



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL CASE NO. 35 OF 2013**  
**BETWEEN**  
**REPUBLIC ..... PROSECUTOR**  
**AND**  
**HENRY OYUGI OBEWA ..... ACCUSED**  
**JUDGMENT**

1. According to the information dated 2<sup>nd</sup> April 2013, **HENRY OYUGI OBEWA** (“the accused”) is charged with the murder of **SILPAH OSUMBA OBEWA** (“the deceased”) which occurred on the night of 29<sup>th</sup> and 30<sup>th</sup> March 2013 at Wotata Village, Homa Bay District within Homa Bay County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. The accused is the son to the deceased and they were living in the same homestead at Wotata Village. The prosecution case is that the accused picked a quarrel with deceased on the evening before she was discovered dead in her house on the morning of 30<sup>th</sup> March 2013. The prosecution called 9 witnesses while the accused elected to give sworn testimony in his defence.
3. Lawrence Edward Juma (PW 1), a cousin of the accused, testified that he was residing about 200 metres from the deceased homestead and that on 29<sup>th</sup> March 2013 at about 4.00pm, while he was at his home with his mother, he heard the accused and deceased arguing. He heard the accused shouting, “*Why is it that you [his mother] have removed my clothes without my permission.*” He knew it was the accused talking because he could see them from his home. He thereafter saw the accused enter the deceased’s house. As it was getting dark he and his mother also entered their house. He did not think much of the incident as he had been staying in Nairobi and had not seen them quarreling before.
4. On the next day, 30<sup>th</sup> March 2013, PW 1 decided to go the deceased’s house to inquire about the incident that occurred the previous day. He knocked the door. Nobody responded so he tried pushing the door but it was stuck. When the door opened, he saw the deceased’s head but was too scared go in. At that time he saw the accused standing by his door. The accused tried calling him but he did not respond.
5. PW 1 went and informed Prisca Akeyo Obewa (PW 2), the deceased’s co-wife, whom he had left with his mother that morning. They both came back and PW 2 got into the house and started screaming that, “*Oyugi has killed his mother.*” The screaming attracted people among them Kennedy Otieno Oiya (PW 3) and Isaiah Amollo Ndongo (PW 4)

6. PW 2 testified that on 29<sup>th</sup> March 2013, she was inside her house, which was about 15 meters away from the deceased's home, when she heard the accused scolding the deceased over his beddings which she had removed from the clothes line. She also heard the accused ask the deceased who had instructed her to remove the beddings. He started abusing her mentioning the names of private parts and other obscenities. The quarreling continued for some time with the accused threatening to kill the deceased. She heard the accused tell the deceased that, "*I will have to kill you*" and "*I am carrying your life in my hands.*" PW 2 further testified that on 30<sup>th</sup> March 2013 at about 7.00am, while she was in her shamba, PW 1 and called her to go and see what had happened to the deceased. When she went to the deceased house, she pushed the door and found the deceased lying dead whereupon she started screaming claiming that the accused had killed his mother.
7. PW 3 was a cousin to the deceased. He recalled that on 30<sup>th</sup> March 2013 at 7.30am, he was on the way home when he saw PW 1 going to the deceased home and followed him. PW 1 told him that he had found the deceased dead. He saw PW 1 try to open the deceased's door but it refused to open. PW 1 asked him and they tried to push the door open but it was jammed. He looked inside the room and saw the deceased lying inside with injuries on her head. He decided to call the clan elder, Isaiah Amollo Ndong' (PW 5).
8. PW 5 testified that the deceased was married to his uncle. He recalled that on the morning of 30<sup>th</sup> March 2013 as he was ploughing, PW 1 sent a young boy to request him go to the deceased's homestead. When he reached the homestead, PW1 told him that the deceased had been killed. He went to the house and through a small opening he could see the deceased from a distance lying with head injuries. He immediately called the Assistant Chief, Silas Juma Ogutu.
9. When PW 5 arrived at the scene, he did not find the accused although he was residing in the same compound. The Assistant Chief forced the accused's door open where he recovered a knife. PW 5 noted that the accused had white and brown trouser which had blood. He further testified that when the police came to the homestead, they recovered a wooden rod from the deceased's house. PW 5 testified that the relationship between the accused and the deceased was bad and that he had been taken to the police station on at least three occasions.
10. Amongst the officers who came to the deceased's homestead was Corporal Paul Mureithi (PW 9) of Homa Bay Police Station Crime Branch. He was also the investigating officer. He recalled that on 30<sup>th</sup> March 2013 he was informed by his Commanding Officer, that the Assistant Chief, Silas Ogutu, called to inform him of a death at Wotata. PW 9 proceeded to the village as directed by the Assistant Chief. They found people at the homestead and were shown a semi-permanent house which belonged to the deceased. They proceeded to the house with Corporal Daniel Mulongo (PW 7), a gazetted Scenes of Crime Officer, who took close up photographs of the deceased and the house. They found the deceased lying dead on the floor with blood splattered all over. They also noted that the house belongings were scattered all over the floor. The deceased had injuries on both hands and a head injury.
11. PW 9 also noted that the accused and the deceased were residing in the same compound. His house was about 10 metres away. He found a blood stained rungu in the deceased's house near the body. The Assistant Chief gave him a knife which he recovered when he arresting the accused. He also recovered a blood stained trouser in the house of the accused. The officers removed the body and took it to mortuary at Homa Bay District Hospital for the postmortem to be conducted.
12. Dr Nicodemus Odundo (PW 4) produced the postmortem report prepared by Dr Ayoma Ojwang who had died by the time the trial was taking place. PW 4 testified that he had worked under the said doctor for five years and was familiar with his handwriting and signature. The post mortem was done on 4<sup>th</sup> April 2013 at Homa Bay District Mortuary after the body was identified by PW 1 and Charles Guda Obewa (PW 6). The body was that of a female aged about 80 years and the body was wasted. She multiple bruises, a few cut wounds and haemotoma on the right anterior

chest. The scalp had a lot of bleeding and a cut wound at the back of the head near the neck. Although the sternum was weak because of age, it was fractured on the upper part. Internal examination of the head revealed a lot of bleeding into the brain substance. He certified the cause of death was certified as head injury with severe pain. A blood sample was taken and handed over to the police officer. PW 4 opined that the injuries may have been caused by a both a sharp and blunt object.

13. Caroline Nzoki Wamae (PW 8), a Government Analyst, working at the Government Chemist Department, Nairobi recalled that on 5<sup>th</sup> April 2013, she received the following items from Corporal Paul Muriithi (PW 9) of Homa Bay Police Station;

Item A - A blood sample indicated to be that of Silpa Osumba Ombewa.

Item B - A pair of trouser wrapped in a khaki envelope indicated to be that of Henry Ombewa.

Item C - A piece of wood wrapped in a newspaper.

Item D - A knife wrapped in a khaki envelope indicated to be that of the accused.

14. The exhibits were accompanied by an exhibit memo dated 4<sup>th</sup> April 2013. The instructions contained therein were to examine the items and determine the source of blood stains. PW 8 examined the items and came up with following observation. First, the piece of wood item C was lightly stained with blood of human origin. Second, item D had no blood stains and third, the trouser item B was lightly stained with blood of human origin. PW 8 carried out a DNA analysis on all the blood stains and concluded as follows; the DNA profiles generated from item C - the piece of wood matched the DNA profile generated from item A - the blood sample of the deceased. Item B - the trouser generated a profile that was of unknown male origin as no reference sample was provided. She noted that though that the DNA profile had a close relationship with the deceased as the profile from trouser had half the profile of the deceased.

15. The accused elected to give sworn testimony in his defence. He stated that he was 55 years old and was residing in Wotata where he was a farmer. He denied that he had fought with his mother or killed her. He testified that his father Otieno Obewa used to work with the Administration Police until the time he died in 1975 and that during his lifetime he had four wives. By the time he died, he was survived by three widows and it is the deceased who received the widow's pension. The accused testified that after the death of his mother, he decided to come back home to take care of his ageing mother.

16. The accused recalled that at about 5.45am on 30<sup>th</sup> March 2013 he was asleep at home when awoken by a loud knock. He got up and went out. He saw three people at his mother's door. He recognized PW1, whom he had not seen for 13 years, but not the other two persons. When PW1 passed near his house, he tried to greet him but he did not respond. He went back to the house and got dressed. Before he got out and he heard PW 1 talk to PW 2 as they were going to the deceased's house. He followed them and but before they reacted the house, PW 1 threatened him. PW 1 and PW2 shouted and alerted the villagers that he had killed his mother.

17. The accused testified that he saw them break the door when PW 5 came. The Assistant Chief came questioned him and arrested him. He stated that PW 1 and PW 2 thought he had killed the deceased. He was handed over to the police by the Assistant Chief and brought to Homa Bay Police Station. As regards the events of the previous day, the accused testified that he had prepared for and he had dinner with the deceased before he went to sleep.

18. The accused stated the he had two brothers who were still alive. One is from his elder mother's house, David Onyango Obewa and the one he followed from his house, PW6. He stated the PW6 resided in Nairobi and they did not communicate. The accused testified the differences arose between his family and that of PW 2 on account of the pension he shared with the deceased. He

also stated that they were also having a land problem and that even though they went to the Chief to resolve the matter, PW 6 was not co-operative and as a result he was threatened.

19. The fact and cause of death of the deceased is not in dispute. She was found dead in her house by PW 1. PW 2, PW 3, PW 5, PW 7 and PW 9 confirmed that they saw the deceased body in the house and that she had been injured on the head and had multiple bruises. Their observations were consistent with the findings of Dr Ojwang who carried out the autopsy. I therefore find and hold that the deceased died and he died as a result of a head injury. The injuries were inflicted by both a blunt and sharp object. The deceased's DNA found on the wooden rod (Exhibit No.3) in the deceased house confirms that it was used to inflict the blunt injuries.
20. In order to prove who inflicted the unlawful act that led to the deceased death, the prosecution relied on circumstantial evidence. The fact that the accused and deceased had quarreled on the day before, that the only the accused could have killed the deceased as he was the only one residing with her in the homestead.
21. The law in this regard to circumstantial evidence has been restated many times by our courts and it is that in order to justify a conviction based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. The circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on and that the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. (See ***R v Kipkering Arap Koske & Another [1949] 16 EACA 135*** and ***Sawe v Republic CA Criminal Appeal No. 2 of 2002 [2003]eKLR***). I am now called upon to examine each piece of evidence carefully and determine whether the evidence excludes any other possibility other than the accused being guilty.
22. I will first dispose of the issue of the blood found on the accused's trousers. PW 1 and PW 3 identified the trousers (Exhibit No. 2) of belonging to the accused. PW 9 stated that he recovered the white trousers from the accused's house. The trousers had blood stains and which was confirmed by the testimony of PW 8. The DNA profile confirmed that blood stains were of an unknown male although it contained half the profile of the deceased's DNA. What is clear is that the trousers did not contain the blood bearing the DNA of the deceased hence the trousers do not place in the house of the deceased. Likewise, the knife that was recovered from his house did not have any blood stains and did not connect the accused to the death of the deceased. This leaves the question whether the accused is the only person who could have inflicted the injuries on the deceased between the time he was seen quarreling with the deceased in the evening and the time her body was found in the morning.
23. The accused and the deceased were the only ones who lived in the homestead. Although they were living in separate houses, the accused confirmed that he used to eat at her place. Apart from the accused on testimony, PW 1, PW 2, PW 5 and PW 6, who were all related to the accused, confirmed that fact that only the accused and the deceased were living in the same homestead. The only surviving biological brother of the accused, PW 6, stated that he did not reside in the homestead. This evidence only excluded the fact that the close relatives who testified could not have committed the murder.
24. However, the prosecution had a duty to exclude the reasonable possibility that no other person could have committed the murder. The prosecution evidence did not foreclose that possibility. For example, the prosecution did not show there were no other homesteads neighbouring the deceased's home other than those of the relatives who testified. Further given the time the witnesses last saw the deceased in the evening and the time she was found dead in the morning, anything could have happened to her.
25. From my own assessment after hearing of the witnesses, it was clear that there was hostility or

animus between the accused and his relatives. Although there was evidence that the accused and the deceased quarreled in the past, there was nothing else to connect the accused and the death of the deceased. This is a case where the suspicion outweighs actual evidence proving that the accused murdered the deceased. In such circumstances, the law requires that I give the accused the benefit of doubt.

26. I acquit the accused **HENRY OYUGI OMBEWA** of the murder of **SILPAH OSUMBA OBEWA**. He is set free unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY this 30th day of November 2015**

**D.S. MAJANJA**

**JUDGE**

Mr Okoth instructed by G.S. Okoth and Company Advocates for the accused.

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