



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL CASE NO. 44 OF 2012**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOEL ODONGO OCHIENG' ..... ACCUSED**

**JUDGMENT**

1. On 27<sup>th</sup> May 2013, this court was informed that **JOEL ODONGO OCHIENG'** (“the accused”) had murdered his wife **CAROLINE ANYANGO OKEYO** (“the deceased”) on 17<sup>th</sup> May 2013 at Kasgunga Central Sub-Location, Gembe West Location, Mbita 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. I completed the hearing in accordance with the provisions of **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* after the trial had commenced before Maina J. The prosecution’s case against the accused was circumstantial and was supported by 8 witnesses and was as follows.

3. Hezron Odhiambo Kundo (PW 1) testified that he was a motorbike rider plying the Mbita-Homa bay route. He recalled that on 17<sup>th</sup> May 2013 at about 9.30 pm he received a phone call from Richard Ouma Ochieng (PW 3), a cousin of the accused, requesting him to come and see him urgently. He proceeded to meet PW 3 near the accused’s house where he found PW 3, Paul Ochieng Ochieng (PW 4), the accused and the deceased. The deceased who was lying down and could not talk. When he inquired what had happened to her, PW 3 told him she was injured. PW 1 was requested to take the deceased to hospital. PW 4 assisted him to put her on the motorbike whereupon they left for Mbita District Hospital. PW 4 supported the deceased while he rode the motorbike. They left the accused in the house.

4. PW 1 further testified that when they reached Kisui, PW 4 told him to stop as the deceased had died. When they stopped they confirmed that she had indeed died. PW 1 immediately called the Chairperson of the Beach Management Unit, Beatrice Irene Atieno (PW 2) who in turn called police officers from Mbita Police Station.

5. On her part PW 2 recalled that she was called by PW 1 at about 10 pm on 17<sup>th</sup> May 2013 and informed that the deceased had died. She was shocked because she knew the deceased and had been with her at the beach that morning where she met her carrying *omena*. Soon thereafter PW 4 arrived at her home with motor bike. They both went to inform the village elder and thereafter proceeded to the scene where the deceased’s body was. Upon arrival, she viewed the deceased’s body and called the police.

6. PW 3 recalled that on 17<sup>th</sup> May 2013 at about 9 pm, he was from the trading centre and when he was about to reach his house he heard a noise from the accused's house. He proceeded there to inquire what was happening. He found the deceased lying down crying while the accused was sitting on a chair inside the house near the door. He asked the deceased what had happened but she did not reply. He also asked the accused what had happened but he told him to ask the deceased. The deceased continued crying while pointing to her chest but she could not talk. He decided to call PW 1 and PW 4. PW 4 arrived first and then PW 1 arrived with his motorbike.

7. PW 4 also recalled that while he was asleep on 17<sup>th</sup> May 2013 at about 9.30 pm he received a call from PW 3 requesting him to go to his house. On arrival there, he did not find him but he was told to proceed to the accused home where he found the deceased lying on the ground. The deceased did not respond to his questions and when he asked the accused what had happened, the accused told him to talk to his wife. He found the accused sitting inside the house while the deceased was lying outside. He called PW 1 to come with a motor cycle and when he arrived they carried the deceased but she passed away near Kisui.

8. Dr Ayoma Ojwang (PW 6) carried out a post-mortem on the body of deceased on 31<sup>st</sup> May 2013 after the body had been identified by the accused's mother, Mary Adhiambo (PW 5). He observed that the deceased had a few bruises on the face and some haematoma formation same area but there were no cuts or fractures. Internally, he noted that the spleen was completely ruptured causing internal bleeding. He certified the cause of death as internal bleeding due to the ruptured spleen. He opined that the injury was likely caused by a blunt weapon. On 20<sup>th</sup> March 2013, he examined the accused and concluded that he was mentally fit to stand trial.

9. The investigating officer, PC Christopher Chalulot (PW 7), was assigned to investigate the case by the Deputy Commanding Officer, Mbita Police Station, Sergeant David Wangila Simiyu (PW 8). He was one of the officers who was called on the night of 17<sup>th</sup> May 2015 and requested to proceed to go to the scene where a woman was said to have been murdered. He proceeded there in the company of other officers from Mbita Police Station and where they found the deceased's body lying along a road. He noted that save for injuries that the deceased had on her face, the body was intact. There were many people at the scene by the accused was not among them. PW 7 interviewed the witnesses present who informed him that the deceased was fighting with the accused and that during the fight she fell unconscious and was rushed to the hospital but she died on the way. He organised for the deceased's body to be taken to the mortuary and for the post mortem to be conducted. He also recorded the witness statements and concluded that there was sufficient evidence to charge the accused with murder.

10. When placed on his defence, the accused elected to give sworn testimony. He testified that the deceased was his wife and on the morning of 17<sup>th</sup> May 2013, they woke up together and she prepared breakfast for them and their 3 children. At about 8.00 am, as he was leaving to go fishing at the lake, the deceased told him she had stomach problems. He gave her Kshs. 200/= to go and see a traditional doctor. When he came back at 8.30 pm, he found the deceased lying next to the door. At that time he could not call PW 3, who was a neighbour, to assist as he was still at the beach. He could also not reach PW 3's wife. He entered the house and asked the children whether their mother had eaten but the children informed him that she had not.

11. Thereafter, he went and sat on the chair to the door to remove his wet clothes. After a few minutes, PW 3 passed by his house and found the deceased who did not respond to him. The accused told him that the deceased was in pain in the morning and that her condition was becoming worse. He requested PW 3 to call PW 1 to come and take the deceased to the hospital. PW 1 came and took the deceased to Mbita District Hospital while he went to look for money. He stated that he got Kshs. 2000/= from his boss Beatrice Atieno Omondi whereupon he proceeded to Mbita District Hospital. At the hospital, he asked for his wife but was informed that they had not received a female patient. He went back home and found people already crying and calling his wife's name. On the next day he went with PW4 to Homa Bay District Hospital mortuary and paid Kshs. 1,800/= for the body to be treated. On 18<sup>th</sup> May 2013 at around 11.00 am, the accused stated that he was arrested and taken to Mbita Police station. The accused denied that he caused the deceased's death.

12. After the close of the prosecution case Mr. Ongoso, counsel for the accused, submitted that from the totality of the evidence, the court could not conclude that the deceased had been killed. He submitted that none of the witnesses called saw the accused inflict injuries upon the deceased hence the prosecution had not proved its case beyond reasonable doubt.

13. Ms Ongeti, counsel for the prosecution contended that the accused and deceased were man and wife and that testimony of the material witness placed the accused and deceased in the house and considering that the deceased was not sick, the only conclusion the court could draw was that the accused is the person who caused the death of the deceased. She called in aid the provisions of **section 111** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**.

14. There are three key ingredients that *must* be present for the offence of murder to be established: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and, third, that the accused committed the act with *malice aforethought*.

15. On this issue the evidence is circumstantial and it is important recall the long established principle concerning such evidence laid down by the Court of Appeal for Eastern Africa in **Kipkering Arap Koske & Another v Rex, [1949] EACA 135** that:-

*That in order to justify, on the circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt and the burden of proving facts which justify the drawing of the inference from the facts to the conclusion (sic) of any other reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused .....*

16. As regards the fact and cause of death, it is clear that the deceased did not sustain any visible physical injuries that would have led to her death. The post-mortem conducted by PW 7 confirmed that she had massive internal bleeding that was caused by a ruptured spleen. I therefore find and hold that the deceased died and she died as a result of a massive internal bleeding due to the rupture spleen. This finding excludes the contention by the accused that the deceased was having stomach problems on that day when he left her in the morning. According to PW 2, she had seen the deceased at the beach carrying *omena* and they had talked.

17. The main issue then is whether it is the accused who inflicted the injury that led to the death with a blunt object. The accused lived with the deceased and on that fateful evening, PW 1, PW 3 and PW 4 testified that the accused was alone at home with his wife. Although he contended in his sworn testimony that he was with the children, nothing to that effect was suggested in cross-examination of the witnesses who were categorical on that issue.

18. Since the accused and deceased were alone at their home and the deceased was found with serious internal injuries, what could have happened to the deceased was a matter within the accused's knowledge under the provisions of **section 111** of the **Evidence Act**. In **Mkendeshwa v Republic [2002] 1 KLR 461**, the Court of Appeal stated that;

*In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.*

19. In proffering an explanation as to what happened, the accused in his defence, stated that his wife had been sick that morning suggesting that his wife died as a result of the stomach problem she had complained to him about. As I have held the post-mortem examination performed by PW 7 disproves this fact and fact that the deceased was seen earlier that morning by PW 2.

20. Even assuming that his wife was sick, his conduct was inconsistent with his innocence. He found his wife in grave pain that evening yet he did not call for assistance or help immediately. He only waited for PW 3 to pass by whereupon he asked him to call PW 1 to take her to hospital. PW 3 and PW 4 also testified that the accused did not tell them what had happened to his wife. If indeed his wife was sick, he could have volunteered that information to them. Again, the accused's contention is disproved by the testimony of PW 3 who came to the scene in response to some noise from the accused home and when he found the deceased lying in pain, he decided to call PW 1 who came and they took her to hospital with PW 4

21. Since no other person could have inflicted the injury on the deceased, it is only the accused who would have done so. I therefore find and hold that the accused is the person who inflicted the injury upon the deceased.

22. As regards the issue whether the injury was inflicted with malice aforethought, it is clear from the evidence of PW 7 that the injury was inflicted with such viciousness as to cause the spleen to rupture and cause internal bleeding. It is the kind of blow that was inflicted with, "*An intention to cause the death of or to do grievous harm to any person, whether the person is actually killed or not*" within the meaning of **section 206(a)** of the *Penal Code*. I find that the prosecution proved that the injury was inflicted with malice aforethought.

23. Having considered all the evidence, I find the accused **JOEL ODONGO OCHIENG** guilty of the murder of the **CAROLINE ANYANGO OKEYO** and I therefore convict him.

**DATED and DELIVERED at HOMA BAY this 26<sup>th</sup> day of August 2015**

**D.S. MAJANJA**

**JUDGE**

Mr Ongoso instructed by Ongoso Ayoma and Company Advocates for the accused.

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