



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Criminal Case 58 of 2008**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**CALEB AMENYA ONCHONGA ..... ACCUSED**

**JUDGMENT**

1. The accused person in this case, Caleb Onchonga Amenya is charged with one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that on the 27<sup>th</sup> day of November 2008 at Riosuta village, Botabori sub location, Gucha South District of the Nyanza Province, he murdered Florence Mogoti Mocha. The accused denied the offence. The case proceeded to trial during which the prosecution called 10 witnesses.
2. According to PW2, Stephen Orangi Mocha, the deceased in this case, who was epileptic, was found dead on the morning of 28<sup>th</sup> November 2008. The body was found lying in her mother's kitchen. The matter was reported to the deceased's uncle, Ongaga Nyangegora, who testified as PW4. Later the report reached Etago Police Station who came and removed the body to Etago police station. According to PW2(Mocha), the deceased had bruises on the legs and neck. There were nail marks on the neck as well as the legs, and at the time when Mocha saw the deceased's body, blood was oozing from the left side of the mouth.
3. Ongaga Nyangegora testified that at about 7.30 a.m. on 28<sup>th</sup> November 2008, he heard screams from Mocha's home and on rushing there, he found the deceased lying dead in her mother's kitchen. She had bruises on the head, hands and legs. He reported the matter to Etago police station as the body was removed to Tabaka Mission Hospital mortuary. Later on, Ongaga went to the accused's house and saw blood on the walls and floor of the accused's home. When asked about the blood, the accused explained that the blood was from a cut on his finger after he fell on a panga. Ongaga also testified that when the accused saw the police arrive at his home, he fled.
4. Ongaga also testified that when he saw the blood on the walls and floor of the accused's house on 3<sup>rd</sup> December 2008, the blood was dry. He also confirmed to the court during cross examination that he was not aware of any bad blood between the deceased and the accused.
5. PW3, Dennis Onsanse Nyareru (Dennis) testified that on 3<sup>rd</sup> December 2008, he went to the accused's home as the two of them were involved in raising funds for the deceased's funeral. When he entered the accused's house after the door had been opened by a small child at the accused's home, he saw blood on the walls and on the floor. On seeing the blood, Dennis got frightened and ran back to report the incident to Ongaga. During cross examination, Dennis stated that he did not know how the deceased died and further that he did not know what the blood found in the accused's house was for. The

testimonies given by Dennis and Ongaga was supported by that of Dominic Oumo s/o Onchweri who testified as PW5. Dominic is a nephew to the deceased and a cousin to the accused. He stated that the blood he saw in the accused's house was a lot and that it was dry.

6. The report of the deceased's death to the police was received by Number 91970 Police Constable Sadiq Abdi of Etago police station who testified as PW10. After receiving the report, PW10 proceeded to the home of the accused but on seeing the police, the accused disappeared into the nearby sugar cane plantation. A walk around the house and a look into the accused's house revealed some blood on the walls and floor. PW10 also looked around the house and recovered from under the bed a blood stained panga which was produced as **P. Exhibit 2**; a blood stained rungu produced as **P. Exhibit 3**. PW10 also took soil samples from the floor of the accused's sitting room, **P. Exhibit 6**; soil sample from accused's bedroom – **P. Exhibit 4**; soil sample from walls of accused's sitting room – **P. Exhibit 5**; a Grey T-shirt which accused was found washing – **P. Exhibit 7**; a black plastic basin in which accused was washing the grey T-shirt – **P. Exhibit 8**. PW10 also produced the exhibit memo used to send the items to the Government Chemist for analysis as **P. Exhibit 10**.

7. After the accused disappeared into the sugar cane plantation, information reached the OCS Etago police station that the accused had gone to hide in a certain home in Bomachoge area. That information was relayed by the OCS, Etago police station to Erastus Bongoye Onchweri, Assistant Chief of Mokubo sub location who testified as PW8. With the help of village elders, PW8 (Erastus) went to the home of one Wanda Akama and found the accused hiding in a house in that home. The accused was together with a son of Wanda Akama. After explaining the purpose for looking him, Erastus arrested the accused who did not resist and later that day, Erastus informed Etago police station that the accused had been arrested. PW0 re-arrested the accused from Erastus and subsequently recommended to the State Counsel that he be charged with the offence of murder.

8. On the 3<sup>rd</sup> December 2008, Boaz Okeng'u Ongaga, (Boaz) a cousin to the deceased, who testified as PW6, identified the body of the deceased to Dr. Willis Omwoyo, PW7 for postmortem. PW7 Number 38172 Cpl. Desterious Siganga was also present at the Tabaka Hospital mortuary when Boaz identified the deceased's body for postmortem. According to PW7, the deceased's body had injuries on the neck and private parts.

9. Dr. Willis Omwoyo the Medical Officer of Health at Ndhiwa District Hospital testified that he conducted a post mortem examination on the body of the deceased on 3<sup>rd</sup> December 2012. According to the post mortem report produced by Dr. Omwoyo as **P. Exhibit 1**, the deceased suffered multiple bruises on the legs and hands as well as bruises on the right aspect of the head. Dr. Omwoyo also told the court that there was evidence of bleeding from the vaginal orifice; the trachea was damaged, while the lungs were pale in colour. He also testified that he found blood around the heart of the deceased. In Dr. Omwoyo's opinion, the deceased died as a result of cardio-respiratory arrest due to asphyxia or strangling.

10. PW9 was Albert Gathuri Mwaniki, a Government analyst stationed at the Government Chemist in Nairobi. He carried out chemical analysis on the following items that were submitted to the Government Chemist on 9<sup>th</sup> December 2008. The items were as follows:-

- a) *Item marked A was blood sample of deceased by the name Florence Mogoti.*
- b) *Item marked B was a vaginal swab of the deceased.*
- c) *Item marked C was a panga.*
- d) *Item marked D was a club or "rungu" in Kiswahili.*
- e) *Item marked E was soil sample recovered from the floor of the suspect's bedroom – one Caleb Onchonga Amenya.*

- f) *Item marked F was another soil sample from the wall of the suspect's sitting room.*
- g) *Item marked G was another soil sample from Floor of suspect's sitting room.*
- h) *Item marked H was a grey T-shirt of the suspect Caleb Onchonga Amenya.*
- i) *Item marked I was a blood sample of the suspect Caleb.*
- j) *Item marked J was a black plastic basin recovered from the suspect's compound.*

11. PW9, (Mwaniki) identified all the exhibits which he said were delivered to him in a khaki envelope. He made the following observations upon examination of the samples/items:-

- *The panga – P. Exhibit 2– was found to have some slight group A human blood on its sharp side.*
- *The club/rungu – P. Exhibit 3– was also slightly stained with blood group A human blood.*
- *All the soil samples were found to have blood samples of Group A.*
- *The T-shirt did not have any blood samples.*
- *The black plastic basin had blood at the bottom of the inside of, and the blood was of Group A.*
- *The blood group of the deceased was found to be of Group A.*
- *The blood group of the accused was found to be of Group B.*

12. In conclusion, Mwaniki stated that from his findings he deduced that the blood stains found on the panga, the club and the basin, including the blood in the 3 soil samples matched the blood sample of the deceased; and that those blood samples could have originated from the deceased after injury. The report containing the results of the analysis was produced as **P. Exhibit 9**.

13. On being cross examined by counsel for the accused, Mwaniki stated that blood Group A is found in about 25% of the human population and that in the circumstances, he could not say for certain that the blood found on the panga, the rungungu, the basin and the soil samples came from the deceased. He also stated that if he had carried out a DNA test on all those samples, there would have been a higher degree of discrimination than what the ordinary analysis gave him. In re-examination, Mwaniki stated that other than blood samples forwarded to him from the accused and the deceased, he did not receive any other blood samples in respect of this case.

14. At the close of the prosecution's case and after hearing submissions from both counsel on no case to answer, the accused was found to have a case to answer and put on his defence. The accused gave an unsworn statement and called no witnesses. His evidence was that on 3<sup>rd</sup> December 2008 at about 8.00 a.m., police officers went to his home and took him to the police station. The police officers who arrested him told him that they would let him know the reason for his arrest once they got to the police station but instead of being so informed, he was taken to the court and charged with the offence of murder.

15. Concerning the evidence given by Mocha, Dennis and Ongaga, the accused told the court that all these witnesses lied to the court, especially Erastus who alleged that the accused stated that he (accused) knew the reason for his arrest. The accused also criticized the evidence of PW10, Number 91970 PC Sadiq Abdi who alleged that he found some exhibits, especially the panga, rungungu, grey T-shirt and the black plastic basin either inside or outside the accused's house and that those exhibits had blood on them. The accused denied that he was found washing clothes when the police officers went to his home. He also denied that the black plastic basin was his.

16. At the close of the defence case, Mr. O.M. Otieno, counsel for the accused urged the court to find that

the prosecution had not proved its case against the accused person beyond any reasonable doubt. Counsel submitted that the only link between the accused and the death of the deceased were the blood samples removed from the accused's house and those removed from the deceased. Counsel submitted that, Mwaniki admitted that the findings from the chemical analysis were not conclusive since the blood found on the items sent for chemical analysis could have come from anybody other than the deceased.

17. It was also submitted that the weapons allegedly used to kill the deceased could not have caused the bruises and strangulation which were said to be the cause of death of the deceased. Counsel submitted that the findings made by Dr. Omwoyo cast great doubt on the prosecution's allegations that the panga and the rungu were used to inflict bruises on the deceased neck, hands and legs and to strangle her. The court was also asked to take note of the fact that the deceased was epileptic.

18. I have now carefully considered the evidence that was placed before me by the prosecution. I have also considered the defence put forth by the accused, to the effect that he is an innocent person who was arrested for no good reason. I have also considered the final submissions made on behalf of the accused person to the effect that the prosecution evidence falls far below the threshold of proving its case against the accused beyond any reasonable doubt.

19. To establish the offence of murder, the prosecution must establish malice aforethought. **Section 206** of the **Penal Code, Chapter 63 Laws of Kenya** defines malice aforethought in the following terms:-

**“206. 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. In other words, the prosecution must prove that the accused herein intended to cause the death of the deceased or to cause grievous harm to the deceased or to any person, whether that person was the deceased or not; that the accused knew that the act or omission committed by himself would probably cause the death of or grievous harm to some person. That the accused had the intent to commit a felony.

21. In the instant case, there is no eye witness to the events that led the death of the deceased, which means that the prosecution's case against the accused rests entirely on circumstantial evidence. In my view, such circumstantial evidence is found in the testimonies of Mwaniki, the Government Analyst, and that of PW10, the investigating officer who told the court that when he and other officers went to the accused's home on the morning of 28<sup>th</sup> November 2008, the accused who was washing the grey T-Shirt in the black plastic basin took flight. Erastus said that the accused was arrested in Bomachoge later that same day. Other witnesses namely Mocha, Dennis and Ongaga also stated that when they went to the accused's home on the morning of 3<sup>rd</sup> December 2008, they saw blood on the floor and walls of the sitting room and bedroom of the accused's house.

22. The question that this court must ask itself is whether the available circumstantial evidence is

sufficient to point to the accused as the person who murdered the deceased. It has been held in such cases as **Andrea Obonyo & others –vs- Republic [1962] EA 542** that circumstantial evidence such as recent possession, and depending on the facts of each case, may support any charge howsoever penal. In the instant case, if it is possible to establish an unbroken chain in the prosecution's case, pointing to the accused person as the one who killed the deceased, then this court would have no hesitation in reaching the conclusion that the accused is the one who murdered the deceased.

23. After a careful consideration of all the evidence and the law, I am persuaded that there is sufficient circumstantial evidence to connect the accused to the death of the deceased. The deceased was an auntie to the accused. She was epileptic and was susceptible to attack by those who were closest to her. Although there appears to be a missing link as to how the deceased's blood was found in the accused's house while her body was found lying in her mother's kitchen, I am persuaded that at some point before she died, the deceased was in the accused's house. The evidence of bleeding from the deceased's vaginal orifice also suggests some sexual assault upon the deceased. It is possible that the accused took the deceased back to her mother's house after assaulting her while she was in his house. The bruises seen on the deceased's lower and upper extremities and the right aspect of the head were likely inflicted upon the deceased in the course of the sexual assault. The accused completed the assignment by strangling the deceased.

24. I have also carefully considered the submissions made by counsel for the accused to the effect that the panga and the rungu could not have inflicted the injuries sustained by the deceased to be farfetched. Mwaniki testified that the traces of blood on the panga and the rungu were only slight and it is not difficult to figure out how the blood got onto those weapons. I have also considered the evidence by PW10 that when he and other officers arrived at the home of the accused, the accused took off. That piece of evidence by PW10 has not been shaken by the defence in any material particular. This court is left wondering why, if the accused was as innocent as he seemed to suggest in his testimony, he should have run away from his home on seeing the police. In my considered view, the accused's conduct of taking flight the moment he set his eyes upon the police was inconsistent with innocence. That conduct by the accused, coupled with the fact that the blood samples extracted from the wall and floor of his house and from the black plastic basin were of the same blood group as that of the deceased clearly point to the irresistible conclusion that that blood came from the deceased. Mwaniki was categorical that though blood of group A is found among 25% of the human population, he did not receive any other sample apart from that extracted from the deceased and the accused's house. Further, Dr. Omwoyo testified that when he saw the body of the deceased, it had blood around the heart, there were bruises on the right temporal region and that the bruises seen on the deceased's body would suggest a struggle.

25. In summary, I am persuaded that the circumstantial evidence is sufficient to connect the accused with the murder of the deceased. I have carefully considered the testimonies by Mocha, Dennis, Erastus, Ongaga and PW10 and find no motivation for any of them making up a case against the accused. In the premises, I have no hesitation in concluding that the prosecution has proved its case against the accused person beyond any reasonable doubt. I therefore find the accused guilty as charged and convict him of the offence of murder in accordance with **section 322 (1) of the Criminal Procedure Code.**

26. It is so ordered.

**Dated and delivered at Kisii this 18<sup>th</sup> day of April, 2013**

**RUTH NEKOYE SITATI**  
**JUDGE.**

In the presence of:

Miss Cheruiyot (present) for State

Mr. O.M. Otieno (present) for Accused

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**