



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT SIAYA

HCCRC NO. 27 OF 2015

(CORAM: J.A. MAKAU – J)

REPUBLIC.....PROSECUTOR

VERSUS

ALOISE OMBERE ONONO.....ACCUSED

JUDGMENT

1. **ALOISE OMBERE ONONO** is charged with an offence of **Murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya**. The particulars of the charge are that on the 21st day of March 2015, at Uhanya Beach in Bondo District, within Siaya County, the accused murdered **GRACE ATIENO OMBERE**.

2. The prosecution called five (5) witnesses while the accused testified on oath and opted to call no witness. The defence was led by Mr. Ooro Learned Advocate, whereas M/s. Mourine Odumba, Learned Prosecution Counsel, prosecuted the case for the State.

3. The deceased Grace Atieno Ombere, was the second wife of the accused. PW1 JIADA FREDRICK OMONDI, brother to the deceased and brother-in-law to the accused, told this Court that on 21.3.2015 at around 7.00 p.m. he was at Kakwanja in Uhanya, at the home of the accused and the deceased, whereby he was staying with the two. That he had come from the school and was cooking at the open kitchen outside the main house. That as he was cooking, Grace Atieno had an argument with her husband Aloise Ombere Onono, who were both outside between the house of the first wife and that of Grace Atieno. He was 20 metres from the two. PW1 heard a loud bang as if someone had fallen and suddenly he heard Grace Atieno Crying. He rushed out only to find the accused on top of Grace and as it was dark he could not see well what the accused was doing. He tried to separate the two but the accused tried to bite PW1's hands. PW1, managed at last to pull the accused from the top of Grace. PW1, then noted Grace could not rise up and was breathing with difficulty. PW1, started administering first aid as the accused rushed to the house and came with water which he poured on the deceased's body but that did not help. PW1, noted Grace Atieno was already dead and started crying and people came to the scene. PW1 testified when the incident occurred, he was with the daughter of Grace, Lydia Auma. PW1 identified the accused Aloise Ombere Onono, by name and pointed at him in court. During cross-examination PW1 testified that it was dark at the material time and he did not see all that happened.

4. PW2, Daniel Ouma Odhiambo, brother to Grace Atieno and brother-in-law to the accused, testified that on 21.3.2013 he was at his home in Kisumu, when at around 8.00 p.m. he received a telephone call from Aloise Ombere Onono, the accused, informing him that his sister died as he was having an argument

with her and as they were about to fight as he was chasing her, she collided with his younger brother Boss (PW1) and both fell down. That the accused and Boss (PW1) got up but Grace did not. PW2, called Grace's mother-in-law instructing her to go and check what had happened. She called him back and confirmed Grace was dead. PW2, then called the accused, but he was not responding. The following day PW2, proceeded to Bondo District Hospital Mortuary and viewed his sister's body which had blood, oozing from the mouth, nose and ears. He then proceeded to Usenge Police Station, where he found the accused and his brother Boss (PW1) in Police cells. PW2, identified the accused as his brother-in-law and gave his name as Aloise Ombere Onono. During cross-examination. PW2 testified that his sister Grace had been married to the deceased for a long time. That he was told of the collision of the three by the accused.

5. PW3, Lydiah Auma Ombere, a minor daughter to the accused and the deceased, gave her evidence on oath. She testified that on 21.3.2015, she was at Yimbo cooking with PW1 at her parent's home, when her father, the accused while standing at his door to the main house, called her to the house of her mother, the accused asked PW3, to repeat what she was saying and she kept quiet, provoking the accused to remove a stick from the roof of the hut and as he was about to hit her, her mother, the deceased intervened preventing the accused from assaulting PW3, the deceased, pulled PW3 behind her and told the accused not to assault PW3, but instead he should kill her first. The accused, then held PW3's mother, Grace Atieno, by her neck and both of them fell down, giving, PW3 an opportunity, to ran away. That when PW3, returned she found her mother already dead. PW3, testified that when her father called her, it was not very dark and she could see clearly what was happening. PW1, was cooking then. During cross-examination PW3, testified that the police recorded her statement the following day. She stated she did not tell police the incident took place at 8.00 p.m. as it was not dark. PW3, stated, when the accused called her, he had already quarreled with her mother. PW3, on re-examination, reiterated when her father called her, it was slightly dark and that when her father called her she found her mother there.

6. PW4, Dr. Awino Bob, performed postmortem, on the body of the deceased, he produced the report as exhibit P1. The Doctor found the respiratory system affected, the lungs thus cyanosed lungs. He was of the opinion, that the cause of death was asphyxia from hand strangulation. During cross-examination, PW4, stated Asphyxia is caused by loss of oxygen. He stated he did not find any marks at the deceased's neck, adding that, a finding of a mark on the neck depends on the level of force asserted on the deceased's neck. He further stated if one seats on another person's chest, that can cause lung collapse.

7. PW5, No.233823 C.I. Jabson Okongo, told the court that he was investigating officer in this case assisted by PC Owino. That on 21.3.2015 at about 10.30 p.m. he received a call from a good Samaritan that there was a woman who collided with her husband, fell down and died. PW5, proceeded to the scene with P.C. Owino and P.C. Mutinda the Assistant Chief, of the area led them to the home of the accused at Uhanya. At the scene they found the deceased lying on the floor of her sitting room, dead, the body covered with a Lesso, the accused was already under arrest by members of public. PW5 and his team, viewed the body and noted no physical injuries, interrogated the members of public around, as they were not satisfied with the information given by the accused, who had told them, the deceased was epileptic. The accused and PW1, were arrested and the body taken to Bondo District Hospital Mortuary. PW1 told them he witnessed the accused fighting his wife, wrestled her down and strangled her by her neck which resulted to her death. That after investigation the accused was charged with this offence and PW1 was treated as a witness. PW5, returned to the scene and got information of how the deceased died. He stated the accused wanted to beat one of his daughters, but the deceased intervened and that caused the accused to attack her. PW5 recorded statement from some of the witnesses, whereas, P.C. Owino, recorded the rest of the statements. During cross-examination, PW5, stated the accused told him the deceased was epileptic and that the brothers and sisters to the deceased told him the deceased was not epileptic, but he stated PW1, told him the accused strangled the deceased.

8. When the accused was put on his defence, he opted to give a sworn testimony and opted to call no witness. He testified that on 21.3.2015 at around 7 pm he was at his home with the deceased and his children, Odhiambo and Haji Baraka while, Lydia Auma (PW3) was outside the house. That he called Lydia Auma, as she was bothering him with her academic performance and as she was not attending school as required. The accused intended to discipline her. That he called her to the house and wanted to

know, why she was performing poorly at the school and why she was not doing her assignments. He took a whip to discipline her, but she rushed out before he could beat her. That he followed her out and met the deceased at the door as she was entering the house at the door and the two collided, shoulder to shoulder, PW3, disappeared and the accused returned inside the house. He took PW3's, books put them in a bag and hanged it. That he went out after a while and found PW1, had arrived and also saw the deceased lying on the ground. He called her twice but she did not respond, PW1, also called her but she did not respond. He then turned her up, as she was lying on her face and found that she was not breathing, PW1 and the accused tried to give the deceased, first aid by loosening her clothes and pouring water on her body, but she did not respond. The accused stated, the deceased was hypertensive. That members of public, came followed by police officers from Usenge Police Station. The accused stated that he did not strangle his wife and that he had no problem with her.

9. During cross-examination, the accused (DW1) stated on the material time in his compound there were people living in the compound. He stated that, when he collided with the deceased he did not see PW1. He stated that he does not know anything about strangulation, during re-examination, the accused stated he had a grudge with PW1, because he refused to lend him KShs.500/= in 2015. He admitted, he never raised the issue of grudge, when PW1 gave evidence, through cross-examination. He also stated when he collided with his wife and was injured, he did not go to the hospital, he admitted he never told the court of the injuries when he was taken for plea nor in his evidence.

10. To prove a charge of murder, the prosecution has a duty to establish the following ingredients:-

i. The death and cause of death of the deceased.

ii. That the accused caused the death through an unlawful act or omission.

iii. The accused possessed an intention to cause harm/kill or malice aforethought.

11. Whether the prosecution proved death of the deceased and the cause of death of the deceased? PW4, Dr. Awino Bob, carried out postmortem, on the body of the deceased, on 24th March 2015, after it was identified to him, by Moris Omondi Ochieng and Julius Otieno Ogotu as per exhibit P1. In this case, PW1, PW3, and PW5 testified, that they saw the body of the deceased, Grace Atieno, at the scene of the crime, whereas PW2, saw the body at Bondo District Hospital Mortuary. PW5, observed the deceased's body at the scene, picked up the body and took it to mortuary. The death of the deceased is therefore not indispute and was proved. The Doctor, PW4, on examination of the body of the deceased, formed the opinion, that the cause of death was due to asphyxia from hand strangulation. The prosecution therefore proved death of the deceased and its cause.

12. The next issue that I now turn to, is who caused the deceased's death? The accused denied having committed the offence. In this case, there are two eye witnesses, PW1 and PW3, who claimed to have witnessed the commission of the offence. PW1 and PW3, were at the scene of crime with the deceased and the accused plus PW3's siblings. It was not very dark at the material time, as it was around 7.00 p.m. and one could see what was happening. PW1, started he was cooking outside the main house, when he heard the deceased and the accused quarrelling. He was not mistaken as to who were quarrelling. He suddenly heard a loud bang, followed by Grace Atieno, (deceased) cries, he rushed to the scene, to find the accused on top of the deceased and as it was abit dark, he could not see exactly what he was doing to the deceased. He had to separate the two as the accused tried to bite his hands. He eventually separated the two, but the deceased could not stand up, he noted she had difficulties in breathing. He applied first aid and assisted by the accused but the deceased had died. PW3 stated the accused, wanted to assault her, when the deceased, her mother intervened and told the accused he will first kill her before he assaults PW3. PW3, saw her father, the accused, hold her mother's neck and both of them fell down. PW3, got an opportunity to run away and did not observe what followed, but she returned later, only to find her mother dead. PW3, was categorical at the time her father attacked her mother, she could see clearly what was happening. From the evidence of PW2, the accused called her and told her that the deceased died after the three collided, thus the accused, PW1 and the deceased. I have perused the evidence of PW1 and PW3, who were at the scene of the crime and none of them mentioned of there being collision between

the three, or between the deceased and the accused. None of them was cross-examined on there being a collision. The accused, in his defence did not mention any collision, between the three but his collision with the deceased shoulder to shoulder. The accused was not injured as he did not seek any medication and if there was any collision, the same could not have caused the kind of injuries noted by the doctor. The injuries noted by PW4, are connected with what PW1, told the court that the accused was on top of the deceased. It is also consistent with the evidence of PW3, who saw the accused hold the deceased by the neck and the two fell down.

13. PW1's and PW3's evidence, is materially consistent with the first report to PW5, that the two had a quarrel followed by the accused grabbing the deceased, by the neck and wrestling her down. I have no doubt in my mind, PW1 and PW3, told the court the truth. PW3 had no grudge with her father, the accused. The Accused stated that PW1 had a grudge with him because he refused to give him a loan of KShs.500/=, this point was not put to PW1, when he gave evidence and was not raised early enough, but during the defence. I find this to be an afterthought. I am satisfied that PW1 and PW2, told this court the truth. PW1's and PW3's evidence, put the accused at the scene of crime which he has not denied. The accused acted unlawfully, by grabbing the deceased by her neck and knocking her down, jumping on top of her and continued with his unlawful acts as PW1 tried to separate him from the deceased. I therefore find that it was due to the accused's unlawful acts that the deceased lost her life. I find that it was the accused who caused the death of the deceased.

14. Whether the accused possessed an intention to cause harm or kill the deceased or whether the accused had malice aforethought? PW1, told the court that at the material time, he heard the deceased and the accused quarrelling. He did not say what the quarrel was all about. That immediately thereafter he heard a loud bang, followed by the deceased crying. He went and found the accused on top of the deceased but without any weapon. PW3, heard the quarrel between her parents before the deceased told the accused to have her first killed, before he could beat PW3. PW3 witnessed the accused holding the deceased by her neck. PW1 and PW3 did not tell this court of any bad blood, between the husband and his wife. The accused stated, he had no problem with his wife, which I believe, to be the truth, bearing in mind they were living together as man and wife and PW1 brother to the deceased was accommodated at the accused's home from where he was attending school.

15. The accused in his defence denied having murdered his wife, raising a collision between the two, as the cause of the death of the deceased. I have evaluated, the accused's defence and the evidence of PW1 and PW3, as well as evidence by PW4, as to the cause of death and I do believe PW1 and PW3, that the deceased's death was caused by strangulation. PW3 saw the accused hold the deceased by the neck and throw her down. PW1, did not see what the accused was doing, when he found him on top of the deceased. PW4, told the Court the respiratory system of the deceased was affected and lungs were blue. He stated if one sits on one's chest, that can cause one's lungs to collapse. He noted the deceased had cyanosed lungs. He stated that though there were no strangulation marks on the deceased's neck the cause of death was asphyxia from hand strangulation stating strangulation marks depends on the force exerted on the neck and that strangulation can occur without visible marks on the neck.

16. On evaluation of the evidence, I find the evidence of PW1, PW3 and PW4 to be consistent with the cause of death of the deceased. I find that the accused's defence to be an afterthought as it was not raised early enough and was not put to the prosecution witnesses during cross-examination. I reject the same.

17. From the evidence of PW1 and PW3, the accused might have acted on provocation by the deceased when she prevented him from disciplining his child (PW3), for failing to go to school and doing the school assignment, when the deceased told the accused he had to kill her, before he could beat the child. The misunderstanding arose out the argument, between the accused and the deceased over the academic performance of PW3. There is no evidence that the accused had planned to commit the offence.

18. In regarding the establishment of malice aforethought where from the evidence, it is established the attack on the deceased was spontaneous without evidence of, there having been prior plan to attack the deceased it cannot be urged that the killing was with malice aforethought (**see the case of Nyabuti & Another V Republic (2009) KLR 409**)

19. In Harun Mwambia Ndereba & Another V R [2015] eKLR the Court of Appeal, Nyeri quoted with approval from the case of **Moses Odhiambo Oduor & 2 Others V Republic CRA No. 348 of 2008** Kisumu thus:

“On our part having carefully considered the testimony tendered before the trial court we would agree with the two counsel that had the two courts below correctly directed themselves, they would have found the appellants guilty of the lesser but cognate offences of either assault or grievous harm rather than that preferred. The evidence on record shows that the attack upon the complainant was preceded by a disagreement or an altercation of some sort, possibly arising from a business rivalry. Again, the fight was protracted and involved other youths.

The attack upon the complainant could only be explained on the basis of some an unexplained reason and not robbery. The two courts below having failed to direct themselves on this issue, the robbery charge cannot stand. We must, accordingly, give the benefit of doubt to have appellant and quash the conviction for robbery with violence and set aside the sentences of death. In their stead we substitute therefore convictions for grievous harm contrary to Section 234 of the Penal Code since the injury sustained by the complainant was classified as main according to the P3 form – exhibit No. 1.”

The court further held as follows:-

“In the instant case, the attack upon the complainant was because he refused to part with KShs.20.00, the illegal “toll” demanded by the appellants. We are therefore of the considered view that had the two lower courts properly directed themselves, they would have found the two appellants guilty of grievous harm and not robbery with violence contrary to Section 296 (2) of the Penal Code as the facts pointed to assault and not the offence of robbery with violence”

For these reasons, I find the accused killed his wife, without intention to kill, but following provocation. I consequently substitute the charge against the accused due to provocation from **Murder contrary to Section 203 of the Penal Code to Manslaughter contrary to Section 202 of the Penal Code.**

20. I find the accused guilty of the substituted charge of manslaughter and convict him accordingly.

DATED AND SIGNED AT SIAYA THIS 14TH DAY OF DECEMBER, 2016.

J.A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT

IN THE PRESENCE OF:

MR. OORO FOR THE ACCUSED

M/S. ODUMBA FOR THE STATE

ACCUSED – PRESENT

C.A.

1. K. ODHIAMBO

2. L. ATIKA

J.A. MAKAU

JUDGE