



NO. 314

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL CASE NO. 38 OF 2007

REPUBLIC.....PROSECUTOR

-VERSUS-

ONKOBA SIMON ORANGI.....ACCUSED

JUDGMENT

Onkoba Simon Orangi, the accused was arraigned before this court on information charging him with murder contrary to section 203 as read with section 204 of the **Penal Code**. It was alleged that on 5th July, 2007 at Igemo sub-locaiton in Kisii District within Nyanza province, he murdered one, **Salome Nyamweya Ondieki**. The accused pleaded not guilty to the information.

The case was initially heard by **Muchelule J**. Indeed he heard a total of 9 witnesses before he left the station on transfer and before he could conclude the case. The task therefore fell on me. At the resumed hearing of the case before me **Mr. Kemo** learned Senior Principal state counsel and **Mr. Okenye**, learned counsel for the accused agreed in terms of sections 200 and 201(2) of the **Criminal Procedure code** that case proceeds from where **Muchelule J** had left. Further the accused did not define to have witnesses who had testified to be resummoned and reheard by this court. As parties were in agreement on the way forward regarding the case and having explained to them the purport of section 200 and 201 (2) of the Criminal Procedure code, I direct that the case proceeds from where **Muchelule J** left and for that purpose the proceedings being typed and availed. That was subsequently done.

The evidence led before **Muchelule J** was that PW1, **Sarah Moraa Nyangaresi** knew **Saolome Nyamweya Ondieki**, deceased. On 5th August, 2007 at about 10 a.m, she left home to fetch water from a well. She wanted the deceased to accompany her. She had seen her in the home of one, Paulina who was a neighbour. She went to the home and called out the deceased. Someone however answered from the house in ekegusii that **“you will get tired of calling Nyamweya”**. She did not recognize the voice though it came from the kitchen she checked the kitchen through the window. As stranger came out of the kitchen through the window and chased her as she screamed **“thief”, thief”**. One **Gichana** and **Cosmas** came to her and chased the stranger and caught him. They took the stranger to the D.O.’s office and left him there. She went back to tell **Paulina** what happened and found the deceased dead in the same kitchen that the stranger had emerged. She observed the body and noted a stab wound through the throat. They started screaming and people came. **Cosmas** then ran to the police to tell them that the man in custody had killed the deceased. Police later came and removed the body. Accordingly to this witness the stranger who chased her and who had come out of the kitchen through the window was the accused.

Cross-examined she stated that she used to sleep at Paulina’s. Paulina had bought land from her father. She called the deceased severally to accompany her to the well. She was at the door when she heard the voice from inside. The accused had nothing in his hand when he came out and started chasing her. When he was about to catch, **Gichana** got up with him.

Cosmas Amencha Ooga (PW2) testified, that he knew the deceased since she stayed with a neighbour. On 5th August, 2009 whilst at home, he heard someone screaming **Mwizi” “Mwizi”**. He came out and noted that it was PW1 who was making the noise. A man was pursuing her. He and **Gichana** ran after the man and caught him. He was a stranger. When asked what he was doing, he told them that he was hungry and had gone to the house of **Paulina** to look for food. They detained him until Paulina came from the market. Paulina stated that he did not know the man and that he had not allowed him into her house. They then took the man to Marani A.P. camp and handed him over to Sergeant **Wanyama**. They returned home. Shortly thereafter he heard noise from the home of Paulina. When he went there he found Paulina crying and saying that the man had killed the child. He found the deceased lying dead near a knife. The body had two cuts on the neck. He ran back to the A.P. camp and reported that the man had killed the deceased. The man he was referring to was the accused.

Cross-examined, he stated that Paulina was a neighbour. One can take a minute to get to Paulina’s home from the witnesses’s home while walking. He found the accused with nothing in his hands. However, **Gichana** caught him first. PW1 was running while the accused was chasing her. It took about 10 minutes from the time he left AP camp to when he heard the noise. AP. Camp is not far from **Paulina’s** home. the deceased was lying near a kitchen knife which had blood.

Mogeni Gichana (PW3) testified that on 5th August, 2007 at about 10.a.m, he heard PW1 screaming **“thief”, thief”** and pointing at the accused who was chasing him. He ran after the accused with PW2. The accused stopped and they caught him. PW1 went and called. She came and instructed them to take the

person to Marani police station. He thereafter went home. At about he heard noise from the home of Paulina and people were saying that the deceased had passed on. He rushed there and found the deceased's body in the kitchen with 2 stab wounds on the neck. People went back to the police station to report that the accused had killed somebody.

Cross-examined, he stated that incident happened at 10.a.m when he first saw the accused and PW1, they were about 40 metres a head. He did not see accused come out of the house. The deceased's body was in the kitchen and had 2 stabs wounds. Henry Ochoi Maragia (PW4) was among those who chased and arrested the accused alongside PW2 and PW3.

Paulina Kwamboka Nyarangi testified as PW5. It was her testimony that on 5th August, 2007 at about 10.a.m, she was at Marani market when PW1 came and informed her that she had found a thief in her kitchen. She was then staying with PW1 and the deceased. She went home and on the way met the accused under arrest. They took him to the D.O's office at Marani. He was a stranger. She then went home. she found the door to the kitchen locked form inside. She asked a 7 year old child to go through the window and open the door. She found the deceased dead with a knife besides her. She screamed and became unconscious. The body was subsequently taken to the mortuary. She had left the deceased in the morning taking tea.

Cross-examined she stated that she did not find accused in her house. Rather it was Sarah who told her that she had found the accused in the kitchen. She did not know how the deceased died.

Dr. Cheruiyot Kipngeno Robert (PW6) tendered in evidence, the post mortem report on behalf of **Dr. Mureithi** who performed the post mortem. The deceased according to the post mortem report died from cardiorespiratory arrest secondary to severe hypovolaemia shock following right internal jugular haemorrhage from stab wound.

PW7 was **Samwel Ondieki Agunya**. He was the father of the deceased. On 5th August, 2007 whilst working in a butchery at Marani he was informed by PW1 and **Veronica Ooga** that his daughter had been killed. The deceased was then staying with her grandmother, Paulina. He went to Paulina's home, who is his mother in law and confirmed that his daughter was dead. There was blood oozing form her right neck which had a hole. He went to Marani D.O.'s office and reported the incident. The accused was in their custody. People went to force their way to see the accused. Police from Rioma police station came and took away the accused. On 14th August, 2007 at about 1.20 p.m, he identified the body at Bosongo mortuary for purposes of post mortem.

Cross-examined, he stated that he received the report at about 10.a.m. The deceased had stayed with the grandmother for 2 years. She was schooling at Marani primary school. He did not know how she met her death.

IP Joseph Wekesa Kaburu (PW8) testified that on 5th August, 2007 whilst at Rioma police station received information that members of public had arrested the accused and escorted him to Marani D.O.'s office and were about to lynch him for killing a young girl. He went to the D.O.'s office and rescued the accused. He then went to the scene and collected the body of the deceased. The body was lying on the floor in the kitchen. Besides the body, he found a knife which was blood stained which he took possession of.

Cross examined he stated that he did not take the blood sample at the scene. The knife as well as clothes of the deceased and accused were taken to the Government analyst. Apart from the stab wound on the right side of the neck, he did not see other injuries on the body.

P.C. Joseph Kirono was among the police officers who accompanied PW8 to rescue the accused from the rioting mob at Marani D.O.'s office. He also attended the post mortem of the deceased at Bosongo mortuary on 14th August, 2007. He later took the sweat shirt of the deceased, knife recovered at the scene and the accused's shirt to government analyst.

Cross-examined he stated that he did not visit the scene until after several days. The sweat shirt was blood stained. It is him who prepared the exhibit memo form. He visited the scene subsequently and drew the sketch of the scene.

Paul Waweru Kangethe (PW10) works with government chemist department as a Government analyst. On 24th August, 2007 he received a kitchen knife, blue sweat shirt, white shirt and blood sample of the accused. It was desired to ascertain the presence of blood in the items, determine the blood group and see if there was any link between the blood of the accused and the submitted items. He carried out a chemical analysis and concluded that the kitchen knife was moderately stained with human blood of group A. The sweat shirt of the deceased was lightly stained with human blood of group A. No blood stains were detected on the shirt of the accused. The blood sample of the accused was found to be of

group B.

The last witness called by the prosecution was PW11, **Benson Ojwang Kerongo**. He identified the body of the deceased at Bosongo medical centre for purposes of post mortem.

At the close of the prosecution case I ruled that the accused had a case to answer. The accused elected to give an unsown statement of defence and called no witness. He stated that on 5th July, 2007, he left his house for his routine work as a mason. On the way he met 2 boys who mistook him for a thief. They arrested him and took him to the chief's camp at marani. From there, he was taken to Rioma police station. Later he was charged for an offence he knew nothing about.

In his submissions, **Mr. Omari**, learned counsel for the accused stated that the prosecution had not proved its case against the accused beyond reasonable doubt. The evidence was contradictory and hearsay. There was no evidence to show that the accused was ever seen in the house. The investigations into the case was poorly done and the police emotionally charged the accused due to the pressure of the members of public at Rioma police station. The defence of the accused was not at all challenged.

On his part, **Mr. Gitonga**, learned state counsel submitted that the prosecution had proved its case beyond reasonable doubt. The body of the deceased was found in the kitchen. It is in the same kitchen where the accused was escaped through the window and was arrested by members of public. The evidence of PW1 was cogent and uncontroverted. Even though there was no direct evidence from eyewitnesses, the circumstances were such that the exculpatory facts irresistibly point to the accused and are incompatible with any other explanation upon any other hypothesis than that of his guilt.

There are basically two issues for determination in this case. They are, whether the deceased was murdered and if so whether she was murdered by the accused. It is trite law that in a charge of murder the prosecution must not only prove that the accused killed the deceased but also did so with the requisite ***mensrea***. In other words, the killing must be accompanied with malice aforethought is deemed to be established by evidence proving intention to cause the death of, or to do grievous harm to any person, knowledge that the act or omission causing death will probably cause the death or grievous harm to same person, intent to commit a felony and 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. It is in the light of the foregoing that the respective submissions of counsel will be reviewed.

It is common ground that the deceased passed on. The entire prosecution evidence attests to this fact. Indeed there is a post mortem report on record confirming that fact. According to the post mortem report, the cause of death is indicated as cardiorespiratory arrest secondary to severe hypovolaemic shock following right internal jugular hemorrhage from stab wounds. Could the deceased have inflicted these fatal injuries on herself? If that be the case then, the case will be taken out of the realms of murder. However considering the evidence on record and the nature of the injuries, I rule out the possibility of the deceased having inflicted those injuries on herself, accidentally or otherwise. The deceased sustained stab wounds on the neck. It is difficult to imagine how the deceased would have stabbed herself in the neck. The deceased was child. The possibility that she committed suicide by stabbing herself as aforesaid is remote and actually non-existent. Those injuries must have been inflicted by another person. The weapon used was the knife found beside the body of the deceased. She could not have stabbed herself and removed the knife. Considering the nature and extent of the injuries whoever inflicted them intended to cause the death of the deceased clearly therefore this was a case of murder.

Did the accused commit the offence? There is no direct evidence linking the accused to the crime for nobody saw him kill the deceased. Rather the evidence linking the accused to the crime is purely circumstantial. In the case of **Kariuki Karanja .v. Republic (1986) KLR 190**, the court of appeal relying on the case of **Rex .v. Kipkering Arap Koske, 16 EACA 135** held as follows “.....***In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the exculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of a guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.....***” Has the prosecution discharged this burden? I think so. That the deceased died as a result of the wounds inflicted on her is not in dispute. The post mortem report to which I have made reference is clear on that aspect. The circumstantial evidence relied on by the state is that Paulina left the deceased in the house and on coming back found the door to the kitchen locked from inside. On opening, she found the body of the deceased. It is from this same kitchen that the accused escaped from through the window, was chased and arrested. That the accused was the last person seen with the deceased. The defence on its part did not address the issue of circumstantial evidence.

There is unchallenged and uncontroverted evidence of PW1 that she went to the house of Paulina looking for the deceased to go with her to fetch water from a well. She had seen her alive in the morning. She called her out but someone responded from the kitchen saying “***you will get tired of calling Nyamweya***” in ekegusii she went to check through the window only for a person to emerge through the window and chased her. She screamed as she ran. Those screams attracted the attention of PW2, PW3 and PW4 who in response pursued and got hold of the person who turned out to be the accused. He was a stranger in the area. He was taken to Marani D.O’s office. In the check on the deceased whom she left behind as he proceeded to Marani market in the morning for her business. She found the kitchen door locked from inside. On opening, she found the deceased lying on the ground dead with a stained knife nearby this was hardly an hour after the accused had been pursued and arrested. The body of the deceased had stab wounds on the neck. The government analyst confirmed that the blood stain on the knife was on same blood group as the deceased. This must have been the weapon used to fatally injure the deceased.

The defence of the accused is one of alibi. That he never killed the deceased. Instead, he was mistaken for a thief, arrested by two people on the material day enroute to his usual chores as a mason. This defence weighed against the prosecution evidence pales into a shadow. PW1, PW2, PW3 and PW4 had bones to grind with the accused. They could not therefore have falsely testified against him. Similarly, the police had no reason to prefer a trumped charge or information against the accused. The offence preferred is serious and the prosecution must have been persuaded of the accused's culpability before they instigated the charges. In my view the defence offered by the accused does not at all hold any water considering the overwhelming prosecution evidence to the contrary.

Whereas it is true that nobody saw the accused inflict the fatal injuries that culminated in the deceased's death, but under the circumstances that are clear from the evidence, the only inference that one could come to is that the accused was the aggressor and none else.

The deceased had been seen alive in the morning. At about 10.a.m or so she is found dead. A stranger who turns out to be the accused chases out of the kitchen through a window and chases PW1. This conduct cannot be of an innocent person. Nothing stopped him from getting out of the kitchen through the door and explained his presence to PW1 to pursue PW1. Was it because he knew that PW1 would come across the body of the deceased and blame her death on him. That seems to me to be the rational explanation of the accused's conduct.

The contradictions in the prosecution evidence alluded to by counsel for the accused are minor and do not go to the root of the prosecution case nor do they impugn the credibility of the prosecution witnesses. Similarly I do not discern any hearsay evidence relied on by the prosecution to mount this case against the accused.

In the end I have come to the inescapable conclusion that the circumstantial evidence, in my view, points to none other than the accused as the perpetrator of the act that ended in the deceased's death. Accordingly I find the accused guilty of the information preferred and convict him. I will now invite parties to address on sentence.

Judgments dated, signed and delivered at **Kisii** this 17th January, 2011.

ASIKE-MAKHANDIA

JUDGE