



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL CASE NO. 20 OF 2012**  
**(FORMERLY KISII HCCR CASE NO. 5 OF 2010)**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**THOMAS OTIENO NYARIWO ..... ACCUSED**

**RULING**

1. The charge facing **THOMAS OTIENO NYARIWO** (“the accused”) is that on 24<sup>th</sup> December 2009 at around Shauri Yako Estate within Homa Bay District, he murdered **ROSE ACHIENG** (“the deceased”) 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 the trial proceeded a pace before Maina J. I completed the trial under **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The prosecution case was that the accused murdered the deceased who was his wife. It marshalled 6 witnesses to prove its case. I am now required, at the close of the prosecution case, to consider whether the prosecution has made out a prima facie case to warrant the accused being put on his defence.
3. It is not disputed that the deceased died a vicious and most horrible death. Dr Ayoma Ojwang’ (PW 4), the Medical Superintendent of Homa Bay District Hospital, carried out the postmortem on the deceased’s body on 30<sup>th</sup> December 2009 at the Homa Bay District Hospital after it had been identified by Caroline Otieno Oloo (PW 3), the deceased’s sister. The doctor observed deep cut wounds all over the body including the left side of the neck, the frontal, occipital and facial part of the head, the upper limb and the right side of the groin. He also noted multiple fractures on the skull. He certified the cause of death as severe bleeding as a result of the multiple cuts and the head injury. He opined that the injuries were likely caused by a sharp object. I therefore find and hold that the deceased died and she died as a result of severe bleeding caused by multiple injuries on her body and head inflicted on her by a sharp object.
4. Having established the fact of death and the cause of death of the deceased, the issue then is whether there is any evidence connecting the accused to the death of the deceased.
5. It is not in dispute that the accused and the deceased were living together at Shauri Yako Estate in not very happy circumstances. They began living together in 2008. Nelson Ochieng Omondi (PW 1), a son to the deceased, lived with his grandmother in Kisumu, he only came to see his mother while on holiday. That December 2009, he came to Homa Bay on holiday but left on 12<sup>th</sup> December 2009 after the accused and deceased quarreled. He testified that the accused beat the deceased and the accused then moved out

to a nearby house taking with him household items. PW 1 did not see his mother alive again.

6. The testimony of Caroline Atieno Oloo (PW 3), a younger sister of the deceased, was that on 23<sup>rd</sup> December 2009 at about 8.30 am, the accused called her in Chemelil and told her that she should talk to her sister as she would be killed and would die a bad death. He accused the deceased of going out with a tout. She told the accused to give her sister money so that she could come home to talk with her over the issue. On 24<sup>th</sup> December 2009, while she was with her brother, Bernard Ooko Oloo (PW 2), the accused called them informed them that the deceased had been killed.

7. Daniel Omondi Mudao (PW 6) was the key prosecution witness. He testified that he resided on the same plot as the accused and the deceased. He lived on the 2<sup>nd</sup> room of a mabati tenement house while the accused and deceased lived in the 1<sup>st</sup> room. He stated that the deceased used to sell *chang'aa* to customers from her premises. The accused was involved in the business as he would bring *chang'aa* from Ndhiwa for sale

8. He clearly recalled the events of 24<sup>th</sup> December 2009 as it was Christmas eve so he slept very late. He heard a single scream of a woman whom he identified as the deceased. She passed by his door and after about 5 minutes he heard something being hit. He could not immediately go out as his wife restrained him from going out as there had been murders in the area before.

9. He finally decided to go outside. He lit a paraffin lamp and when he went out he found a torch, which belonged to the deceased, at the door. The torch had blood. He noticed the door was locked with a padlock and had a lot of a lot of blood. By this time, the other neighbours had come out of their houses. They all followed the trail of blood which led to the end of the building in a nearby bush. They found the deceased lying there, fully dressed. PW 6 did not see any injuries at the time apart from blood on her face. He did not see the accused there. He decided to go and report the incident to Homa Bay Police Station.

10. PW 6 further testified that on that evening he had been with the deceased until about 8.30 pm. She was alone at that time and the accused was not present. He stated in cross-examination that he saw the deceased with a man at her home at about 9.30 pm and they left together at about 10.30pm. The next time he saw the accused was on the next day at about 8.30 am. The accused asked him what happened and he told him. The accused then proceeded to the Mortuary.

11. PC Lawrence Kitisa (PW 5), was the Investigating Officer. On 24<sup>th</sup> December 2009, he was on night duty when a few minutes after midnight, he received members of the public who reported that the deceased had died. One the people who made the report was PW 6. In the company of the Commanding Officer and other officers, he proceeded to the scene of the incident where he found the deceased lying away from the house. He noted that the deceased deep cut wounds on the head, hands, lower abdomen and groin. He organized for the body to be taken to the Homa Bay District Mortuary.

12. PW 5 further testified that the accused came to the police station on 25<sup>th</sup> December 2009 and was arrested. On 5<sup>th</sup> January 2010, he received information that some children were playing near the accused house where the saw a panga in a thicket near the deceased's house. It was a blood stained panga. He took the accused to the place where the panga was recovered. PW 1 also identified the panga as the one the accused had when he was staying with him. He produced the panga as an exhibit in the case. PW 5 took witness statements and organized for the post-mortem. He concluded that the there was sufficient evidence for the accused to be charged with murder.

13. It is apparent the there was no eye witness who saw the accused inflict the injury that led to the death of the deceased. The only possible eye witness, PW 6, did not give any direct evidence. He only heard the deceased scream and found her dead a short while after. Although he testified that the accused was staying in the house with her, he had not seen him that evening. He further testified that he had seen the deceased with another man at about 10.30 pm when they left together. The identity of the man was not disclosed. It is clear from the fact that the deceased's door was locked that the deceased may have been killed elsewhere, either at the deceased home or by the other man in the neighbourhood. There is no

evidence that put the accused at his home or within the vicinity at the time with deceased.

14. Although the panga was discovered near the accused's house almost two weeks after the incident, that fact alone does not assist the prosecution case in light of the fact that the accused was not placed at the scene and the possibility that there may have been another person who was seen by PW 6 a few hours before she was killed.

15. While the accused may have had a motive to kill the deceased, I cannot act on mere suspicion however strong without evidence that would call upon the accused to defend himself. According to the provisions of **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, I must record and I do hereby record a finding of not guilty against the accused.

16. I therefore acquit the accused. He is set free unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY this 30<sup>th</sup> day of April 2015**

**D.S. MAJANJA**

**JUDGE**

Mr Kaburi, Advocate for the accused.

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