



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 97 OF 2014

BETWEEN

REPUBLIC PROSECUTION

AND

MILLICENT ATIENO OTIENO..... ACCUSED

JUDGMENT

1. The accused, **MILLICENT ATIENO OTIENO**, is facing a charge of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information dated 21st October 2014 were that on 10th October 2014 at Osaka Estate within Migori County she murdered **MILLICENT AKINYI** (“the deceased”).
2. The accused and deceased were the wives of one Bernard Otieno alias Makei (“Otieno”). The prosecution case is that on the morning of 10th October 2014, the deceased was with her husband at Osaka Estate, Migori Town when the accused came to where they were covered in a lesa. She went to Otieno and asked him whether deceased a co-wife was. When Otieno confirmed that she was. The accused then turned to the deceased complemented her on her beauty, pulled out a knife and stabbed the deceased in the chest.
3. George Okinyi Abonyo (PW 1) testified that on the morning of 10th October 2014, he was Osaka Estate within Migori Town waiting for casual construction work. He was at an open air kiosk run by the deceased. He knew the deceased as the second wife of his friend Otieno. The deceased used to make chapati and beans. He asked the deceased to give him Kshs. 20/- but since she knew he used to take alcohol, she offered to give him tea and chapati on credit. After a few minutes, the accused, whom he also knew as Otieno’s wife, “Nyabondo,” came to covered in a lesa. She went and asked Otieno whether the deceased was his younger wife and Otieno confirmed that she was. The deceased told her that she had no problem with accused. The accused suddenly removed a knife and stabbed the deceased on the chest. She then attempted to stab Otieno but PW 1 pushed her and she fell down. The deceased ran for about 5 metres and fell down. The accused, on the other hand, tried to ran away but people held her. PW 1 testified that he called a taxi and that he and Otieno put the deceased in the taxi and took her to St Joseph’s Ombo Mission Hospital, Migori where she died while awaiting treatment. He reported the incident to Migori Police Station. PW 1 identified the lesa (Exhibit No. 1) the accused was wearing and the knife (Exhibit No. 2) the accused stabbed the deceased with.
4. When cross-examined, PW 1 admitted that he used to take chang’aa every morning in order to “open the lock.” He stated that he could not go to work without “opening the lock” and on that

morning he had only taken a glass. He however stated that he could clearly recall what happened that morning. He also stated that the accused came and asked Otieno about the deceased being his second wife.

5. Maureen Achieng Ochuka (PW 5) testified that at the material time she was working for the deceased at Osaka Estate. She recalled that she came to work at about 6.00 am on 10th October 2014 and started removing utensils from the house. She was with PW 1, Otieno and the deceased. PW 1 and Otieno were just talking while the deceased was sweeping outside. She saw the accused, whom she knew as Nyabondo, come from a corridor. The accused was wearing a leso which she had covered her head and shoulders. The accused asked Otieno where he had been and Otieno replied that he had left for a while. She then asked Otieno, "*Otieno is this your younger wife*". Otieno responded yes. She turned to greet the deceased and told her, "*You are beautiful...*" ("*Uko mrembo aje*"). She suddenly stabbed the deceased in the stomach. According to PW 5, the deceased started running shouting, "*You have killed me. You have killed me.*" The accused attempted to stab Otieno but PW 1 blocked her. She followed the deceased and that she had fallen down and was bleeding.
6. PW 5 further testified that PW 1 and Otieno went to look for a taxi to take the deceased to hospital and the taxi came and took them to hospital. Although she did not go with the taxi, she later went to the hospital and was informed that the deceased had died. She could not recall the leso the deceased was wearing and denied that the knife that was produced in evidence was the one that the accused used to stab the deceased.
7. APC Abdirahman Ismail (PW 3), an officer stationed at the Migori District Commissioner's Office, recalled that on 10th October 2014, while he was at his place of work, he was called by the administrator of St. Joseph Ombo Mission Hospital and informed that a murder suspect had been arrested and that there was tension at the hospital. He proceeded there and found the accused and Otieno. He arrested the accused and took her to the police station.
8. Dr Niran Chauhan (PW 2), a medical officer at Migori Referral Hospital, conducted the post mortem in respect of the deceased on 17th October 2014. The significant finding was that there was a stab wound at the sub-clavicular area which is just below the neck. He described the nature of the injury and stated that the stab penetrated right to the pericardium of the heart and ruptured the left and right atrium. He certified the cause of death as hemorrhagic tamponade secondary to a stab wound. He described the condition as one where the pericardium, which the covering of the heart, filled with blood causing it to stop beating. He opined that the stab wound may have been caused by a sharp weapon probably with a pointed edge. In cross-examination he stated that the force must have been massive for the knife to penetrate 8 – 10 cm from the point of entry.
9. PC Paul Masai (PW 4), a police officer, attached to the Crime Office, Migori Police Station was the investigating officer in this matter. He recalled that on 10th October 2014 at around 7.25am he was informed of a murder that had taken place at Osaka Estate within Migori Township and that the suspect was in the report office having been brought by administration police officers. There were also two witnesses at the report office from whom he took statements. He set off with the witnesses to the scene of the crime and upon arrival he managed to recover a knife (Exhibit No. 2) and a blue leso (Exhibit No. 1). He proceeded to St Joseph Ombo Mission Hospital viewed the body of the deceased. He observed a stab wound on the left side near the breast. He later organized for a post mortem to be conducted by PW 2. After considering the evidence he concluded that the accused had committed murder.
10. The accused elected to give sworn testimony when put on her defence. She stated that on the material day between 5.00am and 6.00am, she was on her way to the market where she runs a hotel. As she was walking to work, she reached a place where alcohol is sold. In front of the house, she found a place where chapati and beans are sold. She heard the name of her husband, Otieno but could not hear what was being said. She decided to move closer and found him holding another woman whom she did not know. The accused stated that the two were kissing

each other. She asked Otieno who the woman was and he declined to answer. He just left her as he zipping up his clothes. She then asked the woman what she was doing with her husband. The woman stated fighting with her by pulling her blouse. She also started fighting back. While they were still fighting, the woman picked something from the table and wanted to stab her with it but she held her hand. They struggled together and after a few minutes, the woman left crying that she had been injured whereupon she fell face down.

11. The accused said she was shocked by the turn of events. She went to see what had happened and found the woman crying and when she touched her, the woman felt cold. She raised alarm to alert people about what had happened. People responded and helped her get a taxi. They assisted the woman get into the vehicle and took her to hospital. She accompanied the woman in the taxi to hospital. The woman was admitted but the accused was informed by the doctor that the woman was dead.
12. The accused stated that she knew PW 1 before the incident. He called her a drunkard and that she had problems with him as he used to mislead her husband. She said that they have quarreled before. She denied that on that day she had a leso or a knife which she used to stab the deceased. She also denied that she knew PW 5 or the deceased.
13. In his submissions, counsel for the accused contended that the prosecution did not prove its case beyond reasonable doubt. He submitted that the testimony of the key witnesses was not credible as PW 1 was a drunkard and had previous grudges with the accused and the testimony of PW 5 was scanty. He further submitted that there is no evidence that the accused stabbed the deceased. He noted that the testimony of PW 5 corroborated the defence case that there was a scuffle after the accused found her husband in a compromising situation thus negating any malice aforethought. Counsel urged the court to dismiss the charge and acquit the accused.
14. 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*.
15. As regards the fact and cause of death, there is no doubt that the deceased was stabbed. PW 1 and PW 5 saw the deceased being stabbed and PW 4, who saw the deceased's body at the mortuary confirmed that he observed that he saw a stab wound on the left side of the deceased's chest near the breast. The cause of death was confirmed at the post mortem conducted by PW 2. I find that the deceased died and she died as a result of a stab wound inflicted by a sharp object which penetrated the chest through to the heart causing it to stop as a result of internal bleeding.
16. As to who caused the inflicted the fatal injury, I find that there was direct evidence through the testimony of PW 1 and PW 5. The prevailing conditions favoured positive identification of the accused. The incident took place early in the morning when it was not dark. Both PW 1 and PW 5 testified that they knew the deceased prior to that date hence this was clearly a case of recognition rather than identification of a stranger. In her defence, the accused clearly admits that she was present at the scene where she had an altercation with a woman who subsequently died. I find that the totality of the evidence excludes the possibility that there could be a case of mistaken identity.
17. PW 1 and PW 2 described how the accused came where Otieno and the deceased were and then proceeded to stab her. Counsel for the accused impugned the testimony of both witnesses. PW 1 admitted that he would take a drink every morning in order to "*open the lock*." Although he would drink every morning to clear his mind, I do not think this impaired his faculties to the extent that he was unable to observe what was happening or describe what had happened. He gave a clear

description of what happened and his version of events was clearly corroborated by the testimony of PW 5. Further, there is no evidence from PW 4 that he was so drunk that he could not record a statement. The accused also tried to undermine his testimony by implying that he had a grudge against her. I find that the issue of a grudge was an afterthought as the issue of such a grudge was not put to PW 1 in cross-examination. Likewise, I find that testimony of PW 5 credible as her version of events is clearly corroborated by that of PW 1 in material particulars. In short, I heard PW 1 and PW 5 and I find that their testimony was credible.

18. The accused testified that she struggled with the woman who fell as a result of being injured. Although the accused disavowed the fact that she stabbed the deceased, the testimony of PW 1, PW 4 and the accused herself does not point to any other person who could have inflicted any injury on the deceased. If I accept the accused's version of events, the deceased was left alone with the accused after Otieno left where after which a struggle ensued between the accused and the deceased. No other person was involved in the struggle hence no other person could have injured the deceased except the accused.

19. Counsel for the defence laid much emphasis on the fact that PW 5 could not identify the knife that was produced in evidence as the weapon that killed the deceased. It is possible that PW 5 did not see it properly or could not recall what it looked like. In my view, this does not undermine the prosecution case as the evidence is clear that the injury sustained by the deceased was caused by a sharp object and the only person who could have inflicted the injury was the accused. I find and hold that it is the accused who stabbed the deceased with a knife.

20. I now turn to consider the accused's state of mind at the time she stabbed the deceased. The accused's defence is suggestive of self defence. The accused testified that when she confronted that deceased about her husband, the deceased started fighting with her and this led to a struggle where the woman picked an object and tried to stab her but she restrained herself. The testimony of PW 1 and PW 5 is clear that it is the accused who confronted Otieno and the deceased. There is no evidence that the deceased did anything that would have required her to repel an attack with deadly force. PW 1 was not carrying anything while the accused came armed with a knife which she plunged into the deceased. PW 1 and PW 5 who were present at the scene did not see any struggle between the accused and the deceased. I therefore reject the accused's testimony that she could have been attacked by the deceased and that the injury could have occurred as a result of a struggle.

21. Was the accused provoked in any manner by the accused? **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.

22. In *Peter King'ori Mwangi & 2 others v Republic MSA CA Crim. App. No. 66 of 2014* [2014] eKLR, the Court of Appeal held that the statutory definition of provocation requires that two conditions must be satisfied for the defence to be made out. First, the "subjective" condition that the accused was actually provoked so as to lose his self-control and second, the "objective" condition that a reasonable man would have been so provoked. 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. 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 or in other words, it must prove malice

aforethought beyond reasonable doubt (see *Benson Mbugua Kariuki v Republic* NYR CA Crim. App. No. 19 of 1978 [1979]eKLR).

23. There is no evidence that the deceased did anything that would have caused the accused to act in an uncontrolled fit of rage that caused her to stab the deceased viciously. The testimony of PW 1 and PW 5 points to the fact that the accused acted in a cold and calculated manner. She approached Otieno and asked whether the deceased was his second wife, she was calmly turned to the deceased and complimented her beauty and then suddenly plunged the knife into her.

24. **When the accused drove the knife into the deceased's chest with such massive force as to cause it to penetrate the heart, she must have known that the act of stabbing the deceased in the chest with a sharp instrument would cause death or grievous harm. I am therefore satisfied that the prosecution established malice aforethought in terms of Section 206(b) of the Penal Code.**

25. I therefore find the accused **MILLICENT ATIENO OTIENO** guilty of the murder of **MILLICENT AKINYI** and I convict her accordingly.

DATED and DELIVERED at MIGORI this 22nd day of October 2015

D.S. MAJANJA

JUDGE

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

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