then went to the home of Miriam Imo Tata (PW2) and told her about the incident. The two of them returned to the scene only to find that the Deceased in a critical condition.

4. PW2 had on the same day seen the Accused person holding two of her grandchildren. It was the testimony of PW2 that the Accused asked her about the whereabouts of the Deceased. The Deceased is a co-wife to PW3. The Witness was not helpful because she did not know the whereabouts of the Deceased. Although the Witness invited the Accused into her home because of some light showers, he declined and told her that he would return later because there was something he first wanted to discuss with the Deceased. The Accused then left.

5. It was after about 20 minutes that PW3 came running to the house of PW2 with information about the

Accused assaulting the Deceased. After visiting the scene together with PW3 and seeing the dire condition of the Deceased, PW2 telephoned her husband Richard Imo Masai (PW1).

6. On receiving that distressed call, PW1 visited the place where the Deceased was lying. He found her unconscious and in his words her heartbeat was slow. He rushed to report the matter to Kakemer Police Post. He was advised at the Police Post to take the injured person to hospital. PW1 got some help from the owner of a motor cycle who assisted to transport the Deceased to Omoding Health Centre. It was at the Health Centre that a Doctor pronounced the Deceased Dead. One of the people who had followed PW1 to the hospital was David Imo Oyakapel (PW5).

7. Alfred IsiepeiJacob Isemeki (PW4) is a neighbour to PW1. On 5th September 2013, at about 6 p.m., he heard screams from the home of PW1. He also heard PW3 remark “**Oporu why are you killing Ruth**” He says he was able to recognize the voice of PW3 because he spoke to her often. Responding to those screams he went to its direction. There he found the Deceased lying still on a road. He was present when the Deceased was taken to hospital by a Boda boda operator. The witness accompanied PW1 to Omoding Health Centre where the Deceased was pronounced dead.

8. Inspector Moses Kameli (PW7) was at the material time the Officer in Charge Malaba Police Station. He also investigated the incident which is subject matter of this decision. On 5th September 2013, at around 8.30p.m. he was informed of the incident. He and other officers visited Omoding Health Centre where they found that the Deceased had already passed on. The witness saw the body of the Deceased but noticed no visible injuries. The officer later visited the scene at Kakemer but was unable to recover anything. He then proceeded to the home of the suspect where he found the suspect in his homestead. He arrested the suspect, that is the Accused person, who did not resist arrest.

9. In his Defence the Accused told Court that he is attached to the Administration Police Service and currently with the Security of Government Buildings Unit. He has been a Police Officer since 2008. On 5th of September 2013, he was at his rural home having been granted an off from his place of work to enable him attend a funeral of a relative. It was his evidence that after having attended the funeral, at about 2.00p.m., he returned to his home in the company of one David Oyakapel (David).

10. At home, he took tea with David and his wife. At about 3.00 p.m. he escorted David out of his home. At about 5.00 p.m., while he was speaking with David, the Deceased came to where they were. There was a conversation between the Deceased and David in which the Deceased accused David of ganging up with the Accused against her. An argument ensued but the Accused person urged David not to answer back as the Deceased was like a mother to David. Then the Deceased began to curse them and told them that they would die before the end of 2013. The two, according to the evidence of the Accused, ignored the Deceased.

11. That, upset that she was not getting attention from the two, the Deceased proceeded to undress right in front of them. That the Accused tried to stop her but she was stubborn. He even gave her back her clothes to cover her nakedness but she continued to curse. That a crowd was attracted by the unfolding drama and began to mill around them. The Accused then decided to go home. At about midnight, the Accused was woken up by Police Officers on allegation that he had assaulted the Deceased. He denied the offence and maintained his innocence. He told Court that he enjoyed a cordial relationship with Deceased.

12. At the close of both the Prosecution and Defence case, each side made submissions. Mr. Otanga for the Accused, submitted that there was unfortunate confrontation between the Accused and the Deceased and as a result of the Provocative acts of the Deceased, the essential ingredient of malice aforethought was negated. Counsel submitted that the act of the Deceased undressing in public amounted to a curse under the custom of the Accused person and this amounted to provocation.

13. Mr. Owiti for the State submitted that PW3 witnessed the repeatedly assault of the Deceased by the Accused person. That PW3 attempted to intervene but in vain. He further submitted that the injuries revealed in the Post Mortem were consistent with the assault inflicted on the Deceased by the Accused.

14. On the essential ingredient of malice aforethought, the State Counsel argued that the injuries inflicted on the Deceased were so serious and grievous. That the Accused person who was a Law Enforcement Officer was under an obligation to observe law and order. He further submitted that the Accused and the Defence team failed to prove the Defence of provocation.

15. Having heard the evidence and arguments by both the Prosecution and the State, this Court forms the view that the following are issues for determination.

1. Did the Accused person inflict injuries on the Deceased?
2. If the answer to the above is in the affirmative, did those injuries lead to the death of the Deceased?
3. If the answer to (2) above is in the affirmative, is the Defence of provocation available to the Accused Person.
4. If the answer to (1) and (2) above are in the affirmative, was malice aforethought proved?

16. The critical evidence in this episode is that of PW3. It was her evidence that she saw the Accused assault the Deceased. She described the Assault in which she said that the Accused held the Deceased by her hand and kicked her repeatedly. At that point the Accused was wearing sports shoes. The witness attempted to intervene and to stop the attack continuing but the Accused would not hear of it, became hostile and turned on her with a threat that he would shoot her.

17. The witness left the scene shortly and returned with PW2 only to find the Deceased in critical condition. The evidence of PW3 was unshaken. She was consistent in her story. The witness knew both the Accused person and the Deceased. The Deceased was her co-wife while the Accused was her nephew. The assault unfolded in the full view of the witness.

18. Her evidence is corroborated by the evidence of PW2 who joined her in returning to the scene. And as they approached the scene, PW2 saw the Accused person walking away from the place where the Deceased was lying in a critical state.

19. That indeed the Accused assaulted the Deceased was further supported by the evidence of PW4. PW4 shares a boundary with PW1 who is the husband of the Deceased. As the Accused assaulted the Deceased, PW4 was within earshot and it was his evidence that he heard PW3 ask “**Oporu why are you killing Ruth**”. One of the names of the Accused is Oporu while one of the names of Deceased is Ruth. It was his evidence that the voice of PW3 was well known to him because PW3 was his sister in law and they spoke often. In addition the two were immediate neighbours.

20. There is overwhelming evidence that on the evening of 5th September 2013, at about 6.00 p.m. the Accused person assaulted the Deceased. The evidence is that the Accused person inflicted bodily blows on the Deceased by repeatedly kicking her. The Post Mortem carried out by the Doctor (PW6) revealed the damage caused by those blows. The Doctor formed the opinion that the cause of death was exsanguination secondary to severe blunt force trauma. The Doctor stated that the injuries were consistent with repeated kicking. This Court reaches a Decision that the Deceased died as a result of the assault on her by the Accused person.

21. The Defence of provocation was raised by the Accused person through his Advocate’s in submissions tendered at the close of the Defence Case. Section 207 of the Penal Code provides as follows:-

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

While provocation is defined under section 208 of the Penal Code as follows:-

1. **The term “provocation” means and includes, except as hereinafter stated, any wrongful act**

- or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
2. When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the later provocation for an assault.
 3. A lawful act is not provocation to any person for an assault.
 4. An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.
 5. An arrest which is unlawful is not necessarily provocation of an assault, but it may be evidence of provocation to a person who knows of the illegality.

22. Provocation can vitiate a criminal offence. Once set up by an Accused Person, the responsibility of disproving the Defence lies with the Prosecution. The Court in **Kenga Vs Republic (1999)** EA 141 summed it as follows:-

“The Accused does not have to prove provocation but only raise a reasonable doubt as to its existence.”

23. The position of the Defence but coming in the closing submissions, was that the Deceased provoked the Accused person by undressing before him. That according to Teso Custom, this would be an abomination and a curse. But there was no evidence from the Prosecution side that the Deceased undressed before the Accused. PW3 who witnessed the assault stated,

“I never witnessed Ruth quarrel with the Accused. I never saw Ruth undress before the Accused.”

Ruth is the Deceased.

24. On the part of the Defence, the Accused stated that the Deceased undressed before him and David. That she did so in an attempt to provoke them. Yet the Accused person was unequivocal that he never assaulted the Deceased at all. The impression created by the Accused that he walked away from the Deceased’s attempts to provoke him. His version was that Deceased was abusive but he and David ignored her. And that when she escalated her belligerence by undressing, the Accused walked away peacefully. This was his evidence in chief;

“I gave her back her clothes to hide her nakedness. She continued to curse. A crowd started to mill around us and I decided to go home. I stayed home with my family and retired to bed at about 8.00 p.m.” (*my emphasis*)

Later answering questions in cross-examination he stated,

“I tried to stop Mama Ruth from stripping as my son was there. I failed and so I left to avoid a curse.”

25. In my assessment of both the Prosecution and Defence evidence, the Defence of provocation was not set up nor could its existence be inferred. The Accused was firm in his evidence that he walked away from the Deceased’s attempts to provoke him and that he did not assault her. I therefore hold that the Defence of provocation fails.

26. The State Counsel asked this Court to find that the amount of force used by the Accused person was

so excessive that malice aforethought must be imputed. The seriousness or otherwise of the blows suffered by the Deceased would be revealed by the Medical Evidence given by the Doctor who performed the Postmortem examination on the Deceased's body. In the Internal Appearance of the body, the Doctor found the following injuries:-

- a. Fractured ribs 1-T12 on the right side
- b. Fractured ribs T8-T12 on the left side
- c. Ruptured spleen.
- d. On the Spinal Column Fractures on C2-C3.

The Doctor formed the opinion that the cause of death was

“exsanguination Secondary to Severe blunt Force Trauma” (my emphasis)

27. There is, therefore, Medical Evidence that the blows inflicted by the Accused person on the Deceased were severe. There is no evidence that the initial attack was provoked or its continuation necessary. Under Section 206 of the Penal Code Malice aforethought is deemed to be established by evidence proving any one or more of the following circumstances :-

- a. **An intentions to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not;**
- b. **Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

By repeatedly kicking the Deceased who was an elderly woman of 68 years, the Accused person must have intended to cause grievous harm to the Deceased. Indeed the harm was so grievous that it proved fatal. I hold and find that malice aforethought has been established.

28. One another issue. The Information read out to the Accused was that the Murder was on 6th September 2013. The Prosecution evidence proved that the assault on the Deceased by the Accused was at about 6.00 p.m. on 5th September 2013. The evidence is that she died later on the night following that evening. From the evidence, the time of death is unclear. In his Defence, the Accused spoke of a verbal confrontation between himself and the Deceased on the evening of 5th September 2013. On the evidence on record, the case was Prosecuted and Defended on the basis that an incident happened on 5th September 2013 and not 6th September 2013 as set out in the Information. The Information therefore had an error on the date of incident. But this error, in my assessment, did not occasion a failure of justice to the Defence as the matter was Defended robustly on the basis of evidence that the Murder took place on 5th September 2013. I therefore hold that the error, in the circumstances of this matter, was Minor.

29. The outcome is that I do hereby find the Accused Wycliffe Oporu Oyakapel guilty of Murdering Ruth Imachidang Imoo on 5th September 2013. I accordingly convict him for the offence of Murder Contrary to Section 203 as read with Section 204 of The Penal Code.

Dated, signed and delivered at Busia this 18th day of May 2016

F. TUIYOTT

J U D G E

In the presence of:-

Orwasa- C/Assistant

Kituyi -for the Accused

Owiti -for the State