



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Case 83 of 2009

REPUBLIC..... PROSECUTOR

VERSUS

FRED ONYANGO ORIMBA..... ACCUSED

JUDGMENT

The accused, **FRED ONYANGO ORIMBA**, was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The prosecution asserted that the accused murdered A.A.G. on the night of 3rd/4th September 2009, at the Ngomongo slums, within Nairobi East District.

PW 1, C.A.O., used to work at a bar in Baba Dogo Estate.

On 2nd September 2009, the deceased went to **PW 1's** house and gave her a charger which **PW 1** was to hand over to Lina Achieng. The said Lina Achieng was a waiter at the bar where **PW 1** worked.

The deceased told **PW 1** that she was going to attend a funeral meeting at Ngomongo. The deceased also told **PW 1** that she was not sure whether or not she would return.

On 4th September 2009, **PW 1** was at her house, when Lina Achieng arrived. Lina told her that A.A.G. was dead.

PW 1 testified that when she inquired from Lina how A.A.G. died, Lina informed her that A.A.G. had gone to get an abortion.

PW 1 went with Lina and **PW 3** to the doctor's place, where they found A.A.G.'s body. **PW 1** did not see any injuries on the body of A.A.G.

When **PW 1** asked the doctor (who is the accused herein) about what had happened, she was told that A.A.G. had gone to the doctor's clinic when she was weak.

When **PW 1** asked the doctor about what steps would be taken next, the accused told her that he (the doctor) would have the body transported to the mortuary at about 10.00p.m. The accused asked for Kshs.1,000/- for hiring transport.

PW 1 testified that the accused informed her that A.A.G. died when the accused wanted to treat her.

PW 1 reported the incident to the police, who then arrested the accused.

Although the body had been stark naked when **PW 1** first saw it, at about 2.00p.m., the body was fully clothed when **PW 1** returned to the clinic in the company of the police officers.

During cross-examination, **PW 1** said that she did not accompany the deceased to Ngomongo.

PW 1 also said that when she last saw the deceased, on 2nd September 2009, the deceased was in good health. But **PW 1** had no idea that the deceased was pregnant.

As the jeans trousers which A.A.G. was wearing had blood stains on the frontal part, between the legs, **PW 1** said that she could not know if A.A.G. went to the clinic when she was already bleeding.

PW 2, PC SAMMY WATHOME, was at the clinic when the scenes-of-crime personnel took photographs.

He did not know what caused the death of the deceased. He also did not know the health status of the deceased before she visited the clinic.

PW 3 I.W.N., was the proprietor of “Josmat Bar”. The deceased used to work at that bar at the material time.,

On 4th September 2009, Lina Akoth asked **PW 3** for Kshs.1,000/-. Initially, Lina said that A.A.G (the deceased) needed the money: but later, Lina informed **PW 3** that A.A.G was dead.

PW 3 testified that Lina and **PW 1** accompanied her to the clinic of the accused. **PW 3** informed the accused that she had come with the Kshs.1,000/- which the accused had asked for.

PW 3 wanted to have the body moved to the mortuary immediately, but the accused insisted that it would be done at night.

During cross-examination, **PW 3** said that A.A.G. was last at her place of work on 2nd September 2009, in the afternoon. At that hour, A.A.G. was not unwell.

PW 4, J.O.O., was one of the 2 people who identified the body of the deceased, for purposes of post mortem examination. He said that the deceased was a friend of his family.

According to **PW 4**, the deceased used to work at “Muthenya Bar”, in Kariobangi North.

PW 5, PC MUSYIMI MWANZIA escorted the body of the deceased to the City Mortuary, where the doctor conducted the post-mortem examination.

PW 6, PC GEOFFREY EBUSURU, was present at the Kariobangi Police Post when **PW 1, PW 3** and Lina reported about the demise of A.A.G. He then accompanied the ladies to the clinic. He was with **PW 2** and Cpl. Irene.

At the scene, they found the body lying on a bed.

When the police asked the accused about what had happened, he told them that the deceased had gone to his clinic 2 days before, in a critical condition.

When the police asked the accused if he was a real doctor, the accused said that he had done some course on how to care for patients. However, the accused is not have any document to show that he was a doctor.

PW 6 also testified that the clinic operated by the accused did not have any licence permitting it to

operate.

It was the further evidence of **PW 6** that the accused told the police that by the time the deceased reached his clinic, she had commenced an abortion on herself. Therefore, accused was only trying to give first-aid to the deceased, before referring her to hospital.

The investigations carried out by the police revealed that the person who accompanied the deceased to the clinic was Lina. Lina informed the police that after the deceased was ushered into the clinic, she (Lina) remained outside for about 30 minutes. Thereafter, the deceased came out and she went with Lina to Kasabuni, where they lived.

PW 6 also said that **PW 1** informed the police about the deceased telling her that she was going to Korogocho for treatment, and that she may or may not return. **PW 1** told him that she found the deceased groaning in pain, at the clinic, on 3rd September 2009. However, the accused is alleged to have refused Akoth an opportunity to talk to the deceased.

According to **PW 6**, the scene at the clinic was photographed. However, the photographs were not made available to the court because the officer who took the pictures had been arrested for some offence.

PW 6 recovered a drip, a camisole, a jacket, a pair of trousers, syringes and bottles of medication from which the deceased was being treated. All those items were exhibited before the court.

During cross-examination, **PW 6** was referred to his recorded statement. In the said statement he had recorded that Akoth and Adhiambo had told him that the deceased went to the clinic for medication.

PW 1, PW 3 and Lina all told the police that at the clinic, there was also a pharmacy.

According to **PW 6**, the 3 ladies who reported the incident at the police post did not know what the deceased was ailing from. They told **PW 6** that the deceased did not want the ladies to know what was ailing her.

PW 6 reiterated, during cross-examination, that the accused told him that the deceased had tried to procure an abortion before she went to his clinic. However, that information was not recorded in **PW 6's** statement.

PW 6 was the Investigating Officer. However, he said that he did not take the syringes or medical bottle for analysis to establish if they had been used to treat the deceased.

And even though the police found some blood on the bed where the body was, the said blood was never taken for any analysis.

PW 7, DR. ZEPHANIAH KAMAU, examined the accused and found him to be fit to stand trial.

The age of the accused was assessed as 37, and he had no physical injuries when Dr. Kamau examined him.

PW 8, DR PETER MURIUKI NDEGWA, is a pathologist. He conducted a post-mortem examination on the body of the deceased.

He found that the deceased had been pregnant for about 22 weeks, at the time of death.

The lining of the inside of her uterus was raw, with retained products of conception. The uterus was bleeding. Inside the uterus, there was a foetus, which was bruised on the back.

The doctor formed the opinion that the cause of death was bleeding due to incomplete abortion.

During cross-examination, **PW 8** said that although it is possible to tell when the abortion commenced, that was a difficult scientific task.

When being re-examined, the doctor said that he was not able to tell whether the patient commenced abortion on her own or was assisted to do so by someone else.

That marked the close of the prosecution case.

When the accused was put to his defence, he gave an unsworn testimony. He said that he was a nurse by profession.

He said that on 4th September 2009, the deceased and Lina Akoth arrived at his clinic. The time was about 10.30a.m.

Lina said that A.A.G. was sick and weak after bleeding at home for about 3 days.

When the accused asked A.A.G. if she was pregnant, A.A.G. answered affirmatively. She said that she was 4 months pregnant.

A.A.G. also said that she had been undergoing treatment with traditional herbs, for 2 months.

When the accused examined the deceased, he was shocked to see big clots coming out from her private parts. He cleaned out the clots using hot water, and placed a pad in A.A.G.'s private parts.

According to the accused, he told Lina that A.A.G. needed to be referred to the Kenyatta National Hospital. He therefore asked Lina to go and get money for that purpose.

However, the deceased passed away within 15 minutes of Lina leaving the clinic.

The accused phoned Lina, who arrived back at the clinic in about 45 minutes.

Although Lina had initially introduced A.A.G. as her sister, she later told the accused that she and A.A.G. were only friends. She therefore asked the accused not to disclose that she is the person who had escorted A.A.G. to his clinic.

Later, Lina, **PW 1** and **PW 3** went to the clinic with police officers, who arrested the accused.

The accused denied committing the offence.

Having evaluated all the evidence on record, it is clear that A.A.G. is dead. Her cause of death was established by the pathologist, as being bleeding due to incomplete abortion.

The death of the deceased occurred within a clinic operated by the accused.

Although the prosecution had asserted, in the Information, that the offence was committed on the night of 3rd and 4th September 2009, no evidence was led to support that assertion. All the evidence indicates that the death occurred during the day, on 4th September, 2009.

The evidence adduced confirms that the deceased was in a relatively healthy condition by 2nd September 2009. She was working at the bar owned by **PW 3**.

She then told **PW 1** that she was going to attend a funeral meeting at Ngomongo.

Curiously, the deceased told **PW 1** that she may or may not return from the said funeral meeting.

But whereas **PW 1** told this court that A.A.G. had informed her that she was going to attend a

funeral meeting, **PW 6** told the court that **PW 1** informed him that A.A.G. went to Korogocho for treatment.

But whether or not A.A.G went for treatment or to attend a funeral meeting, she left the message that she did not know if she would be returning.

With the benefit of hindsight, the message was actually a prophesy of sorts!

The Investigating Officer (**PW 6**) established that when A.A.G. was first seen at the clinic, the session lasted about 30 minutes. Thereafter, Lina and A.A.G. left and they went to Kasabuni, where they both lived.

Incidentally, although that is what **PW 6** established from his investigations, it is also on record that A.A.G. used to stay at a room within Josmat Bar.

Another puzzle is that whilst **PW 3** testified that A.A.G. worked for her, at the said Josmat Bar, **PW 4** (who was a family friend) knew that A.A.G. worked at Muthenya Bar, in Kariobangi North.

From the first moment when the Investigating Officer talked to the accused, he was told by the accused that the deceased had commenced abortion before she went to his clinic.

If anything, **PW 1** confirmed that the trousers of the deceased had blood stains in the pelvic region. In the light of those blood stains, **PW 1** was unable to tell whether or not the deceased went to the clinic when she was already bleeding.

The only person who could have known with certainty, whether or not the deceased was already bleeding by the time she got to the clinic was Lina. That is because it is the said Lina who accompanied the deceased to the clinic.

Yet, the prosecution failed to make available to this court, the evidence of Lina. No explanation was advanced for the failure to have Lina give evidence.

Considering that Lina was one of the 3 ladies who reported the incident to the police, there should have been little difficulty in getting her to tell the police and later tell the court, the state which the deceased was in when she arrived at the clinic operated by the accused.

Of course, the employer of the deceased saw her on 2nd September 2009, and she appeared to be well.

Her colleagues and friends also said that A.A.G. did not appear to be unwell.

I understand that to mean that A.A.G. did not exhibit symptoms of illness which could be discerned by an untrained eye.

It may even be true that a trained eye may not have been able to discern any illness on the physical appearance of the deceased on 2nd September 2009. I say so because A.A.G. was pregnant, not sick. Pregnancy is not an ailment. Therefore, I am not surprised that A.A.G.'s friends and colleagues said that she was not unwell.

But yet she decided that she needed to see a doctor, or a medical practitioner. One must ask themselves why it was necessary for A.A.G. to consult a medical practitioner if she was not unwell.

That question needs to be given consideration within the context of A.A.G. saying that she did not know whether or not she would return from where she was going.

Had she begun the process of procuring an abortion, personally, or did she go to the accused to

have an abortion procured?

The only way to disprove that evidence would have been through a scientific analysis that would have established the time when the abortion process was commenced.

The pathologist said that such a scientific analysis was possible, but difficult.

Considering that the accused had all along insisted that the deceased had started procuring an abortion before she got to his clinic, it was critical to ascertain when the process was commenced.

Another exercise which may have provided useful leads on the issue would have been the analysis of various medicines and equipment which were recovered from the clinic. As the accused had alleged that the death occurred before he begun treating the deceased, the analysis may or may not have shown that the accused had undertaken some procedures on the deceased.

Regrettably, no analysis was conducted.

Furthermore, the photographs which were taken at the scene-of-crime were not exhibited before the court.

All these loose ends leave a gaping hole in the prosecution case. They leave the court with the considered opinion that the defence put forward by the accused is plausible. It gives rise to serious doubts about the role played by the accused in the demise of the deceased.

I know that the accused is not an angel. He appears to have carried himself off as a medical doctor when he was not.

He operated a medical clinic without the requisite licences.

He even operated a pharmacy without the requisite licences.

For doing all those unlawful things, the accused must be answerable.

However, that of itself does not make him a murderer. The prosecution failed to prove its case against the accused.

In the result, the charge against the accused is dismissed. I find him "Not Guilty" Accordingly, the accused is acquitted.

I order that he be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 25th day of February, 2013

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FRED A. OCHIENG
JUDGE