



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 49 OF 2013

BETWEEN

REPUBLICPROSECUTOR

AND

PAUL OTIENO NDONGAACCUSED

JUDGMENT

1. On 9th July 2013, this court was informed that **PAUL OTIENO NDONGA** (“the accused”) murdered **DORIS KUSA DIANG’A** (“the deceased”) on 7th July 2013 at Kasewe ‘B’ Sub-location in Rachuonyo South District contrary to **section 203** as read with section **204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. The accused pleaded not guilty and the trial commenced before Maina J., and was completed under **section 200** of the *Criminal Procedure Code (Chapter 63 of the Laws of Kenya)*. The prosecution case was that the accused, his wife and their child were passengers on a motorbike when a quarrel ensued between the accused and his wife. The two fell off the motorbike and continued quarreling whereupon the accused stabbed the deceased causing her death. The prosecution called 7 witnesses to prove its case.
3. The main prosecution witness was PW 1, Samson Onyango Ouma. He testified that he was a motorbike rider along the Karota – Musaga Road. He recalled that on 7th July 2013 at about 12.30 pm while he picked three passengers; a man, woman and a child at Kochia Onditi. They were going to Ringa. The woman sat immediately behind him while the child sat in front of him. On the way he heard the man and woman quarrelling in Dholuo. He stated that the man asked the woman about his properties. The quarrel continued for about 30 minutes. As they were riding on a rough road, the motorbike lost control and the passengers fell off. The motorbike fell on top of him as he got hold of the child.
4. PW 1 further testified that after even after the man and the woman fell of motorbike they continued quarrelling. While the he was still on the ground, with the motorbike on his thigh, PW 1 stated that he saw the man with a small knife stab the woman on the head and left hand. Upon seeing what was happening, he pushed the motorcycle and raised the alarm so people could come. People came after he shouted and the man fled through a path leading to a homestead leaving the woman was lying on the ground.

5. As the man fled, he continued shouting for help and running after him but did not catch up with him as he was in pain. By the time he returned to the scene the woman was dead. In the meantime, the villagers chased the man to a river and apprehended him. Police officers from Oyugis came to the scene and found him and the child while the motorbike had been taken by the owner. PW 1 identified the man he carried on the motorbike as the accused in court.
6. PW 2, Herman Nyakuti Matira, testified that he was the cousin to the deceased but he did not know the accused. He had heard that she was married but had never visited her matrimonial home in Oyugis. He was informed that she had died at Kasipul Kabondo and on 18th July 2013, he was called to identify her body at Rachuonyo District Hospital before the post mortem was carried out. Thereafter the deceased was buried at Maseno.
7. PW 3, Josphat Nyanguti Diang'a, a step brother to the deceased recalled that he was informed on 7th July 2013, that his sister had died. He also attended the post mortem conducted at Rachuonyo District Hospital where he identified the body of the deceased. He also confirmed that he knew that the deceased was married but that he had never visited her matrimonial home. He stated that the deceased was buried in Maseno as dowry had not been paid.
8. PW 4, PC Charles Kirimi, a police officer based at Oyugis Police Station recalled that on 7th July 2013, while on normal patrol duties at Oyugis, received a call from Assistant Chief Hesbon Otieno of Kasewe B Sub Location that a person had killed his wife at Kochia Onditi Village on the way to Karoka Market. He proceeded there and found the accused person surrounded by members of the public while the body of a woman lying beside the road. When he observed it had several fresh stab wounds on the chest and the right hand which seem to have been inflicted by a sharp object.
9. PW 4 testified that after interrogating several people at the scene, he arrested the accused and to took him to Oyugis Police Station while the deceased's body was taken to Rachuonyo District Hospital mortuary. He stated that he did not recover the murder weapon. He further stated that the accused was wet and had injuries on the fingers of his right hand.
10. PW 5, Sgt Damaris Ombina, an officer based at Rachuonyo CID, was the investigating officer. On 7th July 2013 at about 4 pm she received a call from the Officer Commanding Police Station ("OCS") who informed her of the incident concerning the accused and asked her to investigate the matter. She took the accused to Rachuonyo District Hospital where he was admitted until 9th July 2013 when the doctor confirmed that he had recovered and was mentally fit to stand trial. She recorded statements of the witnesses, arranged for the post-mortem of the deceased by Dr Peter Ogola (PW 6) who performed the postmortem at Rachuonyo District Hospital. On 7th July 2013 she visited the mortuary and saw the body but she did not observe any injuries as it was bloody.
11. PW 6, the Medical Superintendent at Rachuonyo District Hospital performed the postmortem on the body of Doris Kusa Diang'a on 18th July 2013. He observed that there were multiple lacerations on the scalp on the right side of the head, on the neck, on the trunk both on the right side and at the back of the deceased body. He noted that these lacerations were consistent with stab wounds and ranged between 3cm – 8cm in diameter and some went as deep as the bone. On internal examination, he found that the right lung had been perforated and there was a collection of blood in the right chest cavity. On the right side of the neck, he noted that the vessels taking blood to the head had been severed. In his opinion the cause of death was collapse of the lungs and the heart that resulted in reduced intake of oxygen and also due to bleeding that had resulted from the perforated lung and severed blood vessel due to penetrating injuries.
12. PW 6 also examined the accused on 8th July 2013. He recorded that the accused had superficial bruised and had pain in the chest. X-rays and other tests conducted on the accused showed that he had no serious injuries. He prescribed pain killers and antibiotics. He also conducted a mental examination and concluded that the accused had a normal mental status and was fit to stand trial.

13. The last prosecution witness, PW 7, Hesbon Otieno Asero, the Assistant Chief for Kasewe B Sub location recalled that on 7th July 2013 at about 12.30 pm a clan elder informed him that a man who lived at Karota market had stabbed his wife with a knife. He immediately called the OCS Oyugis Police Station and they agreed to meet at the scene of the incident. He arrived at the scene at about 2.00 pm and found two people lying on the ground by the roadside. The woman was lying in a pool of blood and the man was still breathing. He was informed that the man had been beaten by a mob while trying to escape. He did not find any weapon at the scene. The motor cycle and its rider were there.
14. After the close of the prosecution evidence, the accused was called upon to make his defence and he elected to give sworn evidence. He stated that he hailed from Nyando District, Kisumu County. He stated he was a trader baking mandazi at Kasewe, Kabondo in Rachuonyo District. He testified that on 7th July 2013 at about 1 pm, he was from church at Kochia Onditi to his home in Karota, Rachuonyo District with his wife and child, Doreen Kusa Diang'a and Hilda Akinyi Otieno. They boarded a motorbike at the stage to take them to Ongera where his aunt was. The child was sitting in front while his wife was sitting behind the rider and he was the pillion passenger. On the way, the motor cycle rider was speeding whereupon the rider lost control after hitting a stone and they all fell. He stated that they fell on the same side but in different positions and that the motor cycle leaned on his wife and also lay on my leg. He also stated that his wife passed away as a result of that accident. After the accident he stated that he became unconscious. He stated that he sustained bruises on his right hand caused by the motor cycle's foot rest and also injuries on his left ankle.
15. The accused further testified that some people came to the scene and took away the motorbike and a clan elder called the area chief who in turn called the police. The accused blame the death of his wife on reckless riding of the motorcycle rider. He denied stabbing his wife with a knife. He also denied that he had been beaten by members of the public or that he fled to the river as he was injured in the accident.
16. After the close of the defence case, the parties made final submissions. Mr Osoro, counsel for the accused, submitted that the prosecution has failed to prove its case beyond reasonable doubt. He attacked the testimony of the principal witness, PW 1, on the ground that there was no evidence that the accused and his wife were quarreling. That the prosecution failed to call any person from the mob which chased and caught the accused. He argued that the evidence PW1, PW3, PW4 and PW5 was hearsay. He also pointed to the testimony of PW 3 and PW 4, who were relatives of deceased and who denied any misunderstanding between the deceased and the accused.
17. Counsel submitted that the police investigations were insufficient to implicate the accused in several respects. That the murder weapon was not found yet accused is alleged to have been caught immediately and that the Police failed to secure the scene of crime by taking photographs. He submitted that on the whole the accused case is that the evidence prosecution evidence was insufficient.
18. Ms Ongeti, learned counsel for the State, submitted that the State had met its burden of proof. She stated that the accused was identified by PW 1 and was arrested after the incident which occurred in broad daylight. She submitted that the testimony of PW1 was clear as to what happened and the conduct of the accused in running away proved to the river after the incident proved his guilt. As regards murder weapon, she submitted that it was not fatal to the case if the murder weapon was not found and that in any case post mortem confirmed that the wounds were inflicted by a sharp object. She called in aid **section 143** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* to address the position that it is not necessary to call all witnesses. She urged the court to convict the accused.
19. The offence of murder is defined by **section 203** of the *Penal Code* as, “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” **Section 206** of the *Penal Code* states as follows;

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- a. *an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- b. *knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- c. *an intent to commit a felony;*
- d. *an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

20. The three ingredients of murder which the prosecution must establish beyond reasonable doubt under **section 203** as read with **section 206** of the **Penal Code** are:

- 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 which is the *actus reus* of the offence.
- c. Proof that the unlawful act or omission was committed with malice aforethought.

21. It is common ground between the prosecution and defence that on 7th July 2013, the accused, his wife and child were riding on a motor bike when the incident that led to the death of the accused wife occurred. It is not disputed that the deceased died on the material day. The issues in contention are therefore as follows;

- a. The cause of death of the deceased.
- b. Whether the accused is the person who caused the deceased's death.
- c. Whether the unlawful act which caused was committed with malice aforethought.

22. The prosecution case is that the deceased died as a result of stabbing while the defence case is that her death was the result of the reckless riding by PW 1. PW 1 was an eyewitness as to what happened on 7th July 2013. He stated that he saw the accused stab the deceased with a knife on the head and left hand. PW 4, who reached the scene immediately after the incident, observed the deceased's body and it had several fresh stab wounds on the chest and the right hand which seem to have been inflicted by a sharp object. PW 5, who visited the mortuary on 7th July 2013, saw the body but it was so bloody that she could not see the injuries.

23. The autopsy done by PW 6 revealed that there were multiple lacerations on the scalp on the right side of the head, on the neck, on the trunk both on the right side and at the back. These lacerations were consistent with stab wounds and range between 3cm – 8cm in diameter and some went as deep as the bone and he concluded that they were inflicted by a sharp object.

24. The accused's case is that there were inconsistencies in the injuries described by the witnesses. In my view inconsistencies are not necessarily fatal to the prosecution case. Inconsistencies arise because witnesses have different ways of describing events or things as they may also see events from a different angle or position. In order to resolve such inconsistencies one must look at the evidence as a whole and determine whether it is consistent and whether any of the witnesses had any reason to lie or mislead the court. In this case none of the witnesses knew the accused prior to the incident and they had not reason to lie.

25. PW 1 testified that he saw the accused stab the deceased on the head and hand. He may not have seen entire event that led to the multiple stab wounds as he had fallen down. His testimony though is corroborated by the autopsy which showed that at least, that the deceased sustained injuries on the head and neck. The injuries described by the other witnesses were confirmed by the autopsy. In my view therefore, it is clear that the deceased sustained multiple stab wounds. Furthermore,

the testimony of PW 1 that he saw the knife being used is consistent with the injuries that were observed by the other witnesses.

26. I therefore reject the accused position that the injuries were caused by a motorbike accident as a result of the careless riding of PW 1. The deceased did not suffer blunt injuries that would be consistent with falling down as a result of a road traffic accident. Even if the motorbike had fallen on the deceased; it would not have caused the multiple stab injuries she sustained. If indeed the motorcycle accident was that serious, it does not explain the relatively minor injuries sustained by the accused and PW 1 in comparison with those sustained by the deceased.
27. I therefore find and hold that the deceased died from multiple stab wounds inflicted by a sharp object which led to the collapse of the lungs and the heart resulting in reduced intake of oxygen and bleeding resulting from the perforated lung and severed blood vessel due to the penetrating injuries.
28. This brings me to the next issue of who caused the death of the deceased. There was direct testimony of PW 1 who saw the accused inflict the injuries on the deceased. The incident occurred at midday. He heard that the accused and deceased quarrelling and when they fell off the motorbike they continued quarrelling whereupon the accused stabbed her. I find this testimony credible as there was no motivation for PW 1 to lie as he did not know the accused.
29. The injuries sustained by the deceased could only have been inflicted deliberately by a person and that person was the accused. The only other person at the scene, the child, could not have inflicted the injuries. There is no evidence that any other person could have stabbed by deceased in broad daylight otherwise the accused would have seen the person. The accused and PW 1 are clear that the deceased was seated between them and since they fell together, it is only the accused could explain how the deceased sustained the injuries as he was seated facing the deceased. His defence did not mention anything about how the multiple stab wound could have been inflicted.
30. I also reject the argument made by the defence that the absence of the knife was fatal to the prosecution case. The fact is that PW 1 saw the accused stab the deceased and all the injuries were consistent with a knife being used.
31. Although there seems to have been a quarrel between the accused and the deceased, there is no evidence that the accused was provoked to such an extent that he had to use lethal force or that the deceased did anything that would have required him to act in self-defence. It is the accused who decided to use a knife and viciously stab the deceased. The fact that the accused attempted to run away is confirmed by PW 1 and PW 4 is indicative of his guilt.
32. Mr Osoro suggested that there was no reason for the accused to stab the deceased as there was no evidence of any bad blood or disagreement between the accused and the deceased. PW 2 and PW 3, relatives of the deceased, testified that the deceased had not informed them of any misunderstandings between her and the accused and that they testified did not know the accused. The lack of an apparent motive is not fatal to the prosecution case as the offence of murder is clearly defined in the **Penal Code**. In this case there was direct evidence of the act that led to the death of the deceased. The Court of Appeal dealt with the issue of motive in **Choge v Republic [1985] KLR 1** as follows:

Under section 9(3) of the Penal Code, the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.

33.It is clear that the multiple stab wounds demonstrate malice aforethought as do the number of injuries directed at vital organs of the body. These injuries could only have been intended to cause the death of or do grievous harm to the deceased. I therefore find that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

34.For the reasons I have outlined, I find the accused **PAUL OTIENO NDONGA** guilty of the murder of **DORIS KUSA DIANG'A** and I convict him accordingly.

DATED and DELIVERED at HOMA BAY this 18th day of November 2014

D.S. MAJANJA

JUDGE

Mr Osoro instructed by Osoro and Company Advocates for the accused.

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