



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Criminal Case 53 of 2009**

**REPUBLIC ..... PROSECUTION**

**VERSUS**

**ERICK ODHIAMBO AKUMU .....ACCUSED**

**JUDGMENT**

The accused **ERICK ODHIAMBO AKUMU** (hereinafter referred to as the 1<sup>st</sup> accused) and **JUDITH AKINYI MWAI** (hereinafter referred to as the 2<sup>nd</sup> accused) were jointly 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 or about 15<sup>th</sup> day of December 2009 at Majengo Estate in Mombasa District within Coast Province, jointly with others not before court murdered DOREEN AOKO ACHACHA”**

Both accuseds entered a plea of ‘*Not Guilty*’ to the charge and their trial commenced on 20<sup>th</sup> May 2010. The prosecution led by learned State Counsel **MR. ONSERIO** called a total of fourteen (14) witnesses in support of their case. **MR. WAMEYO** learned counsel acted for both accused persons. The brief facts of the case are given here below.

**PW1 WILLIAM ACHACHA OWITI** who was the husband to the deceased told court that his wife **DOREEN AOKO** carried out a trading business at Mwembe Tayari Market. On 15<sup>th</sup> December 2009 she left to go out to her business in the morning as usual. However the deceased failed to return home at 7.00 p.m. as was usual. **PW1** sent his children to go and search for her at the market. The children went out to search but failed to trace their mother and returned home. **PW1** told the court that he waited until midnight but the deceased failed to return home. The next morning **PW1** went to the market to search for his wife. He met **PW2 FLORENCE ADHIAMBO** also a trader who confirmed to him that she had seen the deceased the previous day and that deceased had left her luggages with **PW2** to keep for her. Later according to the evidence of **PW2** a young man whom she identified as the 1<sup>st</sup> accused came and told her that he had been sent by the deceased to collect the parcel she had left with **PW2**. Since **PW2** did not know the 1<sup>st</sup> accused she was understandably reluctant to release the said parcel to him. They then called the 2<sup>nd</sup> accused whom they refer to as ‘*Nyar-Seme*’ and the 2<sup>nd</sup> accused did confirm to **PW2** that the 1<sup>st</sup> accused was known to her and it was on this basis that **PW2** released the parcel. It was not until 17<sup>th</sup> December 2009 two days after she had gone missing that the dead and decomposing body of the deceased was found in a room No. 101 at Kenya Bar and Restaurant in Majengo. Police were called to the scene and removed the body to the mortuary at Coast General Hospital. The two accuseds were later traced and arrested. Upon completion of police investigations both were arraigned in court and charged with the murder of the deceased.

With respect to the 2<sup>nd</sup> accused this court found that she had no case to answer as no prima facie case had been made out against her. I will now proceed to give my reasons for that decision. The only evidence which was tendered as against the 2<sup>nd</sup> accused was the fact that she told **PW2** that she knew the 1<sup>st</sup> accused as a boy who helped carry luggages in the market. There was absolutely nothing wrong or suspicious in this. There was no evidence that the 2<sup>nd</sup> accused met or was seen in the company of the deceased from the time she disappeared upto the time when her dead body was recovered. Similarly there was no direct and/or tangible evidence linking the 2<sup>nd</sup> accused to this dead body. On the contrary both **PW1** the deceased's husband and **PW4 CAROLINE AKINYI** who was a daughter to the deceased testify that the 2<sup>nd</sup> accused appeared saddened by the disappearance of the deceased and she kept company with the family throughout the whole ordeal until the body of the deceased was recovered. In her evidence **PW3** stated:

**“Accused - 2 came voluntarily to the police station. The 2<sup>nd</sup> accused was talking like one who was in shock. We left the police station together with 2<sup>nd</sup> accused. We boarded one vehicle .... Then Accused -2 suggested that we make an announcement [of a missing person] at Baraka F.M. We all prayed together”.**

**PW1** and **PW3** both told the court that the 2<sup>nd</sup> accused led the prayers for the safe return of the deceased to her family. The actions of the 2<sup>nd</sup> accused were not those of a person who had a guilty mind. She stood in solidarity with the family. It was she who suggested that a missing person advertisement be made in the local radio station. She accompanied the family to the police station to report the matter and back to their home where she conducted prayers. It is clear that the 2<sup>nd</sup> accused was as disturbed as the rest of the family by the disappearance of the deceased who was also her friend. The fact that the 2<sup>nd</sup> accused confirmed that she knew the 1<sup>st</sup> accused did not mean she was party to anything he may or may not have done. A suggestion was made that the 2<sup>nd</sup> accused was owed money by the deceased. However this appeared to be mere conjecture. **PW14 CHIEF INSPECTOR OBWOCHA** told court that he received information that the deceased owed the 2<sup>nd</sup> accused Kshs.10,000/-. He has not told the court how he came by this information or from whom. There was no evidence that the 2<sup>nd</sup> accused had ever made a demand for payment of this 'debt'. Neither **PW1** or **PW3** who were both related to the deceased made any mention of this debt and I do dismiss the same as an unproven allegation. On the whole I found no evidence to link the 2<sup>nd</sup> accused with the disappearance and/or death of the deceased and that is why I did acquit her under Section 306(1) of the Criminal Procedure Code.

With respect to the 1<sup>st</sup> accused this court rule that he did have a case to answer and he was placed on his defence. The 1<sup>st</sup> accused elected to make a sworn defence in which he denied any and all involvement in the death of the deceased. This court now must make a determination on whether this charge of murder has been proved to the standard required in law.

The offence of murder is defined thus by Section 203 of the Penal Code:

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

From this definition derives the three ingredients of the offence of murder:

- 1) That a death has occurred and the cause of that death
- 2) That the accused by an unlawful act or omission caused the death of the deceased and
- 3) That said unlawful act or omission was committed with malice aforethought.

There can be no doubt whatsoever about the fact of the death of the deceased. Both **PW1** and **PW3** the widower and daughter of the deceased respectively told the court that they saw her dead body first at the

lodging room in Majengo and later identified the same body at the mortuary at Coast General Hospital. **PW6 SERGEANT MICHAEL ODUOR** is the Scenes of Crime officer who went to the Kenya Bar and Restaurant in Majengo and took several photographs of the body all of which were produced as exhibits **Pexb1**. The court had an opportunity to view the photographs. They depicted the bloated and decomposing body of a female African adult with blood around the head area.

Similarly evidence regarding the cause of death is quite clear. **PW11 DR. K.N. MANDALYA** was the consultant pathologist who conducted the autopsy on the body of the deceased. He noted that the body was badly decomposed. He also noted a fracture of the upper cervical spine and haemorrhage around the larynx. His opinion was that the cause of death was “*cardio respiratory failure due to cervical spine fracture possibly due to pressure on the neck*”. **PW11** filled and signed the postmortem report which he produces as an exhibit **Pexb2**. It is clear that the deceased met her untimely death due to strangulation. This is expert medical evidence which has not been challenged nor controverted by the defence. Further the presence of blood-stains in the room where the body was recovered suggests that some violent confrontation may have occurred before the deceased met her death.

The final question is whether sufficient evidence exists to prove that it was the accused who caused the unlawful death of the deceased person. In this case **PW2** told the court that on 15<sup>th</sup> December 2009 his wife (the deceased) left their home to go and carry out her fish mongering business as usual. She failed to return home that evening. **PW2** testified that she knew the deceased well as a fellow market trader. On that day i.e. 15<sup>th</sup> December 2009 **PW2** confirms that she saw the deceased who left with her some parcel for safekeeping. Thus by 7.00 p.m. on 15<sup>th</sup> December 2009 the deceased was seen alive – later that same evening at about 9.00 p.m. the 1<sup>st</sup> accused came to **PW2** and requested to be given the deceased’s parcel. He said the deceased had sent him to collect the parcel. It is obvious that 1<sup>st</sup> accused must have met and spoken to the deceased that evening as there is no other way he could have known about the parcel she had left with **PW2**. **PW2** after initially resisting did hand over the parcel to the 1<sup>st</sup> accused who went away with it. **PW2** positively identifies the 1<sup>st</sup> accused as the young man to whom she gave the deceased’s parcel. They spent much time in each others company – enough time to enable a phone-call to be made to the 2<sup>nd</sup> accused who confirmed that the parcel should be released to the 1<sup>st</sup> accused as she knew him. Further, **PW2** spoke to the 1<sup>st</sup> accused and therefore had ample time and opportunity to see him well.

In his defence the 1<sup>st</sup> accused denies having received any parcel from **PW2** or from any other person. I find this statement to be a bold-faced lie. Why would **PW2** who did not even know the accused fabricate evidence against him? She had absolutely nothing to gain by doing this. Further, **PW2** identified the 1<sup>st</sup> accused by his names ‘*Erick Odhiambo*’ which she said she read on his identity card which he showed her. The fact that his names are Erick Odhiambo is not denied by the 1<sup>st</sup> accused. **PW7 PC GEOFFREY MATHENGE** who was the arresting officer told the court that when the 1<sup>st</sup> accused was brought to the police station he questioned him. The 1<sup>st</sup> accused told him that he did indeed collect the parcel on behalf of the deceased but insists that he handed it over to the deceased at the Lebanon roundabout then they parted ways. Why has the accused now changed his story? He originally admitted having met the deceased on the night in question yet in his defence he makes a blanket denial. This inconsistency in his statements shows that accused had something to hide. Once again I reiterate that it is only through the deceased herself that 1<sup>st</sup> accused could have known of the parcel which had been left with **PW2** for safe-keeping. I find this denial by the 1<sup>st</sup> accused to be a desperate attempt to put as much distance as possible between himself and the deceased. I was able to observe the demeanour of **PW2** as she gave her evidence. She was a simple but mature woman and struck me as a truthful witness. As I have stated earlier **PW2** had absolutely nothing to gain by fabricating evidence to implicate the 1<sup>st</sup> accused. I believe her evidence that on the night the deceased went missing the 1<sup>st</sup> accused did go to **PW2** and did collect from her the parcel which the deceased had earlier left with **PW2**.

**PW5 ALI NASSIR ATHUMAN** told the court that he is the proprietor of Kenya Bar and Restaurant where the body of the deceased was recovered two (2) days after she disappeared. He told court that his

cashier named 'Pauline Mbithi' phoned him on 17<sup>th</sup> December 2009 at 8.00 p.m. to inform him of the recovery of a dead body in one of the hotel rooms. **PW5** told her to inform the police. The said Pauline absconded from that day and stole Kshs.80,000/= from the hotel. She has not been traced to date. Similarly the room attendant 'Phillip Kisio' also absconded on that same day and he too has not been traced to date. There is a possibility that the two may have been involved in the death of the deceased but on the other hand they may have just taken advantage of the situation to steal from the hotel and escape. **PW5** told the court that he did call police from Makupa Police Station who came and removed the body which was by then emitting a bad odour. **PW5** also retrieved the hotel register which simply showed that room No. 101 in which the body had been recovered had been let out and paid for. However the name of the client was not recorded in the register.

The only witness who places the 1<sup>st</sup> accused at the scene of the crime was **PW8 DIDA KAILU** who was a cleaner at Kenya Bar. This witness had a speech impediment and therefore could only talk very slowly. However I did note that he had no problem comprehending the questions which were put to him and he did give clear answers thereto. His speech impediment does not in any way affect his veracity as a witness. In addition **PW8** did identify his statement as well as his signature thereon. The statement (which had also been supplied to the defence) was produced as an exhibit to buttress his testimony **Pexb4**.

**PW8** told the court that on 15<sup>th</sup> December 2009 he cleaned room No. 101 at about 9.00 a.m. He later returned from the mosque at 5.00 p.m. but was unable to enter the room to sweep as it was locked. This witness identifies the 1<sup>st</sup> accused as the man whom he saw enter the room in question with a lady. He explained that he saw two men and one woman go to the room. He states that the lady was carrying a bag containing vegetables [probably the parcel which had been left with **PW2**]. Later at 9.00 p.m. **PW8** says he saw one man leave the room lock it and go away. He identifies the 1<sup>st</sup> accused as that man. The next day 16<sup>th</sup> December 2009 **PW8** attempted to gain access to the room to clean it but it was still locked. He did not bother again until 17<sup>th</sup> December 2009 when a client reported a bad odour. Police came and broke open the door and the body of deceased was found therein. All this activity was taking place within the confines of the hotel. **PW8** had ample time and opportunity to see and recognize the 1<sup>st</sup> accused. Indeed in his statement to police **PW8** stated that he would be able to recognize those he saw by their facial features. The first time this witness saw 1<sup>st</sup> accused go up to the room with the deceased it was 5.00 p.m. It was broad daylight and visibility was good. About four (4) hours later at 9.00 p.m. he saw 1<sup>st</sup> accused lock up the room and go away. 1<sup>st</sup> accused did not return the key to the hotel reception as was the normal practice. That is why police had to break the door in order to gain access. I found **PW8** to be an honest witness. As a court I am mindful of the danger of relying on the evidence of a single witness on identification. I am satisfied that **PW8** gave clear and concise evidence and he remained unshaken under cross-examination. Again I find that **PW8** did not know the deceased or 1<sup>st</sup> accused before this incident. He had no motive to render false evidence in court. His words to court were:

**“The dead lady went upstairs to the room with 1<sup>st</sup> accused”**

Nothing could be clearer than this. I find as a fact that the 1<sup>st</sup> accused was seen in the company of the deceased on 15<sup>th</sup> December 2009 the day when she went missing.

The facts show that 1<sup>st</sup> accused entered a hotel room No. 101 with the deceased. A few hours later 1<sup>st</sup> accused emerges from that very room alone, locks the door and leaves with the key. The dead body of the deceased is recovered in the same room 101 two (2) days later badly decomposed (an indication that death had occurred some days earlier). There can only be one logical conclusion from this set of facts. The circumstantial evidence points squarely at the 1<sup>st</sup> accused as having had a direct involvement in the death of the deceased. In the case of **MWANGI –VS- REPUBLIC [1983] KLR 522** the Court of Appeal in discussing circumstantial evidence held as follows:

**“In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and**

**incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference ...."**

This is precisely the situation which pertains in this case. The inculpatory facts point directly to the guilt of the 1<sup>st</sup> accused. No other explanation is reasonably possible. If the deceased had met some misfortune or accident whilst in the room then 1<sup>st</sup> accused ought to have alerted the hotel management, the police or any other authority of this. The fact that having entered the room together with the deceased the 1<sup>st</sup> accused calmly walks out four hours later leaving her battered and bloodied body inside the room is clear proof that it was 1<sup>st</sup> accused who committed this murder. **PW8** said he saw two men enter the room with deceased. He did not see the second man leave. The fact that a second suspect may have been involved does not absolve the 1<sup>st</sup> accused of guilt. The two must have acted in concert. The medical evidence is that the deceased's neck was broken. Any person who attacks another and breaks their neck clearly intended to kill the victim. I am satisfied that malice aforethought is proven to have existed. From the evidence adduced I find that the prosecution have proved beyond reasonable doubt that the 1<sup>st</sup> accused had a direct hand in the death of the deceased. I therefore convict him of the offence of murder as charged.

**Dated and delivered in Mombasa this 2<sup>nd</sup> day of November, 2012.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Onserio for State

Mr. Wameyo for Accused

Court:

Mention 23<sup>rd</sup> November, 2012 for mitigation.

**M. ODERO**

**JUDGE**

**2<sup>ND</sup> NOVEMBER, 2012**

23<sup>rd</sup> November, 2012

Before Hon. Justice M. Muya

Court Clerk Phillip

Mr. Onserio for the State

Mr. Wameyo for the Accused

Court:

Mention 27<sup>th</sup> November, 2012 before Odero J.

**M. MUYA  
JUDGE  
23<sup>RD</sup> NOVEMBER, 2012**

27<sup>th</sup> November, 2012

Before Hon. Lady Justice M. Odero

Court Clerk Mutisya

Mr. Onserio for State

Mr. Wameyio for Accused

Court:

Hearing 28<sup>th</sup> November, 2012.

**M. ODERO  
JUDGE  
27<sup>TH</sup> NOVEMBER, 2012**

28<sup>th</sup> November, 2012

Before Hon. Lady Justice M. Odero

Court Clerk Mutisya

Mr. Onserio for State

Mr. Wameyo for Accused

Accused:

I do not wish to be represented by this lawyer. He did not do my case well. I do not want him to continue with my case.

Mr. Wameyo:

My conscious is clear. I did my best in representing accused. In view of accused's sentiments I beg to be excused from this case.

Court:

I do agree that counsel put up a robust and spirited defence for his client. However, the accused's wishes must be upheld. If he no longer wishes Mr. Wameyo to act for him then court will uphold this wish. Mr. Wameyo is excused from acting. Deputy Registrar to assign a new counsel for accused for purposes of mitigation. Mention 20<sup>th</sup> February, 2013.

**M. ODERO  
JUDGE  
28<sup>TH</sup> NOVEMBER, 2012**

20<sup>th</sup> February, 2013

Before Hon. Lady Justice M. Odero

Court Clerk Mutisya

Mr. Jami for State

Counsel absent for Accused

Mention on 28<sup>th</sup> February, 2013.

Mention notice to Mr. Mushelle.

**M. ODERO  
JUDGE  
20<sup>TH</sup> FEBRAURY, 2013**

5<sup>th</sup> March, 2013

Before Hon. Lady Justice M. Odero

Court Clerk Mutisya

Mr. Jami for State

In person Accused

Court:

Mention on 12<sup>th</sup> March, 2013. Mention notice to Mr. Mushelle.

**M. ODERO  
JUDGE  
5<sup>TH</sup> MARCH, 2013**

12<sup>th</sup> March, 2013

Before Hon. Lady Justice M. Odero

Court Clerk Mutisya

Mr. Jami for State

Mr. Mushelle for Accused

Mr. Mushelle:

I have now been appointed to act for accused. My client instructs me that he is not satisfied with the way in which his lawyer made submissions. He is not happy with the manner in which the court conducted his case. My client wants the matter to start afresh.

Court:

The matter has been heard and concluded. It will not be re-opened. The accused has a right to appeal if he so wishes. The counsel to give mitigation. Hearing 15<sup>th</sup> March, 2013 for mitigation.

**M. ODERO**  
**JUDGE**  
**12<sup>TH</sup> MARCH, 2013**

15<sup>th</sup> March, 2013

Before Hon. Lady Justice M. Odero

Court Clerk Mutisya

Mr. Jami for State

Mrs. Mushelle for Accused

Mr. Mushelle in Mitigation:

The accused is a first offender. He has been in custody for over 4 years. He is very remorseful. We seek a lenient sentence. We pray for a non-custodial sentence.

Court:

Mitigation noted. Accused actions led to loss of human life and left a family without a mother. The offence is serious and a deterrent sentence is called for. The accused is sentenced to forty (40) years imprisonment. He has a right to appeal.

**Dated and Delivered in Mombasa this 15<sup>th</sup> day of March, 2013.**

**M. ODERO**  
**JUDGE**

In the presence of:

Mr. Onserio for State

Mr. Wameyo for Accused

Court Clerk Mutisya