



IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 16 OF 2012

(FORMERLY KISII HCCR NO. 95 OF 2011)

BETWEEN

REPUBLIC PROSECUTOR

AND

GORDON ODHIAMBO SHEM ACCUSED

JUDGMENT

1. On 25th September 2011 **TRUFOSA AGER RESA** (“the deceased”) was found dead in a pool of blood in her house at Kakwajuok Village of Rachuonyo North District within Homa Bay County. On 27th September 2011, this court was informed that **GORDON ODHIAMBO SHEM** (“the accused”) had murdered her 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 trial commenced before Maina J. I completed it under **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The prosecution marshalled 11 witnesses to prove its case while the accused gave sworn testimony in his defence. The prosecution case was as follows.
2. On the morning of 25th September 2011 at about 7.00 am, John Oyiengo Oloo (PW 1), was awoken by his son who informed him that he was being called by his step-mother and that the house of the deceased, who was also his step-mother, had been broken into. He went to her house and found the deceased lying on the floor in a pool of blood. He called his wife, Cecilia Atieno (PW 2) and then proceeded to the home of the Assistant Chief of Lower Kakwajuok Sub-location, Wilson Were (PW 3) to report the matter. By the time PW 3 got to the deceased’s house mourners had already arrived. He viewed the deceased’s body and saw cut wounds on the neck and head.
3. PW 3 testified that when PW 1 came to his home and informed him of the deceased’s death, he immediately called the Kendu Bay Police Station Commanding Officer (OCS), Inspector David Makali (PW 7) and proceeded to the scene of the incident. He asked PW 1 where the accused was and he was informed that he was in the crowd of mourners but had left. PW 3 suspected that the accused may have been involved in the death of the deceased as she had come to see him on 21st September and told him that the accused had demanded food from her by force and threatened to kill her. He gave her a letter, inviting the accused for a meeting on 26th September, to take to the village elder but due to the deceased’s death the meeting did not take place.
4. PW 3 further testified that PW 1 brought the accused to him and that he handed him over to the police officers who had arrived at the scene. The accused and police officers all went to the home of PW 1 where the accused used to sleep and recovered a white blood stained pair of trousers (exhibit 3) under a mattress. The police officers also found blood stains on his shirt (exhibit 2),

asked to remove it and wear another shirt. The accused was handcuffed and taken by the police. The deceased body was removed and taken to Simbiri Mortuary.

5. According to the accused's brother, Erick Ouma Shem (PW 4), the accused would go out to look for work then go and return to eat at the deceased's home and then sleep in PW 1's house. He last saw the accused pass by his house on the morning of 24th September 2011. James Odhiambo Oyiengo Oloo (PW 5), PW 1's son, testified that he used to sleep in the same house with the accused. He recalled that on 24th September 2011, he had just gone to sleep when the accused came in a few minutes after 10.00 pm. He woke up at 7.00 am to go to school and left the accused sleeping. He was later called home by his father and when he came home he found the accused had been arrested by police officers. He testified that he saw the accused wearing the shirt (exhibit 4) and trousers (exhibit 3) which were produced in evidence.
6. PW 7 came to the scene after receiving a call from PW 3. He had sent other officers to the scene earlier and when he joined them, they took him to the deceased's house where he observed the body of the deceased in a pool of blood with a deep cut on the left side of her neck. The officers, who included Acting Inspector Isaac Mwema (PW 9) had recovered a blood stained axe (exhibit 1) and the accused's clothes (exhibits 3 and 4) were handed over to him. He called the District Criminal Investigations Officer (DCIO) to take over investigation of the matter.
7. PW 9 was one of the officers who had been instructed by PW 7 to go scene immediately after receiving a call from PW 3. He proceeded there with two other officers where they met PW 3 who took them to where the deceased was lying in a pool of blood with a cut on the neck. They recovered a blood stained axe (exhibit 1) and a red dress (exhibit 2). PW 3 directed them to a house within the compound where they found the accused and recovered a white long trouser (exhibit 3). The accused was wearing a dark blue shirt (exhibit 4) which had blood stains which they asked him to remove. He took custody of the exhibits and handed them over to the CID officers to continue with investigations.
8. Superintendent Ayub Bakari (PW 10), the Rachuonyo South DCIO at the material time, proceeded to Kakwajuok Village after receiving a report of the murder from PW 7. While there he met PW 7 and took over the scene. By the time he arrived at 10.30 am, the deceased's body was still lying in a pool of blood. He observed injuries on the head, neck and left eye. He arrested the accused and took custody of the exhibits given to him by PW 7. He organized for the exhibits to be taken to the Government Chemist. He also arranged for a post mortem to be carried out on deceased's body.
9. Dr Peter Ogolla (PW 6), the Medical Officer of Health of Rachuonyo South, conducted the autopsy on the deceased's body on 29th September 2011 after it had been identified by relatives of the deceased. He observed that the deceased has a cut wound on the outer side of the left eye, left cheek bone and right jaw. The jaw had a fracture and the 4th to 6th spinal vertebra were compressed. He formed the opinion that the cause of death was cardiopulmonary arrest secondary to asphyxiation, cervico-spinal compression and assault. He drew a milliliter of blood and gave the sample to PC Richard Chemjor (PW 11). He also examined the accused and found him mentally fit to stand trial. He also drew blood from the accused and gave the specimen to PW 11.
10. PW 11 confirmed that he attended the postmortem of the deceased conducted by PW 9. He took custody of blood samples from the deceased and the accused. He took also custody of the exhibit memo (exhibit 7A) prepared by PW 7 together with all the exhibits and took them to the Government Chemist, Nairobi.
11. Lawrence Kinyua Muthuri (PW 8), a Government Chemist Analyst, recalled that on 5th October 2011, he received from PW 11 the following items; a blood sample from the deceased; a brownish dress of the deceased (exhibit 2); a blood sample from the accused; a blue shirt of the suspect (exhibit 4), a whitish pair of trousers (exhibit 3) and a metal axe with a stick handle (exhibit 1). The instructions were to determine the source of blood on the items. He found that the shirt, trouser and axe were moderately stained with human blood while the dress was heavily stained

with human blood. He conducted DNA profiling and made the following findings; The DNA profile on the blood on the dress, shirt, trouser and axe all matched the DNA profile from the blood sample of the deceased. He prepared a report documenting the findings which he produced together with the exhibit memo form (exhibit 7B).

12. After the close of the prosecution case, I put the accused on his defence and he elected to give sworn testimony. He recalled that on 24th September 2011, he came back home at about 8.30pm and went to have supper with his grandmother. After supper he went to sleep. He was woken up by PW 1 and told that the deceased lying down in her house and could not talk. He rushed to her house, found her lying down and tried carrying her but he discovered she was dead so he left her on the ground. As he was distraught, he started crying and while he was crying his brother, PW 4, came where he was. He thereafter went to see the village elder but as he came out of the house, he found his trouser was stained with blood. He went back to his house, changed clothes and went to the village elder. He did not find the village elder so he came back to his grandmother's house. He sat next to the deceased and when the Chief and police officers came, they asked him to take them where he was sleeping. He took them to his room where they found the clothes he had worn. He was arrested and taken to Kendu Bay Police Station. The accused stated that in answer to the questions put to him by police officers at Kosele, he stated that when he heard his grandmother had died, he ran to her place and fell on her body and that is how his clothes had her blood on them.
13. At the close of the defence case, counsel for the accused, submitted that the prosecution did not lead any evidence implicating the accused in the murder and that none of the witnesses saw the accused commit the murder. Counsel submitted that misunderstandings between family members were normal and they could not form the basis for any suspicion or conclusion that the accused had killed his grandmother. The defence contended that the accused was in the vicinity of the crime, he did not run away and he explained how his clothes had blood stains. On the whole, counsel submitted, the circumstantial evidence could not found a conviction.
14. The prosecution submitted that the circumstantial evidence pointed to the accused as the person who committed the offence. Counsel for the prosecution submitted there was motive and opportunity for the accused to kill his grandmother. He was staying with the deceased in the same house and he was the person last person seen with her and that his clothes were stained with the deceased's blood. The prosecution contended that the court could only infer that he murdered the deceased in the ordinary course of events.
15. 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*.
16. The fact and cause of death of the deceased is not in dispute. All the witnesses who testified found the deceased lying in a pool of blood with injuries on the neck and head. The injuries were confirmed by the autopsy performed by PW 6 who certified the cause of death was arrest of the heart which resulted from a lack of oxygen from compression of the spinal cord and assault. I therefore find and hold that the deceased died and she died as a result of strangulation and assault inflicted by a sharp object likely by the blood stained axe (exhibit 1) recovered from the deceased's house.
17. The main issue in this case is whether the accused caused the death of the deceased. The prosecution case was based on circumstantial evidence placing to the accused in the vicinity of the

murder and the fact that the deceased's blood was found on his clothes.

18. In determining whether the accused's clothes had the deceased's blood stains, the chain of evidence is of supreme importance. The accused's blood stained whitish trousers were recovered from the place he usually slept while the blood stained axe and deceased's dress were recovered from the deceased's house by the police officers who first came to the scene. He was wearing the blood shirt which was recovered from him. The trousers (exhibit 3), shirt (exhibit 4), axe (exhibit 1) and the deceased's dress (exhibit 2) were taken by the police officers and handed over the investigating officer. The items were forwarded to the Government Chemist by PW 11 accompanied by an exhibit memo (exhibit 7A) which was confirmed by PW 9 who performed the requisite tests to determine the presence of the deceased's blood. The DNA profile confirmed that the deceased's blood stains were found on the accused's shirt and white trousers. I am satisfied that the chain of custody of evidence established that indeed that accused clothes were stained with blood from the deceased.

19. The shirt and trousers are personal items of clothing and therefore the accused bears an evidential burden to provide a reasonable explanation how the deceased's blood was found on his clothes. **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.

20. Where the accused fails to offer any reasonable explanation as to how the deceased's blood came to be found on his clothes, 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.

21. The accused, in proffering an explanation, made two admissions. That he went to the deceased's house and as he tried to carry her, his clothes became blood stained. He thereafter went to the place he used to sleep and took off his trousers. This confirms the prosecution case that the trousers were recovered by the police officers in his house and that his clothes had the deceased's blood stains.

22. The duty of the prosecution is to prove beyond reasonable doubt that the deceased blood was found on accused clothes for the reason only that the accused is the one who assaulted the deceased. In other words, the prosecution had to disprove the accused's explanation or account beyond reasonable doubt.

23. PW 4, who was staying with the accused, testified that the accused came to sleep at about 10.00pm and left for school at 7.00pm before the accused woke up. The accused stated that PW 1

woke him up and informed him that his grandmother was lying in her house and could not talk. PW 1 gave an account of how he found the deceased and how he proceeded to inform PW 3 of the deceased's death. No question was put to him in cross-examination to suggest that he is the one who woke up the accused or even sent him to inform the village elder of the deceased's death. The accused also stated PW 4 came to the deceased's house while he crying over the body but PW 4 testified that he only came to the scene in response to crying he heard and he did not see the accused. It was also not suggested to him in cross-examination that he met the accused that morning crying over the body of his grandmother. I therefore reject the accused's testimony that he was informed of the deceased death by PW 1 and that he was crying over the deceased's body causing his clothes to be bloodstained. Even if I accept that the accused was woken up by PW 1 and this fact was suggested by PW 2 who stated that she heard from PW 1 that he woke the accused up, that fact does not detract from the fact that the accused was found with blood stained clothes which could not be explained away.

24. I also reject the proposition that the accused went to the deceased's house that morning once the deceased's body was discovered. He had been left in the house by PW 4 that morning and the facts irresistibly point to the fact that either after supper with the deceased or at some point in the night the accused went to the deceased house struck her with the axe and strangled her. The only explanation of the blood stains on his clothes is that he killed the deceased that night. After the act, he went home and changed his bloodied trousers and went to sleep. Although learned counsel for the accused put questions to the witnesses to suggest that there could have been an intruder, the existence of an intruder does not explain how the accused's clothes became stained with the deceased blood since I have found, the accused did not go near the deceased body that morning. Even if I accept that the accused found the deceased already dead at some time that morning, why wasn't he the first to raise alarm or inform anyone else that the deceased had been found dead. The prosecution evidence therefore excludes the possibility that the deceased could have died in any other way other than by the hand of the accused.

25. The principles applicable in cases where circumstantial evidence is relied upon to found a conviction have been elucidated in many cases among them ***Kariuki Karanja v Republic [1986] KLR 190*** where the Court of Appeal stated that:

In order for circumstantial evidence to sustain a conviction it must point irresistibly to the accused and in order to justify the inference of the guilt on such evidence the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving the facts justifying the drawing of that inference is on the prosecution.

26. All the evidence points irresistibly to the accused who had the opportunity to kill the deceased and who was found with his own clothes stained with the deceased's blood in circumstances excluding any other explanation. Likewise, the prosecution proved that he had the motive to kill the deceased. In ***Choge v Republic [1985] KLR 1***, the Court held that:

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.

27. The motive of the accused was proved by the testimony of PW 3 who had received a report from the deceased about threats from the accused. PW 2 also confirmed that there had been disagreements between the accused and the deceased. But even without such a motive, there is sufficient evidence to implicate the accused. I find and hold that the accused killed the accused.

28. The final issue for consideration is whether the prosecution proved malice aforethought. Malice aforethought is defined in **section 206** of the *Penal Code* as follows;

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- a. *an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- b. *knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- c. *an intent to commit a felony;*
- d. *an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

29. From the evidence of the doctor, PW 6, and all the witnesses who saw the deceased's body, the degree and extent of the cut injuries inflicted by the axe and the strangulation did not merely intend to cause the deceased grievous bodily harm, but it is such grievous bodily harm that ultimately led to her death. I therefore find and hold that the prosecution proved that the accused killed the deceased with malice aforethought.

30. I therefore find the accused **GORDON ODHIAMBO SHEM** guilty of the murder of **TRUFOSA AGER RESA** and I therefore convict him.

DATED and DELIVERED at HOMA BAY this 27th day of May 2015

D.S. MAJANJA

JUDGE

Mr Okoth with him Ms Nyarige instructed by G.S. Okoth and Company Advocates for the accused.

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