



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE 58 OF 2003

REPUBLIC PROSECUTOR

VERSUS

JAPHETH MORARA OTAO ACCUSED

JUDGMENT

The accused was charged with murder contrary to **section 203** as read with **204** of the **Penal Code**. The particulars of the offence were that on the night of 17th and 18th February, 2003, at Mageri sub location in Nyamira District within Nyanza Province, he murdered **Clemensia Kemuma Otao**, hereinafter referred to as **“the deceased.”**

The prosecution case may be summarized as hereunder:

Stephen Arika Otao, PW1, is a son of the deceased. He testified that on 17th February 2003 together with the deceased, they went to Nyamira Law Courts to stand surety for the accused who had been charged for interfering with a boundary. The accused had been granted bond and remanded at Kisii G.K. Prison. After they left Nyamira law courts the deceased returned home and PW1 proceeded to Kisii G.K. Prison and secured release of the accused. On their way home at a place known as Nyabite market the accused asked PW1 why they had let him remain in remand for 10 days. He was upset by the fact that his family members had not secured his release much earlier. He started beating PW1. PW1 reported the matter to the police and he was directed to go to a hospital to seek treatment.

On the morning of 18th February 2003, PW1 went to the deceased’s house to inform her of what the accused had done to him. He found the door locked from inside but one window was slightly open. A son of PW1 by the name **Dennis** pushed the window and got in and opened the door. Dennis used to stay with the deceased in the same house but on the material night he had not slept there. PW1 went in and found the deceased lying on the floor, dead. He screamed and many people rushed to their home. The accused was nowhere to be seen. His house was about 200 metres away from the deceased’s house. He was seen running away carrying a panga. Villagers gave chase and caught him and took him to the deceased’s home. When

asked why he was running away, he confessed that he had differed with the deceased and decided to kill her. The accused was handed over to the area Chief and later to the police.

In cross examination, PW1 said that when Dennis opened the window he peeped in and saw the deceased lying down and informed him. PW1 was the first person to enter the house.

Regarding the case of interfering with a boundary which the accused was facing, PW1 explained that they had sold a parcel of family land to one **Nehemiah Motema Ogwora**. He paid a sum of Kshs. 200,000/= which was shared between the deceased, the accused, himself and his other brothers. When the accused interfered with the land boundary, Nehemiah made a complaint and the accused was arrested and charged. PW1 had testified as a witness for Nehemiah.

Guocha Kimori, PW2, is a neighbour of the deceased. On the morning of 18th February, 2007, he heard screams coming from the house of the deceased. He went there and found that the deceased had been killed. Many people had gathered in that home but the accused was not there. Some people decided to go to the home of the accused but when he saw them approaching he ran away. He was pursued and apprehended at Nyamekenye market. When questioned as to why he was running away, the accused responded that the deceased had snatched his title deed and identity card and that is why he had killed her. A report was made to the area Chief and to the police.

The area Assistant Chief, **Andrew Nyamanga Onduki, PW3**, testified that on 18th February, 2003, it was reported to him that the accused had killed the deceased. He went to the home of the deceased and confirmed the report.

James Kongo Onyoni, PW4, is a grandson of the deceased and was one of the people who saw the accused running away, gave chase and apprehended him. He testified that the accused confessed that he was the one who had killed the deceased after his title deed went missing.

Dennis Nyagwachi, PW6, was 15 years old when he testified under oath. He said that he used to sleep in his grandmother's house, the deceased. On the day the accused was released from prison he started quarrelling with the deceased about a certain parcel of land. He alleged that the land had been damaged and some things in his house had also been destroyed. He was blaming the deceased for not having taken care of his property. On the material night PW6 did not sleep in the deceased's house because of that quarrel between the accused and the deceased. He slept at his father's house, PW1. He corroborated the evidence of PW1 in all material aspects. He said that he was the one who went in through a window and opened the door to the deceased's house. However, in cross examination, he said that his father did not get into the house. He said that the accused was brought to the home of the deceased and confessed that he had murdered her.

Charles Bonsia Bwocha, PW7, was one of the people who were attracted to the home of the deceased by the screams of PW1. When he went there he saw the deceased's body lying down and a knife was on the side. When the accused was brought to the home he confessed that he was the one who had murdered the deceased because of a land dispute. Some people wanted to kill the accused but they were restrained. The witness and others took the accused to the area sub chief who gave them a letter to take to Nyamira police

station where they escorted the accused to. A police officer from Nyamira police station and PW7 went to the accused's house. They found a blood stained white t-shirt which the witness identified in court. He also identified the kitchen knife that he saw in the deceased's house.

The deceased's post mortem report was produced by **Dr. Benjamin Wabwire, PW8**. It revealed that the deceased died due to severe blood loss following a head injury and bilateral lung collapse. The doctor also produced a mental assessment report in respect of the accused which showed that the accused was mentally stable.

Police Constable Francis Kimemia, PW9, assisted **Corporal George Mutieri** in conducting investigations into the death of the deceased. He said that when they proceeded to the deceased's house they recovered a dark striped coat. A metal bar and a kitchen knife were recovered near the body of the deceased. They also recovered a white t-shirt about 200 metres from the house. These items were produced as exhibits. The t-shirt and the coat had blood stains.

In cross examination, the witness said that the T-shirt was on a drying line but had some blood stains.

In his defence, the accused said that he was not aware that he had murdered the deceased. He said that there was a land dispute between PW1 and a buyer by the name Nehemiah Mitema. The purchaser alleged that the accused was causing disturbance and had him arrested on a number of occasions. The purchaser had also alleged that the accused had interfered with the land boundary. After his release from prison remand on 17th February 2003, he went to see his nephew. When he returned home he was told by some people that PW1 had alleged that he was the one who had murdered the deceased and disappeared. He explained to the people that he had no idea as to what had happened but they would hear none of it. He was taken to the police station where he remained upto 2nd of October, 2003.

Mrs. Asati for the accused submitted that none of the witnesses saw the accused commit the offence. The witnesses were merely suspicious of the accused. Counsel cited the case of **JUDITH ACHIENG OCHIENG -VS- REPUBLIC** [2009] e KLR where it was held that mere suspicion cannot form the basis of a conviction for the offence of murder. The circumstantial evidence that was sought to be relied upon by the prosecution was too weak to sustain a conviction, counsel added. She further submitted that the evidence of PW6, a minor, was not corroborated.

As regards the exhibits that had been produced, the same were not properly connected to the accused. The blood stains on the clothes were not shown to belong to either the deceased or the accused.

Mrs. Asati further submitted that the accused's constitutional right as provided under **section 72 (3) (b)** of the **Constitution** had been violated in that he was arrested on 18th of February, 2003 and kept in custody until 2nd October, 2003 when he was arraigned in court. That was inordinate delay and the same had not been explained by the prosecution. She cited **ALBANUS MWASIA MUTUA -VS- REPUBLIC**, Criminal Appeal No. 120 of 2004. She urged the court to acquit the accused.

In reply, Mr. Mutuku, Senior Principal State Counsel, submitted that the prosecution had adduced sufficient evidence to warrant a conviction of the accused.

Regarding the delay in arraigning the accused before court, he said that acquittal was not the only remedy in the circumstances. The accused could be awarded damages, he added. He urged the court to consider the rights of the deceased as well.

From the evidence on record, there is no doubt that before the death of the deceased there existed a misunderstanding between the accused on one hand and his brothers and the deceased on the other. The misunderstanding was due to a parcel of land that had been sold to one Nehemiah Motema. After the accused was released from prison on 17th February 2003, he went to his home. According to Dennis Nyagwachi, PW6, the accused went to the house of the deceased and started quarrelling her over a certain parcel of land and some things which he was alleging had been destroyed in his house. He was blaming the deceased for not having taken care of his property while he was in prison custody. As a result of that quarrel PW6 did not sleep in the deceased's house that night.

On the morning of the following day PW1 went to the deceased's house and found it locked from inside. When PW6 managed to go through a window and opened the door PW1 entered the house and saw the deceased lying dead on the floor. He screamed and attracted many people to the home. The accused's house was 200 metres away from the deceased's home. Even though many villagers rushed to the deceased's home in response to the screams by PW1, the accused did not show up yet he was in his house. There is evidence by several witnesses that when the accused saw villagers approaching his house he ran away. The accused's behaviour so far created reasonable suspicion that he was aware of what had happened to the deceased.

When the accused was apprehended he admitted that he had murdered the deceased following an argument which they had over a piece of land. Even in the absence of that confession, all the circumstantial evidence pointed to the accused as the one who had murdered the deceased. Why did he not respond to the screams by PW1? Why did he run away?

The law regarding circumstantial evidence is well settled. In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilty on such evidence the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. See **KARIUKI KARANJA -VS- REPUBLIC** [1986] KLR 190.

Although the police recovered a knife and a metal bar near the body of the deceased, no evidence was led to show that these items belonged to the accused and neither were they shown to have been the murder weapons although there was reasonable suspicion that they were. Likewise, the prosecution did not adduce evidence to show that the blood stained clothes that were recovered from the home of the accused were in any way connected to either the deceased or the accused. Although PW8 said that a blood sample was taken from the body of the deceased, there was no evidence that that sample together with the blood stained clothes were submitted to the Government Chemist for analysis to determine whether the blood group on those clothes

matched that of the deceased. Notwithstanding that omission, I am satisfied that the circumstantial evidence coupled with the accused's admission before several witnesses is sufficient to warrant a conviction.

As regards the accused's complain that the long delay in arraigning him in court violated his constitutional right and ought therefore to be acquitted of the charge of murder, I note that this is an issue that was brought by his defence counsel in her submissions at the close of the trial. If indeed the accused was kept in police custody from 18th February 2003 upto to 2nd October 2003, there was inordinate delay that required an explanation by the prosecution. **Section 72 (3) (b)** of the **Constitution** requires that a person arrested on a capital offence be arraigned in court within 14 days from the date of arrest or as soon as possible thereafter.

The burden of proving that the person arrested has been brought before a court as soon as is reasonably practical rests upon any person alleging that the provisions of **subsection 3** thereof have been complied with. Ordinarily, the police ought to be called upon to explain the delay but where no such opportunity has been availed to them, the court cannot determine with any certainty that the delay was unwarranted. In a matter like this one where the accused is represented by an advocate, the court would have expected that the issue of delay be brought up much earlier so that appropriate determination of the same can be made after hearing any explanation that may be proffered by the police. In the circumstances, I am unable to find that the accused's constitutional right was violated. In any event, the accused is not without a remedy in the event that he wishes to pursue that claim further. He can sue for damages.

Having considered the sum total of the evidence on record, I find that the accused must have been the only person who inflicted the fatal injuries upon the deceased. In doing so he had malice aforethought. Consequently, I find him guilty of murder and convict him accordingly.

DATED, SIGNED AND DELIVERED AT KISII THIS 2ND DAY OF JULY, 2010.

D. MUSINGA
JUDGE.

Accused: I did not murder my mother.

D. MUSINGA
JUDGE.

SENTENCE: The accused, having been duly convicted of murder, is now sentenced to death as by law prescribed. Right of appeal within 14 days from the date hereof.

D. MUSINGA
JUDGE.
2/7/2010