



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 17 OF 2014
(FORMERLY KISII HCCR CASE NO. 55 OF 2011)

BETWEEN

REPUBLIC PROSECUTOR

AND

JARED OCHIENG OWENGAACCUSED

JUDGMENT

1. On 16th June 2011, the court was informed that the accused, **JARED OCHIENG OWENGA**, had murdered **JANNIFER OJWANG OTIENO** (“the deceased”), on 11th May 2011 at Koderia Kwoyo Sub location, Sakwa North Location, in Migori County contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**.

2. The accused pleaded not guilty and I completed the trial under **section 200** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** after it had commenced before Sitati J. The case against the accused is based on circumstantial evidence. The prosecution case is that the accused was seen carrying and was found with some personal items belonging to the deceased, a 65 year old woman, who was found dead after she had been strangled. The prosecution called 7 witnesses to prove its case.

3. Fred Omondi Otieno (PW 1), a barber with a shop at Ringa recalled that in 11th May 2011 at about 11.00 pm, he was coming back from his barber shop, when he got to the home of the accused, a neighbour living about 50 metres away. He found 2 people he did not know standing at the accused place. He greeted them but they did not respond. He saw one of them carrying a metal bar, which had sharp pointed things like nails on it. When he greeted them a second time, they told him that they were the accused’s visitors. Before he got to his house he met the accused locking the deceased’s door while carrying a small white pouch like handbag and a small metal bar with his left hand.

4. On the next day, 12th May 2011 at about 6.00 am, he was awoken by people mourning from the direction of the deceased’s house. When he went to her house, he found her lying on her bed. She had a deep cut on the left side of her head running from the eye to the ear. He also noted that part of the left ear was missing. He met his father, Peterlis Otieno Nyaoro (PW 4), whom he told that he had seen the accused the previous night locking the deceased’s door.

5. PW 1 testified that the accused was not at the deceased place in the morning but he came back at about noon. PW 1 heard him crying in Dholuo that God should help him because he had done something bad. He left and was traced at Kamwango 3 days later. PW 1 recalled that a search was conducted at the

accused house by the police where they found the white coloured pouch wrapped in a polythene bag and hidden under his bed.

6. Janet Adhiambo Odhiambo (PW 2), the deceased's granddaughter, recalled that on 12th May 2011, after waking up at about 6.00 am, she proceeded to her grandmother's house so that they could go to the shamba. She called her but she did not respond. When she looked at the door, it was closed. She opened it, entered the house and once again called the deceased but she did not respond so she went into her bedroom. The bedroom window was partly closed so she opened it. She saw the deceased lying on her back half covered in a blanket with a part of her ear was cut and a deep wound around the ear and in one of her eyes. She immediately raised alarm. People came in response to the alarm but the accused not among them.

7. PW 2 testified that she was present when the police carried out a search in the accused's house. She identified a white pouch which was wrapped in a polythene bag hidden under the accused's bed. She identified it as one belonging to the deceased and one she often saw the deceased with. The pouch was also opened in her presence and she identified the deceased's national identity card, voter's card, some papers and photographs.

8. PW 3, Gordon Juma Otieno, recalled that on 12th May 2011 at about 6.00am, he was awoken by PW 2 screaming from direction of the deceased's house. He proceeded there and found his parents there. He also found the deceased lying on her bed with a deep wound on the left ear with blood was oozing. PW 3 and his father decided to call the assistant chief, Moses Odhiambo Chare, who then called police officers from Awendo. The police officers came and cordoned off the area and stopped people from getting into the house.

9. PW 3 further testified that the accused was not present that morning but he came at about 2.00 pm and began mourning saying, "*God remember me and forgive me.*" He then disappeared for about 3 days after which he was arrested. PW 3 testified that on 12th May 2011, he was present when a search was carried out in the accused house by the police. He testified that the deceased's purse was found under the accused's bed.

10. Peterlis Otieno Nyaoro (PW 4) was the husband of the deceased who was one of his four wives. He recalled that he was having dinner at her house on 11th May 2011 between 7.00 pm and 9.00 pm. As he was about to leave, the accused, his step brother, knocked the door was welcomed in. PW 4 asked him what he wanted and the accused said he wanted Kshs 500/- from the deceased so that he could take his sick son to hospital. The deceased told the accused to sit down and it is at this point that PW 4 left to go to his fourth wife's house where he slept.

11. On the next morning, he was woken up by alarm raised by PW 2. He went to the deceased's house where he found her lying on her bed, face down. He noted that she had a dislocated neck and her right eye had knife stabs. As he had left the deceased with the accused the night before, he began to ask where the accused was. Although the accused mother, Domtilla Okello was present with the other people mourning, he did not see the accused, his wife or children. He called the police at Awendo who came to collect the deceased's body.

12. PW 4 testified that he was present when the police searched the accused's house and found the deceased's purse. He identified the hand bag and its contents. He recalled that the deceased had put Kshs. 6000/- in her purse after she had sold sugarcane a week prior to the incident. PW 4 identified the deceased's body when the postmortem was conducted at Rapcom Hospital Mortuary in Awendo.

13. PW 5, Evans Odiwuor Otieno, a step son to the deceased, testified that on 11th May 2011, he had dinner with the deceased at about 8 pm approaching 9 pm. After eating, he went to study in another house after leaving the deceased with his father, PW 4. At about 10.00 pm as he was going to sleep he passed the deceased's house which was about 4 metres away. He heard the deceased talking to the accused inside the house. He knew it was the accused because he asked the deceased who she was talking to and she told

him that it was the accused. He went to sleep and since he went to school early in the morning, he only received news of the deceased's death in the evening.

14. Dr Emmanuel Odhiambo Oyier, PW 6, conducted the autopsy on the deceased's body after it was identified by PW 4. He observed that the deceased's neck was wobbled, there was a cut on the pinnae of the left ear with a blood stain on the ear and skin of the left cheek. He noted that there was blood oozing from the eye and both cornea were torn. The internal examination of the spinal cord and column revealed a fracture of the cervical spine and a damaged spinal cord. As a result of the examination he concluded that the cause of death was cardiorespiratory arrest due to a fracture of the cervical spine as a result of physical assault and strangulation. PW 6 also carried out a mental assessment of the accused and concluded that he was fit to stand trial.

15. The final prosecution witness was the investigating officer, PC Samson Ole Tome (PW 7) who was attached to Awendo Police Station at the time of the incident. He testified that on 12th May 2011, he was at the Police Station when he received a call from the Assistant Chief, Moses Ocharo, about a dead body at Ringa village. In the company of other officers, he proceeded to the village and upon arrival he found the deceased body in a house. He recorded statements at the scene and organized for the body to be taken to the Rapcom Mortuary. On 13th May 2011, the accused was brought to Awendo Police Station. He was interrogated and released due to inadequate evidence. He continued carrying out further information. On 21st May 2011, he received a white handbag from PW 4, which was said to belong to the deceased and which contained photographs, a national identity card, an electors card, and her photo. The items were brought to the police station by PW 4, one Vitalis Juma and other members of the public. He testified that the accused was arrested on 14th June 2011 in Bambecha Sub-location in the homestead of one Opondo.

16. After the close of the prosecution case, the accused elected to make an unsworn statement after being put on his defence. He stated that he is a cane crusher and on 11th May 2011, he was arrested when he was Kamagambo Kamwango. He was arrested by the Assistant Chief and taken to Rongo Police station. He denied that he knew the deceased or that he was at her house as alleged and that at all times he was at Kamawango until he was arrested.

17. In order to secure a conviction for the offence of murder under the provisions of **section 203 and 204** of the **Penal Code**, the prosecution must prove beyond reasonable doubt the following ingredients;

- a. Proof of the fact and the cause of death of the deceased.
- b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.
- c. Proof that the unlawful act or omission was committed with malice aforethought as defined in **section 206** of the **Penal Code**.

18. It is not in doubt that the deceased was found dead in her house. Her death was confirmed by PW 1, PW 2, PW 3 and PW 4 who went to the deceased house and saw the deceased body. The injuries they described were consistent with those observed by PW 6 when he conducted the post mortem. I therefore find and hold the deceased died and she died from cardiorespiratory arrest caused by physical assault and strangulation resulting in a fracture of the cervical spine and a damaged spinal cord.

19. As no one saw the accused assault and strangle the deceased, the prosecution relied on circumstantial evidence to prove that the accused murdered the deceased. The law in this regard has been restated many times by our courts and it is that in order to justify a conviction based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. The circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on and that the burden of proving facts which justify the drawing of this inference from the facts to the

exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. (See **R v Kipkering Arap Koske & Another [1949] 16 EACA 135** and **Sawe v Republic CA Criminal Appeal No. 2 of 2002 [2003]eKLR**).

20. The circumstantial evidence is based on the fact that the accused was the last person to be seen at the house of the deceased and that he was found with the deceased's possessions shortly after the death of the deceased.

21. The accused was the deceased house on the night of 11th May 2011. PW 4 was in the deceased's house as he was leaving and PW 5 confirmed that he heard the voice of the accused in the house that night as he was going to sleep. PW 1 saw the accused locking the deceased's door at about 11 pm. He told him that the deceased had gone to the latrine. PW 1, PW 4 and PW 5 all knew the accused and therefore this was not a case of identification but rather recognition.

22. Even where the accused is recognized the court must still exercise caution and ensure that the testimony is free from error. PW 4's testimony was clear that the accused came into the house and they spoke for a while before he left. PW 1 testified that there was full moonlight and he had a torch from his phone when he saw the accused. He also spoke to the accused. I am satisfied that the circumstances for positive recognition of the accused were favourable.

23. I find and hold that the accused, having been the last person seen at the deceased home in suspicious circumstances was likely involved in her death. But apart from being seen at the deceased's house, the prosecution case is that the accused was found with the deceased person property. The prosecution case implicates the doctrine of recent possession. In **Christopher Rabut Opaka v Republic, KSM CA Criminal Appeal No.82 of 2004 [2006] eKLR** the Court of Appeal observed as follows regarding the doctrine that:-

It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

24. It is not in doubt that the items purportedly recovered belonged to the deceased. The purse was positively identified by PW 2, PW 3 and PW 4. Furthermore the contents in the purse were the deceased's personal identification documents which leave no doubt that the purse belonged to her. But were these items found in the home of the accused? PW 1, PW 2, PW 3 and PW 4 all testified that they were present when the police went to the accused's home and found the deceased personal items on 12th May 2011. However, PW 7, the investigating officer testified that he received the deceased's items from PW 4 when they were brought to the Police Station on 21st May 2011 which was 9 days after the death of the deceased.

25. PW 7 testified that the accused was arrested on 13th May 2011 but released for lack of evidence. If indeed the police had conducted a search at the accused house on 12th May 2011 and recovered the deceased's items, they would have charged the accused. This inconsistent evidence of recovery of the deceased's items undermines the prosecution case based on the doctrine of recent possession. It cannot be said that the property was recovered from the accused. The inconsistent evidence is the kind of evidence that tends to weaken the chain of evidence linking the accused to the death of the deceased.

26. This gap of 9 days means that either that the deceased's relatives were lying about recovery or the investigating officer was concealing information. Either way, in light of the inconsistent testimony regarding the recovery of the deceased's items presented, I am unable to convict the accused even though I strongly believe that he had something to do with the death of the deceased.

27. The accused is acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 23rd day of March 2015

D.S. MAJANJA

JUDGE

Mr Nyagwencha instructed by Nyagwencha and Company Advocates for the accused.

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