



REPUBLIC OF KENYA

IN THE REPUBLIC OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 1 OF 2006

REPUBLIC

VERSUS

AMINGA OCHOLA OOGA.....ACCUSED

JUDGMENT

1. The accused person herein, was charged with the offence of murder contrary to **S.203** as read with **S.204** of the Penal Code. It was alleged that on 3.11.2005 at Isongo market, East Wanga Location, Butere/Mumias District of Western Province, he murdered Lilian Kerubo. He denied the offence and in evidence it emerged as follows;
2. That on 3.11.2005 , PW6, **Everlyn Ogake Ongoto** was working as a bar-maid in Isongo market when the accused person, whom she had seen in the bar previously, walked in and consumed two bottles of beer before shifting to soda. He sat in the bar until it closed at 11 p.m. and at that time, PW6, together with the deceased and Janet Atieno, who were all work-mates decided to go and sleep and according to PW6, the deceased decided to sleep in the bar counter while the accused person was given one room to sleep in while PW6 and Janet, PW7 went to sleep in another room.
3. Further, that after PW 6 and PW 7 had gone to bed, the accused knocked on their door and demanded to know where the deceased was. PW 6 told him that she had gone to sleep and suddenly she heard the deceased asking the accused where he had obtained a panga from and when she went out, she stated as follows;

“I opened [the door] and saw the accused cutting the deceased with a panga. There was electricity. I was just near the accused.”

4. PW6 and PW7 in any event retreated back to their room and when they heard the deceased groaning and calling for help, they went out and the accused attacked them and cut PW6 on the head and back. She fell down and PW7 fled to a sugarcane plantation to avoid the accused’s wrath.

5. PW8, **Rodgers Kaburu**, the watchman at the bar, said that upon seeing the accused about to attack the deceased with a panga, he fled the scene and ran to the Police Camp nearby and when he returned, he found that the deceased had been injured and he made a report to the area Chief, PW5, **Henry Omuseve Ochami**, who went to the scene and took the deceased and PW6 to hospital at Kakamega but on the way, the deceased died and he then made a report at Kakamega Police Station and he also telephoned Mumias Police Station for help. He returned to the scene and begun looking for the accused person who had been described by PW7 and PW8 but by 6 a.m. he had not been traced and PW5 went home. At 8 a.m., PW2, **Lucas Radoli Ochami** told him that the accused had been seen at Makunga area and he rushed there. The accused was sighted and he was arrested at the home of one Musa Shitandi.

6. PW2, **Lucas Radoli Ochami**, the owner of the bar where the incident happened, was present when the accused person was arrested as was PW1, **PC Daniel Maritim**, who also recovered the panga allegedly used in the murder (P.Exh.1).

7. PW9, **PC Moses Kinuthia**, investigated the case, took the accused for assessment of his mental status on 11.11.2005 and on the same day, he witnessed the post-mortem on the deceased’s body. The Post-mortem was conducted by PW10, **Dr. Jason Amukonyi**, who concluded that the cause of death was internal haemorrhage due to severe head injury caused by a fracture of the skull.

8. When put to his defence, the accused person in an unsworn statement admitted being in the bar on the material night and admitted that he had known the deceased who was his girlfriend. He admitted that he was in the bar until closing time and that at that time the deceased left the bar and when she failed to return quickly, he went out and found her with the watchman, naked and making love. When he confronted them, the watchman became rude and the two started fighting and so he took the panga that the watchman had and cut the deceased on the head and when PW6 came, he also cut her on the head. They both fell down and he walked away, enraged and confused, and when he saw a crowd in the morning, he ran off into a sugarcane plantation and when he saw a police land-rover, he ran into it and he was promptly arrested.

9. He pleaded that he was drunk at the time and that he was provoked when he found the watchman making love to the deceased who he was engaged to marry.

10. The act of causing death is not denied and I take it in any event that from the evidence of PW6 and PW7, as well as that of PW8 it was the accused and no other person who caused the deceased’s death. There was ample light at the time since the bar was lit with electric light and further, the conduct of the accused when arrested was telling. He was a stranger in the area and so had no home to go to. He hid in a sugarcane plantation the whole night and was tracked and arrested in the same plantation the next morning.

11. Was he so drunk as to lack the mind to form an intention to kill? From the evidence of PW6, the accused person took two beers and soda after that. PW7 confirmed that it was PW6 who served the beers

and so he was not so drunk and there is no evidence that he was so intoxicated as to lack the knowledge of his surrounding and actions. There is also no evidence that he was otherwise drunk before he arrived at the bar.

12. Regarding provocation, PW6 stated that she did not know whether the accused person had a sexual relationship with the deceased but PW7 was categorical on the subject. She stated that the deceased was the accused's girlfriend and that when he came, he told the deceased that "they were to leave together the next day at 10 a.m." According to her, the deceased did not react positively to the news.

13. It was the evidence of PW7 which contradicted that of PW6 that they both decided to share one room and allow the deceased to share one room with the accused. It will be recalled that PW6 had said that the deceased was to sleep at the counter while the accused would take one room. In any event, PW7 also stated that after a while, she heard the accused demanding where the deceased was and afterwards she heard the counter door being hit and the deceased fell out, injured.

14. It is important at this stage to recall the evidence of PW8, the watchman. It is instructive that when the accused became violent, he ran off. The accused person was a stranger in the area and no witness said that he had a panga while in the bar. In fact, the deceased, according to PW6, asked him where he had obtained a panga from. My opinion is that the panga could only have come from the watchman, which then takes me to the accused's defence. I am satisfied that his defence under **S.208 (1)** of the Penal Code was properly raised. That section provides as follows;

"S.208 (1) - The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relationship, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

15. The above section was discussed in ***Mukutano Gogo vs R. – Cr. Appeal No. 178/2001 (U.R)*** and the Court of Appeal stated that where doubt was raised as to whether the accused person was provoked or not, the doubt must favour the accused person. In this case, that holding must be held to be true. The accused person was provoked when he found the watchman making love to his girlfriend whom he had visited and wished to take home the next day.

16. In the event, I am of the same mind as the learned Judges in ***Gogo*** and will acquit the accused of the charge of murder under S.203 as read with S.204 of the Penal Code and will substitute it with a conviction for the charge of manslaughter under **S.202** as read with **S.205** of the Penal Code. It is so ordered.

Delivered, dated and signed at Kakamega this 17th day of March, 2011.

ISAAC LENAOLA

J U D G E