



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL CASE NO. 104 OF 2014**  
**(FORMERLY OF KISII HCCR NO. 110 OF 2010)**

**BETWEEN**

**REPUBLIC .....** **PROSECUTOR**

**AND**

**KENNEDY OCHIENG ONGINDO .....** **ACCUSED**

**JUDGMENT**

1. The accused **KENNEDY OCHIENG' ONDINGO** (“the accused”) was charged with the murder of his wife **MILDA ACHIENG** (“the deceased”) on 7<sup>th</sup> November 2010 at Sori Township within Migori County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. Sitati J., commenced the trial and I completed it after complying with the provisions of **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The prosecution marshalled four witnesses while the accused gave sworn testimony.
2. As this is a case of murder the prosecution is required to establish the following ingredients under the provisions of **section 203** and **204** of the *Penal Code*;
  - 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*.
3. Dr Gordon Odhiambo Okongo (PW 1), a Senior Medical Officer at Nyatike conducted the post mortem on the deceased on 14<sup>th</sup> November 2010 at St. Camillus Mission Hospital after the body was identified by the deceased’s mother, Domtilla Akumu (PW 3). The significant observations were that there was blood on the left arm, the 7<sup>th</sup> vertebral spine was broken and the spleen was ruptured leaving 400ml of blood in the stomach. He certified the cause of death as shock due to massive spleen rupture and excessive bleeding. He opined that the spleen rupture could have been caused by a fall from a height or force from a blunt object.
4. As regards the first ingredient I agree with the findings and testimony of PW 1 that the deceased died as a result of an assault resulted in a massive rupture of the spleen and internal bleeding. The main issue then is whether the accused cause the death of the deceased and if so, whether it was with malice aforethought.

5. The undisputed evidence is the accused and deceased were married and that they lived together in Sori. They had two children. According to Patrobas Machage Mauko (PW 2), a businessman from Sori, who had been their neighbour for 2 years, the two had constant quarrels. The deceased's mother, PW 3, also confirmed that over the time they stayed together, the deceased reported to her the marital problems. She stated that the deceased would sometimes leave the accused but would return to him.
6. When put on his defence, the accused recalled when he came home from work at about 10.00pm on 7<sup>th</sup> November 2010, his wife welcomed him. He went to bathe and then waited for her to prepare supper. While she was cooking, he heard her phone ring. When he picked the phone it had a message saying in Dholuo stating, "*I request that we meet at the centre Bongo as we had agreed.*" The accused testified that the message was from a male person called Victor who wanted to have sexual intercourse with his wife. When he confronted her with the message, they started quarrelling. In the course of the quarrel, the deceased told him that he was as foolish as his mother. He got so annoyed that he slapped her twice on the cheeks. At the time, the deceased was holding a knife which she had been using to cut tomatoes, slashed him on the neck causing him to bleed.
7. The accused immediately called his brother who was living next door to take him to hospital. His brother carried him to Kokeyo Dispensary which is about 3 kms away. They arrived at the dispensary at about 1.00 am where he was treated. He remained there until 7.00 am. As he was returning home, he found many people near his house. He did not know who these people were but they threatened to beat him. He tried to ask why they were beating him but they refused to tell him. The removed the bandage from his neck, dragged him into the house and locked him inside. While in the house, he found his wife had already died. The police arrived after about 10 minutes and took him to Macalder Police Station.
8. The accused further denied that he had any weapon and that he only slapped her during the argument that night. He stated that he slapped her on the abdomen and that he was only doing so because she abused him. He further stated that after she slashed him, he did not fight with her again. He denied that he ever harbored any intention of killing his wife.
9. The case posited by the accused through his advocate's submissions is that the prosecution failed to prove that prove malice aforethought as there was nothing in the evidence to prove that the accused pre-meditated the offence he was charged with. He also submitted that the evidence from the accused and prosecution witnesses was that there was a fight that "*went awry*" and therefore the accused ought to be acquitted or at the very least convicted of manslaughter.
10. The principal prosecution witness, PW 2, recalled that on 7<sup>th</sup> November 2010, he was going home after leaving his shop at about 8.00 pm. On reaching his door, he found the accused beating his wife. He went into the house, which was about 10 to 15 metres away, and prevailed upon the accused to stop beating her. He went back home and at about 10.00 pm he started hearing the accused and his wife quarrelling but since it was at night he decided not to go out.
11. On the following day, 8<sup>th</sup> November 2010, PW 1 went to his shop and came back at about 8.00 am for breakfast. He found the deceased crying in her house as she was in serious pain. At that time, the accused was not present but her brother in law there. The brother in law went to look for the accused so as to take the deceased to hospital. After 20 minutes the deceased asked somebody to give her water which she drunk and went silent. PW 1 testified that he left to seek assistance to take her to hospital but when he returned she was dead.
12. Thereafter PW 2 informed the neighbours not to raise alarm fearing that the accused would escape. Together with the neighbours, he went looking for the accused. They found him sitting in a boat by the lake shore and convinced him to go back to the house. They locked the accused in the house. In the meantime they called the police. When the police officers came they found the accused had slashed himself with a knife on the neck. They rushed him to the hospital while the body of his wife was taken to St. Camillus Hospital Mortuary.

13. Corporal Wilfred Kigen (PW 4) was one of the officers who arrived at the scene. At the material time he was an officer stationed at Karungu Police Post which is under Macalder Police Station. On the material day, while he was at the Police Post, PW 2 called him from Sori and informed him that one of his neighbours had beaten his wife the previous night and he suspected that she had died. He immediately left for Sori and found members of the public had gathered at the deceased's home. He was informed that the accused had been locked inside and when he opened the door, he found the accused lying next to the deceased's body. The accused was bleeding from the neck. Members of the public attempted to lynch the accused but he escorted the accused to Karungu Hospital and then to St. Camillus Mission Hospital where he was admitted for about 4 days. He came back to the scene and took the deceased's body to St. Camillus Hospital Mortuary. He did not detect or observe any visible injuries on the deceased. Thereafter he took witness statements, caused the post mortem to be conducted and thereafter charged the accused with murder. He stated that he did not recover any weapon that may have been used to assault the deceased.

14. The totality of the prosecution evidence is that it is the accused who assaulted the deceased. His own testimony placed him in the presence of the deceased where injuries were inflicted. He admitted assaulting the deceased. The credible testimony of PW 2 is that he found the accused assaulting his wife and intervened. He also heard the deceased scream a second time on that night and on the next morning found her in great pain before she died. Contrary to the accused's testimony that he did not know PW 2, there was nothing in the cross-examination to suggest that the witness was lying or that he had any grudge against the accused. Besides the incident occurred in the accused's house where he was residing there with his wife and children thus excluding the possibility that anyone else would have inflicted the injuries on the deceased. I therefore find and hold that it is the accused who inflicted injuries on the deceased that led to her death.

15. The final question I must answer 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.*

16. It is clear from the evidence PW 1 that the degree and extent of blow or blows inflicted on the accused did not merely intend to cause the deceased grievous bodily harm, but such grievous bodily harm that ultimately led to death. The rupture of a spleen and massive internal bleeding can only be caused by a beating so vicious. I therefore reject the accused's contention that he only slapped her either on the face or on the abdomen without such intent. That though is not the end of the matter because the accused had raised the defence that he was provoked by the deceased.

17. For the defence of provocation to hold under **section 207(1)** of the *Penal Code*, there must be evidence that the assault which caused his death was caused by sudden provocation and before there was time for his passion to cool down. Provocation as defined under **section 208(1)** is an act which is likely to deprive the person provoked 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.

18. The implication of **section 208** of the *Penal Code* is that an unlawful killing in circumstances

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 (see *Kenga v. Republic* [1999] 1 EA 141).

19. The testimony of PW 2 and PW 3 establishes the fact that the accused and deceased had a rocky marriage. In his testimony the accused stated that he came home at about 10pm and after bathing found that he found the offensive text message. The events narrated by the accused cannot stand scrutiny for several reasons. First, PW 2 stated that he arrived home at 8.00pm and found the accused assaulting the deceased. It is at about 10.00 pm that PW 2 heard the deceased crying. I therefore reject his contention that he came home at 10.00pm. Second, while there was a quarrel or an argument, the fact that the deceased slashed him on the neck is not borne out by the evidence. On the morning of 8<sup>th</sup> November 2010, when PW 2 mobilised people to search for accused and he was found, he had not suffered any injury on the neck. It is only after he had been locked and was later arrested by PW 4 that he was found to have slashed himself. I reject his testimony that the deceased assaulted him with a knife. I find that the accused was not provoked in assaulting the deceased.
20. In the same vein I must reject any notion that the accused could have acted in self defence. There is no evidence to raise the possibility that the accused believed that his life was in danger to the extent that he was entitled to use force to protect himself. As I have found, the accused version of events is not true. When PW 2 came to his house on that fateful night, it is the accused who was assaulting the deceased until he intervened. The story of the knife was clearly contrived to explain his attempted suicide. While it is possible that the accused and deceased had a quarrel, the massive blow or blows inflicted on the deceased's abdomen causing the spleen to rupture could not have been inflicted to repel any attack.
21. It is therefore clear that the injury inflicted on the deceased could only have been intended to cause the death of or do grievous harm to the deceased. I therefore find that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.
22. For the reasons I have outlined, I find the accused **KENNEDY OCHIENG ONGINDO** guilty of the murder of **MILDA ACHIENG** and I convict him accordingly.

**DATED and DELIVERED at MIGORI this 22<sup>nd</sup> day of October 2015**

**D.S. MAJANJA**

**JUDGE**

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

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