



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 59 OF 2013

BETWEEN

REPUBLIC **PROSECUTOR**

AND

GIDEON MAGAK ORUA **ACCUSED**

RULING

1. The particulars of the information brought to this court on 12th September 2013 are that between 22nd and 24th August 2013 at Kanyaluo South Location in Rachuonyo North District within Homa Bay Court **GIDEON MAGAK ORUA** murdered **GRACE AUMA ASERO** (“the deceased”) 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 prosecution marshalled 7 witnesses before the closed its case. I am now called upon to decide whether the accused should be put on his defence.
2. In order to secure a conviction for the offence of murder, the prosecution must prove beyond reasonable doubt (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.
3. It is not disputed that the decomposing body of Grace Auma Asero was found in River Sare, Kanyaluo. Thomas Mboya Oima (PW 1), the Assistant Chief of Kamenya South Sub-location testified that on 24th August 2013, he was called and informed that there was a dead body in a seasonal stream within the area. He rushed there at about 5.00pm and found the partially decomposed body of Grace Auma Asero whom he knew. He remained there until Police Officers from Kosele Police Station arrived at about 9.00pm.
4. Corporal Thomas Mutua (PW 6), a police officer working at the Kosele Police Station and the investigating officer, was one of the officers who came to the scene. He recalled that on 24th August 2013 at about 6.00pm he was informed by his Commanding officer that a body had been found in a swamp in Kanyaluo South Sub-location. At the scene he found a partially decomposed body of a female lying face down in a swampy area covered in elephant grass. PW 1 was present at the scene. He made inquiries and was informed that the body was found by a herdsboy, John Amisi (PW 1). He also established that the deceased had been killed 2 or 3 days prior to that date. He organized for the body to be taken to Rachuonyo District Hospital Mortuary where a post mortem was done by Dr Ogola.
5. Dr Peter Ogola (PW 7) conducted the post mortem on the body of the deceased on 2nd September

- 2013 after it had been identified by William Ochieng Nyayiego (PW 4), a nephew of the deceased, who was accompanied by PC Joseph Makimet (PW 3). He noted that the deceased was an adult female and that it was difficult to determine her age as the body had started decomposing. He observed foaming around the mouth, the tongue was protruding between the teeth and the tongue and nucleus membranes had assumed a bluish hue as a result of deprivation of oxygen. On internal examination, he found both lungs had a dough like feeling and were filled with an unclear fluid. He concluded that the cause of death was lack of oxygen resulting from drowning.
6. PW 7 also examined the accused on 3rd September 2013 at Rachuonyo District Hospital in order to determine whether he was mentally fit to stand trial. He certified that he was mentally fit to stand trial. He noticed that the accused had a wound that was healing on the anterior part of the right ear consistent with a human bite which he estimated to be about a week old.
 7. From the testimony of PW 1, PW 3, PW 4, PW 5 and PW 6, I am satisfied that the prosecution established that the deceased died and she died as a result of drowning. The next issue and the substance of the matter is whether there is sufficient evidence pointing to the accused as the person who caused the unlawful act that led to the deceased's death.
 8. The principal witness was John Amisi (PW 2), a herdsman residing in Kanyaluo. He recalled that on 22nd August 2013, he was herding cattle and at about 3.40pm he saw two people fighting from a distance of about 200 metres. When he moved close, he saw a man beating a woman with his hands. He could not hear what they were saying but he knew the person as "Soldier" as he had seen him in the area before. Although he did not know the name of the woman, he recalled that she was the wife of a man he knew in Kanyaluo. As he was herding cattle near sugar cane plantation, he had to take care of them so he could not intervene in the fight. He left the couple going towards the bushy stream. On the next day, 23rd August 2014, he went back to the river and a fellow herdsman called Masunga called him and showed him a body in the river. He recognised the body as that of the woman he had seen the previous day being beaten by *Soldier*. He identified the accused as *Soldier*. He reported the matter to the police and recorded a statement.
 9. The other prosecution witness was Lensa Atieno Obong'o (PW 3), a resident of Kanyaluo. She testified that she knew the accused and that on 22nd August 2013, the accused and his associate supplied sand to her and after the assignment she made them tea and they left at about 9.30am. The next time she heard about the accused was on 24th August 2013 when the accused's father and another man came to her home asking whether her husband had paid the accused. She told him that that her husband had paid him Kshs. 1000/=. The accused's father informed her husband that on the way the accused met some people who beat him. Later that day she heard that a dead body had been found at River Sare.
 10. At this stage I am only required to decide whether there is sufficient evidence to put the accused on his defence. What amounts to a *prima facie* case has been set out in several cases among them ***Ramanlal Trambaklal Bhatt v R* [1957]EA 332**, ***Wibiro alias Musa v R* [1960]EA 184** and ***Anthony Njue Njeru v Republic* NRB CA Crim. App. No. 77 of 2006 [2006]eKLR**). It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
 11. The only evidence against the accused is the testimony of PW 2 who stated that he saw the accused beat the deceased on 22nd August 2013 at River Sare. The deceased's body was discovered by PW 2 on the afternoon of 23rd August 2013 and recovered on the next day.
 12. The prosecution case is purely circumstantial and it is clear that there are many gaps in the case. First, there is no evidence that anyone who knew the deceased reported that she was missing in the period between 22nd August and 24th August 2013 when the body was recovered. Second, there was no evidence about the relationship between the accused and the deceased. As the **case against**

the accused was grounded on circumstantial evidence, motive was an important element in the chain of presumptive proof. Such motive may be drawn from the facts, though proof of it is not essential to prove a crime (see *Libambula v Republic* [2003] KLR 683). Third, there was no account of the accused's movements from 22nd August 2013 when he was seen by PW 3 to the time of his arrest and given the length of time the accused was last seen with the deceased and the time when the body was recovered, anything could have happened. Finally, there is evidence of the human bite mark on the accused's ear which tends to suggest that the accused may have been bitten by the deceased during the fight. PW 3 in her testimony, referred to information she received from her husband about the accused being beaten by other person after being paid Kshs. 1000/- by her husband. This statement was clearly hearsay and the prosecution should have called testimony to prove the circumstances under which accused was beaten and whether it had anything to do with the deceased's death. Failure by the prosecution to call critical witness would entitle the court to make an adverse inference on the prosecution case (see *Bukenya & Others v Uganda* [1972] EA 549).

13. Although the evidence points to suspicion that the accused could have been involved in the death of the deceased, in light of the matters I have raised, I find that to call upon the accused to defend himself would amount to relieving the prosecution of its burden to prove its case beyond reasonable doubt by requiring the accused to fill in the gaps in its case. Even if the accused elected to remain silent, the prosecution case would fail. Under **section 306(1)** of the ***Criminal Procedure Code (Chapter 75 of Laws of Kenya)***, I am required to enter a verdict of not guilty which I hereby do against **GIDEON MAGAK ORUA**. The accused is acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 26th day of October 2015

D.S. MAJANJA

JUDGE

Mr Osoro instructed by Osoro Moriasi and Company Advocates for the accused.

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