



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL CASE NO. 41 OF 2014**  
**(FORMERLY KISII HCCR NO. 50 OF 2013)**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**REYMOND OCHIENG JUMA ..... ACCUSED**

**JUDGMENT**

1. On 30<sup>th</sup> April 2013, this court was informed that the accused, **REYMOND OCHIENG JUMA** had murdered his wife **ROSA KEMUNTO** on 27<sup>th</sup> April 2013 at Rayuthi Village, Kakrao Sub-location of Migori County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. He pleaded not guilty. The prosecution called 6 witnesses while the accused elected to make an unsworn statement and called 1 witness.

2. On the morning of 27<sup>th</sup> April 2013 at about 9.00 am, the residents of Rayuthi Village were attracted by alarm raised from the home of Dismus Owuor. People were saying that his son, the accused, had killed his wife. A neighbour, William Amollo Odero (PW 4), was in his shamba when he heard the alarm. He went there immediately and found other villagers. He went to the accused's house within the homestead, looked through the window and could see the accused body dangling from a rope. The door was locked from the inside and people were afraid to enter the house. His step-brother Nicholas Opoko (PW 5) came and opened the door using a stone. They found the deceased lying on floor. She had stab wounds on the chest. Both PW 4 and PW 5 assisted to untie the accused and laid him on the floor in the sitting room.

3. At about that time, Nyakweba Nyakwara (PW 1) received a call from his niece informing him that the deceased had been killed in the home of her boyfriend. He quickly rushed to the scene and found the deceased lying on the floor in the house while the accused was lying outside the house with a rope and a knife next to him.

4. PW 5 decided to call the Assistant Chief Peter Amara who then called the Chief of North Suna Location, Titus Odoyo Odira (PW 2) where Rayuthi Village is situated. After being informed of the incident, PW 2 called the Commanding Officer, Migori Police Station and immediately set off for the village. When he arrived at the scene and the deceased's body was still lying on the bedroom floor while the accused was lying outside in an unconscious state. The Commanding Officer arrived there at about 9.30am with other police officers.

5. Among the officers who came to the scene was Corporal Evans Nyakiramba (PW 8), a police officer

stationed at Migori Police Station. He was also the investigating officer. By the time he arrived the accused was lying outside the house and the deceased's body was at the doorstep. He prepared a sketch plan and took photographs of the deceased and the accused. He also took custody of a blood stained kitchen knife which was next to the accused's body. He also organized for the deceased's body to be taken to Migori District Hospital for the post mortem which he attended. He also took the accused to hospital where he was treated and discharged.

6. On 29<sup>th</sup> April 2013, Dr Jared Ndege (PW 3) performed the autopsy after the deceased's body was identified by PW 1. He observed that the deceased had stab wounds on the anterior abdominal wall just above the stomach, the right upper part of the abdomen and a stab wound on the anterior aspect right forearm and another at the left upper abdomen. The internal examination revealed that there were penetrative wounds to the spleen and liver which had ruptured. The large intestine had been perforated and there was a lot of blood in the stomach. He concluded that the cause of death was massive bleeding as a result of the ruptured spleen, liver and contamination by the gut. He opined that the most probable weapon used was a sharp object.

7. PW 3 also examined the accused on 27<sup>th</sup> April 2014 to determine whether he was fit to stand trial. He conducted a psychiatric assessment and concluded that he was sane and fit to stand trial.

8. After the close of the prosecution case, I put the accused on his defence. He elected to give an unsworn statement and call one witness. He stated that when he woke up on 27<sup>th</sup> April 2015 after arriving home late at night after drinking alcohol. His wife was unhappy about this. In the morning he woke up and went to do his duties like taking care of the cows. Thereafter he went back to the house and found that his wife had made breakfast and cleaned the house. He decided to go back to bed and rest. His wife came to the bedroom and confronted him about where he had been the day before. She continued scolding him but he ignored her. She suddenly attacked him with a kitchen knife. He tried to prevent her but he felt that he had been injured badly. He lost his memory, was shocked and afraid. He stated that his wife also collapsed. He took a rope and hanged himself. He lost his consciousness at the time and when he regained consciousness he found himself in hospital.

9. Peter Onyango (DW 2), the Executive Officer of the Migori Law Courts, was called to produce the file for *Migori Chief Magistrates Criminal Case No. 176 of 2013 (R v Raymond Ochieng Juma)* where in the accused had been charged and convicted on his own plea of guilty for the offence of attempted suicide contrary to **section 226** as read with **section 36** of the *Penal Code*.

10. 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 by **section 206** of the *Penal Code*.

11. The fact and cause of death are not in dispute as the deceased. All the witnesses who went to the accused's home found the deceased lying dead on the floor with multiple stab wound injuries. The injuries described by the witnesses were consistent with the findings of PW 3. I therefore find and hold that the deceased died and she died as a result of multiple stab wounds inflicted on her body which caused massive internal bleeding as a result of the ruptured spleen and liver and contamination by the gut. I have no doubt that the injuries were caused by the sharp object namely the knife which was recovered at the scene of the incident by PW 4 and PW 5 who were the first people to enter into the house.

12. As to whether the accused inflicted the fatal injuries, the evidence clearly points to him. PW 4 and PW 5 testified that by the time they arrived, the house was locked from the inside and it is only the accused and the deceased who were in the house and who had access to it. There is no evidence that there was any other person who could have had ingress. In the circumstances, it was the accused to provide a

reasonable explanation as to what could have occurred that caused the stab wounds on the deceased. In his unsworn statement, he stated that he argued with his wife and although he did not state that he stabbed her, the irresistible conclusion is that he is the only one who could have stabbed her.

13. In addition, there is the accused's own admission in **Migori Chief Magistrates Criminal Case No. 176 of 2013 (R v Reymond Ochieng Juma)** where the following facts were read to him;

*On 27/4/2013 at Rayuthi Village accused went home and picked a quarrel with his wife and then stabbed her in the stomach killing her. Later he tied a rope on his neck trying to commit suicide. Members of the public rushed to the scene and rescued him. The body of the wife was taken to the mortuary. Accused was escorted to Migori District hospital for treatment. He was later charged.*

14. The accused admitted those facts and a plea of guilty was entered. In my view, the admission of the facts was also conclusive evidence that the accused stabbed the deceased. I therefore find and hold that it is the accused who stabbed the deceased.

15 The final issue is whether the accused killed the deceased with malice aforethought as defined by **section 206** of the **Penal Code**. Malice aforethought concerns the state of mind of the accused and in this respect I am obliged to consider the circumstances in which the incident took place.

16. In his unsworn statement the accused stated that he quarreled with his wife. This brings to fore the defence of provocation. **Section 207** of the **Penal Code** describe "killing on provocation" as follows;

*When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.*

**Section 208(1)** of the Penal Code defines "provocation" as follows-

*The term "provocation" means and includes, as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.*

17. The implication of **section 208** of the **Penal Code** is that an unlawful killing in a situation which would constitute murder would thus be reduced to manslaughter if the act is done in the heat of the passion caused by sudden provocation. It is a question of fact whether the accused in all circumstances of the particular case was acting in the heat of the passion caused by grave and sudden provocation (see **Wero v Republic [1983]EA 549**). Furthermore, the accused does not shoulder the burden of proving the defence. The prosecution that must marshal evidence to disprove the defence beyond reasonable doubt.

18. Did the deceased provoke the accused? In this respect we only have the unsworn statement of the accused. He did say what words or abuses the deceased uttered that so provoked him into a fit of uncontrolled rage that caused him to stab the deceased viciously multiple times. There is also no evidence that the accused and deceased had disagreements prior to the incident from which such provocation could be inferred. In short, I reject any hint that the accused was provoked.

19. Did the accused believe that his life was in danger to the extent that he had to use lethal force to repel an attack by his wife. The accused's unsworn testimony is to the effect that his wife attacked him with the kitchen knife. The treatment card from Migori District Hospital produced by PW 8 does not suggest that the accused sustained injuries indicative of a struggle or fight with the deceased where he attempted or took the knife she was holding. If indeed there was such an attack, it would only mean that the accused

effectively disarmed the deceased and proceeded to inflict the vicious injuries. The evidence presented with by the prosecution clearly disproves the any notion of self defence.

20. There is also no suggestion that the accused suffered a disease of the mind. **Section 12** of the **Penal Code** which states a follows;

*12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission, but a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or more of the effects above mentioned in reference to the act or omission.*

21. PW 3 examined the accused and found his fit to plead. Nothing was presented from his previous antecedents or behavior that would point to the accused suffering from any form of insanity.

22. The accused in his unsworn statement did allude that he was drinking at night before he came home. The issue of intoxication is dealt with in **section 13** of the **Penal Code** as follows;

*13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.*

*(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—*

*(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*

*(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.*

*(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) relating to insanity shall apply.*

*(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.*

*(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs. [Emphasis mine]*

23. While intoxication is not in itself a defence, it may be taken into account whether in determining whether the accused had a specific intent to cause death or grievous harm. In the case of **Manyara v R [1955]22 EACA 502**, the court noted that, “It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing the defence rests on him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this on the accused.” (see also **David Munga Maina v R NYR CA Crim App. No. 202 of 2005 [2006]eKLR**).

24. According to the accused, he woke up in the morning that did his chores and went back to the house to relax. He could not have been suffering from the effects of intoxication at that time.

25. Under **section 206(a)** of the **Penal Code** malice aforethought shall be deemed to be established by evidence proving, “*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*” The accused stabbed the deceased four times. The stabs wounds were deep confirming the savagery with which the accused acted in inflicting the injuries that caused internal organs to rupture. The weapon used, the nature and extent of the injuries show that the accused intended not only to cause grievous harm but to kill the deceased. His attempt to commit suicide could only have been an attempt to avoid the consequences of his wrongful act. I therefore find and hold that the prosecution proved malice aforethought in terms of **section 206(a)** of the **Penal Code**.

26. I find and hold that the prosecution proved its case against the accused beyond reasonable doubt. I find **REYMOND OCHIENG JUMA** guilty of the murder of **ROSE KEMUNTO** and I convict him.

**DATED and DELIVERED at MIGORI this 24<sup>th</sup> July 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Onyango instructed by Sam Onyango and Company Advocates for the accused.

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