



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 32 OF 2010**

REPUBLIC.....PROSECUTION

VERSUS

RHODA ABISAKI ONDUSO.....ACCUSED

**JUDGMENT**

The accused **RHODA ABISAKI ONDUSO** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

**On the 29<sup>th</sup> day of August, 2010 at Kongowea Sosiani village, Kisauni District within Coast Province murdered FRANCIS AMBANI ASAMUKA.”**

The accused entered a plea of ‘*Not Guilty*’ to the charge and her trial commenced before me on 7<sup>th</sup> June, 2012. The prosecution led by **MR. TANUI**, learned state counsel called a total of five (5) witnesses in support of their case. **MR. ONJORO** Advocate acted for the accused.

**PW1 RISPA ADHIAMBO** a neighbour to the accused told the court that the accused and the deceased lived together as man and wife in Sosiani village in Kongowea. On 26<sup>th</sup> August, 2010 at about 10.00 p.m. **PW1** told the court that she was seated in the veranda outside her house. The deceased came home from work at that time and found that his wife the accused had not returned. The accused came home later at about 10.30 p.m. and found the deceased in the house waiting for her. Both were drunk. A quarrel ensued between the couple. **PW1** advised the accused to go and sleep elsewhere. As the accused left the house the deceased followed her and the two began to fight. Suddenly **PW1** saw the deceased fall to the ground groaning. She went to check on him and saw a big cut wound on his stomach from which his intestines were spilling out. Neighbours gathered and rushed the deceased to a nearby clinic for medical attention. The deceased was later admitted at the Coast General Hospital for 26 days after which he succumbed to his injuries and died. The knife which was used to stab the deceased was recovered hidden behind the couple’s house. The accused was arrested and taken to the police station and upon completion of investigations she was arraigned in court and charged with the offence of murder.

At the close of the prosecution case the court found that the accused had a case to answer and she was directed to give her defence to the charge. The accused elected to make a sworn statement in which she totally denied having stabbed and killed the deceased. It is now the duty of this court to analyze the evidence on record in order to determine whether the charge of murder has been proved beyond a reasonable doubt as required in law.

The offence of murder is defined as follows by section 203 of the Penal Code, Cap 21, Laws of Kenya

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

From this definition arises three crucial ingredients all of which must be proved beyond a reasonable doubt in order to establish a charge of murder

1. Proof of the fact as well as the cause of death of the deceased.
2. Proof that the deceased met his death as the direct result of an unlawful act or omission on the part of the accused; and lastly
3. Proof that said unlawful act or omission was committed with malice aforethought.

Regarding the first ingredient there can be no controversy. **PW1** a neighbour stated that she saw the deceased fall to the ground with his intestines spilling out of a cut wound to his stomach. **PW3 STEPHEN MUNGALLA** a brother to the deceased stated that after receiving news of the incident he went to the hospital where he found the deceased admitted in a critical condition. Both **PW1** and **PW3** who knew the deceased well identify him as ‘Francis Ambani’. Both confirm that the deceased died 26 days after his admission at the hospital. Evidence on the cause of death was given by **PW4 DR. NGAALI MBUUKO** a pathologist attached to Coast General Hospital. **PW4** told the court that he conducted the autopsy on the body of the deceased. He noted that the body had infected wounds on the left side of the abdomen. He opined that the cause of death was “*septic shock due to perforated injuries to the chest and abdomen*”. **PW4** filled and signed the post-mortem report which has been produced in court as an exhibit **Pexb2**. This finding is consistent with the evidence that the deceased was stabbed in the stomach area. It amounts to expert medical evidence and has neither been challenged nor controverted by the defence. I am satisfied therefore that the fact as well as the cause of death of the deceased have been proved beyond a reasonable doubt.

Aside from the above the prosecution is under a duty to prove that it was the accused who inflicted the fatal cut wounds on the person of the deceased. **PW1** told the court that on the material evening she saw the accused and the deceased who were both drunk fighting. Although **PW1** stated that she did not see either of the two wielding any weapon she did witness the deceased fall suddenly to the ground outside their house. When she went to check she found him lying there with a cut wound on the stomach and with his intestines spilling out. The day after the incident **PW1** told the court that the accused told her that she had hidden the knife behind the house. **PW1** and others went to check behind the house and recovered there a kitchen knife. The said knife was produced in court as an exhibit **Pexb1**. This evidence is corroborated by **PW2 SYLVESTER ODUOR** the husband of **PW1** who was the landlord to the couple as well as **PW3** the brother of the deceased. All three witnesses insist that it was the accused who revealed where she had hidden the knife and all three witnesses identify the knife in court as the one which was found behind the house. In her defence the accused denies that it was she who revealed where the knife was. However, in my view this defence rings hollow. Why would all three witnesses insist that it was the accused who told them where the knife was if this was not so. There is no evidence of any pre-existing grudge that would cause any of the three to lie against the accused. Further in her defence the accused suggest that the deceased may have fallen and injured himself on a sharp object. This is mere speculation. No sharp object was found at the scene and certainly no object was found there which could have caused such grievous injury to the deceased. I therefore reject this aspect of the defence.

The fact of the matter is that the accused and the deceased were engaged in a fight. Suddenly the deceased falls down mortally injured by a deep cut to the abdomen. The accused runs away. The next day the accused tells witnesses that she has hidden the knife behind the house. A knife is recovered behind the house exactly as the accused stated. The only logical conclusion from this set of facts is that it was the accused who stabbed the deceased and later disposed of the knife by hiding it. The circumstantial evidence points squarely at the accused as the person who stabbed the deceased. No other person at the time was engaged in a fight or quarrel with the deceased. I find that the *actus reus* of the offence of murder has been proved against the accused. There is no doubt that it was she who stabbed and injured the deceased, an act which ultimately led to his death.

Having proved the *actus reus* of the offence the prosecution must go further and prove the mental elements for the offence of murder. This is defined as the '*mens rea*' and is described as '*malice aforethought*'. Evidence must be adduced sufficient to show that at the time when she stabbed the deceased the accused was possessed of the intention to cause his death. It is important in this regard to consider the circumstances under which the offence took place. **PW1** who was a neighbour told the court that the accused and the deceased were a couple who had a stormy relationship. Both she and **PW2** the landlord stated that the couple quarreled and fought often and indeed most neighbours in the plot were tired of their behaviour. On the material day a quarrel arose because the accused arrived home late. In her evidence **PW1** states

**“They quarreled. Both were drunk. I told them I was tired of their daily quarrels.....”**

Then **PW1** states that the accused loudly stated that she would do something unbelievable. She later qualified this by stating that the accused used to say this each time the couple quarreled. **PW1** states

**“The couple used to fight regularly. The accused said she will do something big. She always used to say this.....”**

On that material day as the couple fought **PW1** advised the accused to leave the house and to go and sleep elsewhere. She probably advised this in an attempt to put some distance between the two and in that way diffuse tensions. In other words **PW1** was advising the accused to just walk away. This was sound advice and by all accounts the accused intended to heed the advice as she walked out of the house and began to leave. However, as she was leaving the deceased blocked her path and pulled her back. This struggle degenerated into a fight in which the deceased was stabbed. This narration of events is made very clear by **PW1** when she states in her evidence-in-chief as follows:

**“The accused was trying to run out of the house. The deceased had blocked the door with his hand. Me and Were came and intervened. We told accused to go and sleep at a neighbours and deceased to remain in their house. The accused went out. The deceased ran after her. They began to fight in the darkness.....”**

Under cross-examination by defence counsel **PW1** clarified the events further when she states

**“The accused got out of the house. The deceased followed her and began to beat her with a belt. The deceased often used to beat the accused.....”**

It is clear therefore that the accused did not launch an unprovoked attack on the deceased. She was actually in the process of walking away from the deceased. It was the deceased who blocked her path and began to beat her with a belt. The accused in an attempt to defend herself also began to fight with the deceased. This version of events is confirmed by **PW5** the investigating officer **CORPORAL GOOD MPHoya** of Mtwapa police station who stated as follows:

**“I was told on 29<sup>th</sup> August, 2010 the accused came home late. Her husband [the deceased] asked where she had been and a quarrel ensued which degenerated into a fight. The deceased began to whip the accused with a belt. He threw her clothes from the house. As the accused left to seek a place to sleep the deceased followed her. They continued to fight.....”**

Again under cross-examination **PW5** reiterates this when he states

**“The witnesses told me that the deceased began to whip the accused with a belt. I was told that as the deceased was leaving to seek a place to sleep the deceased followed her.....”**

It is manifestly clear that it was the deceased who was the 'agent provocateur' in this situation. He ought

to have let the accused go away. Instead he followed her and began to beat her with a belt. The accused retaliated and in the process stabbed her husband.

The accused in my view was provoked into acting as she did. This is evident from the fact that witnesses state that she appeared very shocked when the deceased fell down bleeding. I have no doubt that the accused acted in the heat of the moment and in such a situation she cannot be said to have been possessed of malice aforethought. Where an act is committed in the heat of the moment as the result of provocation then the offence of murder cannot be said to have been established. Section 207 of the Penal Code provides

**“207. When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool is guilty of manslaughter only.”**

The accused here did act under provocation. She acted in the heat of the moment by picking a common kitchen knife with traces of ugali on it and stabbing her attacker. The killing though unlawful cannot be said to have been pre-meditated. If the accused had planned to kill the deceased she would not have been walking away to seek an alternative place to sleep. Based on the foregoing I find that the *mens rea* for the offence of murder has not been established in this case. I therefore enter a verdict of ‘*Not Guilty*’ in respect of the charge of murder. However I am satisfied that the offence of manslaughter has been proved. I therefore convict the accused of the lesser offence of manslaughter under section 207 of the Penal Code.

**Dated and delivered in Mombasa this 8<sup>th</sup> day of April, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Ayodo for State

Mr. Matheka h/b Mr. Onjoro

Court Clerk Mutisya

Court:

Mention 11<sup>th</sup> April, 2014 for mitigation and sentence. Hearing notice to Mr. Onjoro.

**M. ODERO**

**JUDGE**

**8<sup>TH</sup> APRIL, 2014**

**11<sup>th</sup> April, 2014**

Before Hon. Lady Justice M. Odero

Ms. Mwaura for State

Mr. Onjoro for Accused

Court Clerk Mutisya

**Mr. Onjoro:**

Accused is extremely remorseful. She is a young mother of a six year old child. She is the sole breadwinner. The grandmother is unable to care for the child. She has been in custody since 2010. She has learnt her lesson. We pray for a non-custodial sentence.

**Court:**

Mitigation noted. The accused's actions led to loss of life. She is sentenced to serve four (4) years imprisonment.

**M. ODERO**

**JUDGE**

**11<sup>TH</sup> APRIL, 2014**