



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL CASE NO. 13 OF 2012**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**WILSON OHURU BAJE ..... ACCUSED**

**JUDGMENT**

1. The accused, **WILSON OHURU BAJE** was charged with the murder of his wife **ANJELINE AUMA OHURU** (“the deceased”) which occurred on 16<sup>th</sup> August 2004 at Osiri village, Kothidha Sub-location of Homa Bay County. The trial commenced afresh after the Court of Appeal ordered a re-trial of the accused. The prosecution called 7 witnesses, after which the accused was put on his defence. He elected to make a sworn statement.
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. The fact and cause of death is not in dispute. The cause of death was established by the post mortem conducted by Dr Ayoma Ojwang’ who had died by the time the case was heard. The post mortem report was produced by Dr David Nyawade (PW 5) who confirmed that he had worked under Dr Ojwang’ and was familiar with his handwriting and his signature. According to the Post Mortem report, the autopsy was carried out on 26<sup>th</sup> August 2004 at Homa Bay District Hospital Mortuary after the body was identified by Christopher Ochieng Baje (PW 2). Dr Ojwang observed that the deceased’s naked body had a multiple cuts and stab wounds all over the body. These injuries are consistent with the photographs of the deceased’s body taken by the scene of crime officer and produced by Corporal Shem Ondieki Mogaka (PW 7). Although there were no fractures, he noted a massive haemothorax on the left lung cavity. Dr Ojwang’ certified that the cause of death was severe bleeding and a collection of blood in the left chest cavity.
4. In order to establish who cause the deceased death the prosecution called several witnesses. The accused’s sister in law, Florence Aluoch Ochieng (PW 1) recalled that on 16<sup>th</sup> August 2004, she went to see the deceased to ask her to assist her as she had visitors on that day. She arrived at the accused’s house at around 9.00am. She entered the house and found the accused in the bedroom. There was blood on the floor and when she asked the accused about the blood, he responded, “*We differed*”. She looked inside the bedroom and she saw the deceased sitting by the wall with her

hand raised on her head holding her side of the head. When she touched her she fell sideways. She saw injuries all over the body including the deceased's hands and the neck. She immediately went and informed the accused mother, Dina Akumu Baje (PW 3), who was living in the same homestead.

5. Dinah Akumu Baje (PW 3) recalled that on the morning of 16<sup>th</sup> August 2004, before going to look for fish at the lake, PW1 called her and informed her that the accused had killed his wife. She testified that when she saw the accused that morning he told her that morning that he had killed his wife. She immediately went to Ngegu Police Post to report the incident.
6. PW 1's husband and the accused's brother, Christopher Ochieng Baje (PW 2) recalled that the same day at about 10.00am he was at Ngegu Beach. His mother sent Duncan Otieno Ouma to inform him that the accused had killed his wife. After receiving the message he immediately went to Ngegu Police Post where he found his mother. PW 2 left with police officers to the accused's home at Osiri Village. They found the accused in his house seated on his bed while the deceased was lying on a mat next to the bed. He observed injuries on the legs, cuts on both hands, a stab wound on the left breast and face.
7. Sergeant Charles Origi (PW 6) was at Ngegu Police Post when PW 2 came to make a report of murder. After receiving the report and informing his superiors at Homa Bay Police Station, he left for the accused's homestead with other officers. He found the accused seated in the sitting room of a grass thatched house with two rooms while the deceased was lying in the bedroom. He observed cut injuries on the head, hands and the legs. When he went back to the sitting room he noticed a stick which had blood. PW 6 arrested the accused. Officers from Homa Bay Police Station arrived later and collected the deceased's body and left with the accused. He also collected a stick which had a blood and which he handed over to the Investigating Officer, Inspector Simiyu. They were also accompanied by officers from the Scenes of Crime unit who came and took photographs. The late Sergeant William Amollo took photographs which were produced by Corporal Shem Ondieki Mogaka (PW 7).
8. The accused elected to give sworn testimony when called upon to make his defence. He recalled that on 15<sup>th</sup> August 2004, he went to Ngegu Beach to fish at about 7.00pm and came back at about 4.00am. As he approached his house, he could see some light from the window. He heard some talking in the house when he got to the door. He called his wife to open the door but there was no response. Instead the light was switched off. He stayed at door for a while. He called his wife again but she did not open. He could hear the voice of a man in the bedroom then they moved into the sitting room. When called her for the third time and she did not respond, he pushed the door and entered the sitting room which was dark. Suddenly someone caned him on his back using a stick. He grabbed the stick and pulled it. He saw the man and the deceased standing in a corner. He thought they intended to run away. As he tried to hit the man with the stick, the man pushed the deceased and the stick he was holding hit her. He went to look for the lamp which he lit. He came back and found his wife was injured and the man who was in his house had escaped. He decided to go and look for means to take his injured wife to hospital. When he came back he found PW 1 at the gate and called her to come and assist him. When he got back to his house, his wife was dead.
9. The next issue is whether the accused killed the deceased. There is no direct evidence of how the deceased died but the testimony of all the prosecution witnesses, PW 1, PW 2, PW 3 and PW 6 established the fact that the deceased's body was found in the accused's house. Since the deceased was found dead in house, he was called upon to explain what could have taken place in the home where he alone lived with his wife. In his sworn defence, the accused stated that he found a man with his wife and the man, in the course of attempting to flee pushed his wife and the stick he was holding hit her. He went out to seek assistance and when he came back he found his wife dead.
10. From the evidence, I find that the existence of a man in his house implausible for several reasons. First, the accused did not raise any alarm that there was a stranger in his house which would have

been a likely reaction. Second, the accused made specific admissions that point to his guilty. He told his own mother, PW 3, that he had killed his wife. Further, when PW 1 asked happened he replied, “*We differed.*” If indeed, there was a third person, he would have told his mother as much. Such a statement is admissible as it is not an inadmissible confession within the meaning of **section 25A** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* (see *Sango Mohamed Sango & Another v Republic CA MLD Crim. App. No. 1 of 2015 [2015]eKLR*). Third, the accused’s explanation of how the deceased could have been injured by falling on a stick is inconsistent with the multiple injuries sustained by the deceased. The accused version does not make any sense because by the time he went to seek help, the deceased had one injury from falling on the stick and man he found had already left but when he came back he found her dead with multiple injuries. The prosecution evidence discounts the possibility of a third person in the house who could have caused the death of the deceased. I find and hold that the accused killed the deceased by hitting her several times with the sharp stick causing her the multiple cut wounds.

11. In determining the question of malice aforethought, the court is entitled to take into account factors such as the part of the body that was targeted, the type of weapon used, if any, and the type of injuries inflicted upon the deceased (see *Rex v Tubere s/o Ochen [1945] 12 EACA 63*). In this case, multiple injuries inflicted upon the deceased, which resulted in her death, are consistent with an assault intended to cause grievous injury if not death. These injuries were consistent with the unlawful killing of the deceased actuated by malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

12. I have also noted that the investigation officer was not called as a witness. He is usually the witness who appraises the court of investigations conducted and summaries the evidence against the accused person. Failure to call him may reflect poorly on the prosecution especially when no explanation is given. However, this was an old case and it was difficult to locate all the witnesses. In any case, the evidence presented of crucial witnesses was sufficient to prove the case against the accused beyond reasonable doubt.

13. Having considered all the evidence, I find the accused **WILSON OHURU BAJE** guilty of the murder of **ANJELINE AUMA OHURU** and I convict him.

**DATED and DELIVERED at HOMA BAY this 16<sup>th</sup> day of December 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.