



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 69 OF 2013

BETWEEN

REPUBLIC.....PROSECUTOR

AND

DANIEL NYANJONG ODEDE.....ACCUSED

JUDGMENT

1. The accused, **DANIEL NYANJONG ODEDE** is facing a charge of murdering his wife, **IRENE ATIENO NYANJONG**, at Kowino Sub location, Rachuonyo South District of Homa Bay County on 26th October 2013 contrary to **section 203** as read with **section 204** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The accused pleaded not guilty and the prosecution called 5 witnesses to support its case. The accused did not call any witnesses.

2. In order to secure a conviction for the offence of murder under **section 203** of the ***Penal Code***, the prosecution must prove beyond reasonable doubt (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought as defined under **section 206** of the ***Penal Code***.

3. The fact and cause of the deceased's death are not in dispute. Dr Peter Ogola (PW 3) conducted the post-mortem on the deceased's body on 5th November 2013 at Rachuonyo District Hospital after Kennedy Odhiambo Nyabongu (PW 2) identified it. The significant observations were that the deceased had multiple lacerations and stab wounds on the face, trunk and the limbs. Both upper limbs at the lower part were fractured. There was a perforating wound on the left chest wall leaving blood within the left chest cavity and a bone deep wound on the head. PW 3 established that the cause of death was severe haemorrhage which was the result of multiple lacerations and perforation of the left lung. He opined that a sharp object was used to inflict the injuries.

4. In order to prove who caused the deceased's death, the prosecution relied on circumstantial evidence. The accused's brother, Kennedy Odhiambo Nyabongu (PW 2), recalled that on 26th October 2013, he arrived home at about 6.00pm after spending the day at Oyugis market. He found the deceased's children at his place, went to the river to bathe and when he returned at about 8.00pm, they had left. After a while the children came to his house crying. They told him that their mother and father had locked themselves in the house. He decided to call his cousins who went and informed the area Chief, Tom Ochieng, and the Assistant Chief, Joel Owenga Onyonge (PW 1).

5. PW 2 testified that they all went to the accused house. He stood at the door while the Chief knocked. After a while, the Assistant Chief kicked the door open. He asked the accused where the deceased was.

The accused told them that she had left for a journey. When the Chief entered the house, PW 2 heard him asking the accused why he had killed his wife. PW 2 entered the house and found the deceased completely naked, seated in the floor while leaning by door. There was blood on the door to the bedroom where she was sitting. He observed that her hand was broken.

6. The Assistant Chief of Kowino Sub-location, Joel Owenga Onyonge (PW 1), testified that he knew the accused and the deceased as residents of his jurisdiction. He recalled that on 25th October 2013 at about 11pm, he was at home when he received a phone call from PW 1 informing him that the accused had locked his wife in his house and could not get access and that the accused had quarrelled with his wife during the day. After receiving the call, he proceeded to the accused's home where he found a crowd of people including PW 2 in the compound.

7. When PW 1 reached the door, he saw blood spilling from the door. He knocked the door and called out the accused but there was no response. He tried to push the door but it was locked from inside. He pleaded with the accused to open but is only after about 20 minutes that the accused opened the door. He recalled that he saw two pangas with blood on the table and a rod with a wooden nut. He entered the house and immediately handcuffed the accused. He asked the accused where the deceased was; he told him that she had run away after they had a quarrel.

8. PW 1 told the court that there was blood all over the floor and the chair in the house which had three rooms; the sitting area, a store and the bedroom. He followed the blood stains and they led to the bedroom where he found the deceased naked body slumped on the floor in a seated position with bruises all over the body. He stated that the hand and thigh looked broken while blood was oozing from the vagina.

9. PW 1 called the Commanding Officer from Oyugis Police Station and informed him of the incident. After a while police officers arrived and took the deceased's body to Rachuonyo Hospital Mortuary while the accused was taken to Oyugis Police Station.

10. Police Constable James Gitonga (PW 5) from Oyugis Police Station told the court that on the material night, he was on mobile patrol in Oyugis Town when he was informed by his duty officer that he had received a phone call from PW 1 informing him that a person he identified as the accused had killed his wife. PW 2 directed them to the scene and when they arrived at the accused's homestead where they found PW 1, the accused's family members and other neighbours gathered. PW 5 told the court that PW 1 had handcuffed the accused, who was seated in the sitting room. He saw the deceased's body in the bedroom and observed that she had fresh deep cut wounds on the limbs. PW 1 handed over to them two pangas and a rungu. They took the deceased body to Rachuonyo Level 4 Hospital where the doctor on duty confirmed she was dead.

11. The investigating officer, PC Thomas Kareithi (PW 4), was directed to investigate a murder on 28th October 2013 after the incident was booked at Oyugis Police Station. He confirmed that he called witnesses and recorded statements, visited the scene and caused the post mortem to be conducted. He received the two pangas and a rungu which he produced in evidence.

12. The accused elected to give sworn testimony when called upon to make his defence. He denied the charge against him. He told the court that the deceased was his wife they had five children. He lived on closely with his brother and cousins in the neighbourhood. He recalled that on the night of 26th October 2013, the Assistant Chief found him tied with a rope. He stated that the children were not at home and had gone to watch TV at PW 2's house.

13. He further told the court that on Friday, 25th October 2013, his wife went to the market at Oyugis as usual as he went to take care of the animals. At about 4.30pm, when the children returned from school, he allowed them to go and play at PW 2's house. The deceased arrived home at about 7.15pm while the accused was listening to the evening news.

14. The accused explained that when the deceased arrived, four people came into the house while the door

was still open. Though there was a safari lamp on top of the cupboard, he could not recognise any of them. They ordered him to sit on the floor. One of the assailants hit him on the forehead while another hit him on the left hand with a walking stick as he tried to block the blow causing him to fall. As he was on the floor, the assailants took the deceased to the bedroom where they raped her. Since he was in fear he could not scream. He overheard one of the assailants telling the others to stop assaulting the deceased and take whatever she came with from the market while the deceased pleading with the assailants not to kill her and to take whatever they wanted.

15. The accused did not realise when the assailants left. He recalled that the assailants locked the door. When he recovered, he tried to use his phone to call his step-mother but the call was not going through. He heard PW 1 asking to open the door but he told him that he could not open the door as he had been tied. As the door had not been locked, he told PW 1 to push it. PW 1 pushed the door and gained entrance. He narrated to PW 1 what happened. He recalled that the police came after a short while and took the deceased's body.

16. The central issue in this case is whether the accused assaulted the deceased and caused her death. The testimony of PW 1 and PW 2 confirms that the deceased was alone in the house when the deceased's body was found. The natural and direct implication, is that the accused is the one who struck his wife and killed her. In these circumstances, the accused had to explain what happened to his wife in accordance with **section 111(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)** which provides as follows:

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. [Emphasis mine]

When the accused fails to offer a reasonable explanation, the court is entitled to presume what could have happened under **section 119** of the **Evidence Act** which states;

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.

17. The tenor of the accused's defence was that the deceased was killed by four unknown assailants who had followed her from market on that fateful evening. Is this explanation reasonable? At this stage I must emphasise that the accused does not bear any burden of disproving the prosecution case. It is the burden of the prosecution to prove its case beyond reasonable doubt and the accused need only to raise reasonable doubt either by putting forward an affirmative defence or by raise doubt on the prosecution case. In **Mkendeshwa v Republic [2002] 1 KLR 461**, the Court of Appeal stated that;

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.

18. The accused did not suggest to any of the witnesses who testified on behalf of the prosecution that the murder could have been committed by some assailants. I also hold that the prosecution witnesses

excluded the possibility of the murder being committed by third parties. First, it is the children of the accused who alerted PW 2 on the possibility that something bad had taken place in the accused's house. The children came crying and there was no indication that some assailants had attacked the accused and deceased. Second, when PW 1 and PW 2 went to the accused's house, the door was locked from the inside and it had to be broken down. This confirms what the children had told PW 2 that their parents had locked themselves in the house. Third, the accused claimed that he had been tied when there was no such evidence when PW 2 broke the door and found him in the house. Fourth, there was no indication of rape or sexual assault nor was such a suggestion made to PW 3. Fifth, the accused did not make any report of the alleged attack to PW 1, PW 2 or the police or report that he was injured during such attack. Sixth, the injuries on the deceased are consistent with injuries inflicted by the two pangas and rungu found in the accused's house. On the whole therefore I find that the accused's defence was an afterthought and did not undermine the prosecution case at all. The accused behaviour was inconsistent with his innocence. The attack of his loved one would, in ordinary circumstances, have elicited a different response from the accused.

19. The totality of the prosecution evidence is that on the evening of 26th October 2013, the accused was at home with his wife when a fight or argument must have erupted leading to the accused assaulting the deceased. The children, who were in the house, left and went to report to their uncle, PW 2, about what was happening. PW 2 fearing what could have taken place called PW 1 who came and they broke the accused door and found the deceased lying dead with severe injuries all over her body. All these facts pieced together leave no other explanation other than that the accused committed that act that led to the deceased's death. I therefore find and hold that it is the accused who killed the deceased.

20. As regards the issue whether the injuries were inflicted with malice aforethought, the evidence is clear that the injuries inflicted on the deceased were so vicious as to cause multiple fractures and injuries leading to her death. These are the kind of injuries inflicted with, "*an intention to cause the death of or to do grievous harm to any person, whether the person is actually killed or not*" within the meaning of **section 206(a)** of the *Penal Code*. I therefore find that the prosecution proved that the injuries were inflicted with malice aforethought.

21. Having considered all the evidence, I find the accused **DANIEL NYANJONG ODEDE** guilty of the murder of **IRENE ATIENO NYANJONG** and I convict him accordingly.

SIGNED at KISUMU

D. S. MAJANJA

KISUMU

DATED and DELIVERED at HOMA BAY this 3rd day of November 2016

H. OMONDI

JUDGE

Mr Ongoso, Advocate for the accused.

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