



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 5 OF 2015
(FORMERLY KISII HCCRC NO. 32 OF 2010)

BETWEEN

REPUBLIC PROSECUTOR

AND

ARTHUR ONYANGO ONDIGO ACCUSED

JUDGMENT

1. **ARTHUR ONYANGO ONDIGO** (“the accused”), who is charged with the murder, had inherited **MILDRED ADHIAMBO OCHIENG** (“the deceased”) after the death of her husband. According to the information, the accused murdered the deceased on 17th April 2010 at Rambira Location, Rachuonyo North District of Homa Bay County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The accused denied the charge and the prosecution marshalled 6 witnesses to prove its case while the accused elected to give an unsworn statement.
2. The deceased’s sister, Jocelyn Achieng Adero (PW 3) testified that after her husband had died, the deceased was living alone although she had been inherited by the accused who would come to visit her from time to time. She told the court that she came from Kisumu on 5th April 2010 to assist the deceased nurse her baby after she had given birth. She mentioned an incident where the accused came one night and went out with the deceased. After a few minutes, she heard the deceased scream that she was being strangled. When she tried to go out, she found the door locked from outside. She opened the window and called for help. When neighbours came, she saw the accused ran away. The accused returned to the house much later and slept on the sofa.
3. PW 3 recalled that on 17th April 2010, while she was staying with the deceased and the accused, the accused left in the morning to go to the farm. At about midday, as the deceased was going to work, she heard the accused tell the deceased to get some medicine for him as he was having a stomach upset. When the deceased returned in the evening, the accused had not returned but he came at about 9.00pm as they were preparing to sleep. The accused stayed in the house for a few minutes and then rushed out complaining about his stomach. PW 3 heard him call and request the deceased to bring him toilet paper. The deceased went out as requested.
4. PW 3 further recalled that the accused returned to house alone after about 30 minutes. He told her that the deceased had told him to request her to give him Kshs. 200/= which was in her purse. PW 3 told him that she did not know where the purse was but he insisted that she look for it. The

- accused also began searching for the purse and when he got it, he took some coins which were in the purse and told her they were going to see the doctor. She waited for them to return but they did not come back.
5. On the next morning at about 5.30am, PW 3 was woken up by her elder's sister son who wanted to go to the toilet. Since it was still dark, she escorted him. Along the way, at a distance of about 100metres, she saw something like body but did not make much of it. She went to inform the deceased's mother-in-law that the accused had left with the deceased the night before and had not returned. She wanted to know what to do with the baby. She also told her she what she had seen outside. He mother in law called her son, Fredrick, to go and check what it was. He came back as informed them that it was the deceased's body. PW 3 observed the body and noted that it was the deceased still wearing the clothes she left with the night before. Police officers were called and took charge of the scene and she later recorded her statement.
 6. One of the officers, who came to the scene on 18th April 2010, was Acting Inspector Isaac Muema Nzwili (PW 1), at the material time a Senior Sergeant based at Kendu Bay Police Station. The officers arrived at the homestead at around 7.00am after receiving a call from the area Assistant Chief. PW 1 proceeded with to the scene with other officer where the deceased's body lying about 100 metres from the home. Although he noticed that the deceased had bruises on the neck, he did not see any other injuries. There were slippers beside the deceased's body. PW 1 interviewed PW 3 who narrated to him what had happened. He called the Scenes of Crime officers from Homa Bay who came and photographed the body which they took to Kendu Bay Funeral Home. Corporal Shem Mogaka (PW 5) produced the photographs taken by Sergeant William Omolo who passed away during the pendency of these proceedings.
 7. PW 1 further testified that before they left they tried to look for the accused at his home which was not very far but they found his father who promised to bring his son to the police station if he came home. PW 3 recalled that the accused was brought to the police station by the father at around 8.00am in the morning of 19th April 2010 whereupon he was arrested and charged.
 8. The accused's father, John Odingo Onyango (PW 2), confirmed that the accused inherited the deceased. He recalled that on 18th April 2010 at about 8.00am, he saw a multitude of young men coming to his place threatening to burn his house. They said that they wanted the accused on suspicion of murdering the deceased. The Assistant Chief and the police came and calmed the crowd. He told them he had not seen the accused that morning. He recalled that in the evening, at about 8.00pm, the accused came and asked to be escorted to the Police Station where he was arrested. PW 2 stated that this son was innocent and that the in-laws were not happy with the relationship between him and the deceased.
 9. Dr Peter Ogola (PW 4) conducted the post-mortem on the deceased body on 19th April 2010 at Kendu Adventist Hospital. The significant finding was that there were faeces at the buttocks. There was a bluish discolouration on the nails signifying lack of oxygen. There were small haemorrhages on the eye lining signifying suffocation although the lungs were normal. PW 4 also examined genital area and established that there was no evidence of injuries. He concluded cause of death was severe lack of oxygen due to suffocation but it was difficult to ascertain that she had been strangled. PW 4 opined that it was not normal for someone to suffocate without intervention by another person and that she could not have self suffocated.
 10. The accused elected to give an unsworn statement. He denied murdering the deceased. He confirmed that he had inherited the deceased and was residing with her although her in-laws were not pleased with the relationship and had tried to separate them and had in fact laid an ambush for him twice before. He stated that early in the morning of 16th April 2010, the deceased informed him that there had been a meeting where her in-laws were planning to ambush him. After receiving this information he had a stomach upset. He however went to work and returned home at about 7.00pm. During that night he decided to go home out for a long call. He called the deceased

to give him toilet paper and she brought it. Afterwards, he had sexual intercourse with her. Immediately thereafter the deceased's brothers-in-law, Mzee Okal Opinde and Matama Okal, appeared from the bush and tried to attack him. He managed to escape to his father's compound. He later heard that the deceased had been murdered. He told his father what happened and since he could not go to the Police Station during the day as he feared that he would be lynched, he waited until next morning when his father took him to the Police Station.

11. In order to establish the offence of murder the prosecution must prove the following: first, the prosecution must prove beyond reasonable doubt 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 act with *malice aforethought*.

12. The prosecution relied on circumstantial evidence. In this respect it is important recall the long established principle concerning such evidence laid down by the Court of Appeal for Eastern Africa in ***Kipkering Arap Koske & Another v Rex, [1949] EACA 135*** that:-

That in order to justify, on the 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 hypothesis than that of guilt and the burden of proving facts which justify the drawing of the inference from the facts to the conclusion (sic) of any other reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused

13. The prosecution relied on four strands of evidence to prove that the accused killed the deceased. First, the deceased did not die from natural causes. Second, the accused was the last person seen with the deceased. Third, the deceased body was found not far from her house the very next morning after she left with the deceased. Fourth, accused's conduct after the deceased's death was inconsistent with his innocence.

14. As regards the fact and cause of death, the post-mortem conducted by PW 4 confirmed that the deceased died from cardiopulmonary arrest due to hypoxia or insufficient oxygen due to suffocation. PW 4 stated that suffocation could only be the result of intervention by another person. Moreover, the deceased had no history of sickness. PW 3 testified that she was normal on the night she left with the deceased. Likewise, the accused who was with her on the night she died did not contend that she exhibited any signs of ill health. The fact that there were no visible or external injuries detected does not exclude the possibility that she was killed. In light of the evidence, I find and hold that the deceased died as a result of suffocation caused by deliberate and intention action by a person.

15. The testimony of PW 3 was that on the material night the deceased left the house to give the accused toilet paper and never returned. In his unsworn statement, the accused confirmed that he indeed called the deceased to bring him toilet paper and she obliged. He came back to the house without her after about 30 minutes and left. The deceased was found dead the next morning not so far from her house. Since the accused was the last person to be seen with the deceased, he has a duty to provide a reasonable explanation as to how the deceased died. **Section 111(1)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which casts the burden of proof on the accused, in certain instances, provides as follows:-

111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with

which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

16. Elucidating this provision, the Court of Appeal in ***Mkendeshwa v Republic*** [2002] 1 KLR 461 stated follows;

In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.

17. Where the accused fails to offer any reasonable explanation as to how the deceased met her death, the court is entitled to presume certain facts under **section 119** of the ***Evidence Act*** which provides;

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

18. In his unsworn statement, the accused contended that he and the deceased were ambushed by the deceased's brothers-in-law who were against their relationship. Did the prosecution prove beyond reasonable doubt that the death of deceased was caused by another person other than the accused?

19. The prosecution did not call the deceased's brothers-in-law who were opposed to the relationship between him and the deceased. **Section 143** of the ***Evidence Act*** does not require the prosecution to call all or any witnesses. It states that, "*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact.*" Although it is not necessary for the prosecution to call all or any number of witnesses to prove its case, in ***Bukenya and Others v Uganda*** [1972] EA 549, the Court held that that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case.

20. I do not think that the failure to call the deceased's brothers-in-law is fatal to the prosecution case. Had they been called, they would have clearly denied that they caused the deceased's death more so when this issue is considered alongside the accused's unsworn testimony. Although it was a matter of notoriety that the deceased's in-laws were against her relationship with the deceased, there is nothing in the evidence to suggest that the accused and deceased were even attacked on that night. Had they been attacked, the accused would have reported the matter to the police that morning and also informed his father, PW 2 since, as he stated, there was a history of hostility between him and the deceased's in-laws. Nothing of this sort was put PW 2 in cross-examination.

21. The accused's defence is further discredited by the testimony of PW 3 who told the court that half an hour after the deceased left the house, the accused came back told her that they were going to see a doctor. He did not tell her that they had been attacked by the in-laws. I found PW 3's testimony straightforward and she struck me as an honest witness. Counsel for the accused did not put to her any question suggesting that she was lying or had a grudge against the accused. The accused proclaimed his love for the deceased yet when they were attacked, he did nothing to protect her, call for help and even inform those he reported to in the first instance that they had been ambushed. This conduct is, in my view, inconsistent with his innocence.

22. I am satisfied that all the evidence points inextricably to the accused as the person who murdered the deceased. The likely cause of events was that on the morning of 17th April 2010, the accused, intent on creating a ruse, informed the deceased he was unwell and that the accused should get him medicine for his stomach. When he came back that night, he lured the deceased to her death by asking her to take him toilet paper. When she went out, he suffocated her, went back to the

house and lied to PW 3 that the deceased was sick and that they were going to see the doctor. The accused then disappeared into the night leaving the deceased's body to be found in the morning. In order to complete the ruse, he asked his father to take him to the police station so that he would appear innocent.

23.As regards the motive, the Court of Appeal in *Choge v Republic* [1985] KLR 1 held as follows:

Under section 9(3) of the Penal Code, the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.

24.According to PW 3, the accused had made an attempt to strangle the deceased once before. Even if this fact is discounted as part of the motive, I find the chain of evidence forming the prosecution case and which I have outlined so strong and complete and when pieced together one cannot arrive at any other hypothesis other than that the accused murdered the deceased.

25.I therefore find the accused **ATHUR ONYANGO ONDIGO** guilty of murdering **MILDRED ADHIAMBO OCHIENG** and I convict him accordingly.

DATED and SIGNED at KISUMU this 24th day of June 2016.

D.S. MAJANJA

JUDGE

DATED and DELIVERED at HOMA BAY this ___28th___ day of June 2016

H.A. OMONDI

JUDGE

Mr Nyangwencha instructed by J. M. Nyangwencha and Company Advocates for the accused.

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