



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Case 14 of 2003

REPUBLIC.....PROSECUTOR

V E R S U S

NATHAN ODUOR ODINDI.....ACCUSED

J U D G E M E N T

The accused, **NATHAN ODUOR ODINDI**, was charged with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code.

During the trial, the prosecution called a total of 7 witnesses.

PW1, JUSTUS OKETCH, was a relative to the deceased **JULIA ODHIAMBO**. He testified that the deceased used to live with the accused person, within Nyamboka village, Dudi sub-location. PW1 was also a resident of that village.

On 14th October 2003, PW1 was at Muhanda market, where he heard 3 children who were saying that the deceased had died. PW1 heard screams from the home of PW2, and he went there. He found PW5, who was the assistant chief of Doho sub-location at the home.

According to PW1, the accused had already been arrested by PW5. At the request of PW5, PW1 helped to tied-up the accused person, whom they later escorted to Dudi Police Station.

Later the police removed the body of the deceased from the place where it had been lying, which was near the pit latrine.

As the body was covered, PW1 did not see whether or not it had any injuries.

During cross-examination, PW1 said that he last saw the deceased alive about 5 months before the incident. He also said that he did not now if the deceased used to take alcohol.

PW2, BENTA ODUMA LUKAYI, was the step-mother to the accused. She said that both her husband and the mother to the accused were deceased.

She testified that her home was near to the home of the accused. In her assessment, the homes were about a kilometer apart.

PW2 knew the deceased as a friend to the accused, although she also referred to the deceased as her daughter in-law.

On the night of 14th October 2002, the deceased went to PW2's house at 7.00 p.m., and said that she would spend the night there. When PW2 asked the deceased if she was sick, the answer was in the negative.

Although the deceased normally slept in the accused's house, she had also slept in PW2's house on many occasions.

When PW2 opened her door at 7.00 a.m. she found the accused standing outside. The accused asked PW2 if the deceased had spent the night at her house, and PW2 said that that was so. At that point, the deceased woke up and the accused asked her to move near to him. The accused then grabbed the deceased and started beating her outside PW2's house. The accused had a rungu.

As the accused beat the deceased, the latter was screaming and struggling. PW2 also screamed, but nobody went to the rescue of the deceased. So, PW2 rushed to the village elder. She said, in her evidence, that she did not separate the accused from the deceased because she feared her son.

When PW2 met the village elder, PW6, she told him what had happened. PW6 then rushed off to notify the Assistant Chief, PW5. Meanwhile, PW2 went back home, where she found the deceased lying on the ground near the pit latrine which was near the gate. PW2 tried to talk to the deceased, but the latter was already dead.

PW2 started crying, and that attracted people to her homestead. Later, the Assistant Chief and the village elder also arrived with the police.

During cross-examination, PW2 said that she did not know if the accused and the deceased had quarreled. PW2 specifically said that when the deceased went to her house, the deceased was not drunk.

In her understanding, PW2 knew the deceased to be a good woman. PW2 denied the contention that the deceased had sold household effects.

And in re-examination, PW2 clarified that by the time she was leaving her homestead, to go and notify the village elder, the accused was beating up the deceased near the gate. Later, when PW2 returned home, she found the body of the deceased lying on the ground, near the gate, where PW2 had left the accused beating the deceased.

PW3, ANNA MUKHWANA, was the mother to the deceased. She testified that the deceased had previously been married, and had had children. However, the deceased left her husband after they had differences with her husband. The deceased returned to her mother's home.

PW3 said that the accused befriended the deceased during the time when the deceased was at the home of PW3. The two used to spend time at the home of the accused.

On the material day, PW3 received information from someone called Okito, that the accused had beaten the deceased to death.

PW3 went with Okito, to the home of PW2, where she found the body of the deceased lying on the ground. PW3 noticed swellings on the left and right parts of the neck and on the groin of the deceased's body. However, PW3 did not see the accused at the time.

During cross-examination, PW3 said that on the night of 12th October 2002, the deceased spent the night at PW3's house. PW3 also said that the deceased was not a drunkard.

PW4, DR. KELLY ALOO OKUMU, is a medical doctor. He carried out the post mortem on the body of the deceased on 18th October 2002. He noted that the clothing on the body was soiled.

On the body, PW4 noted bruises on the left side of the face and also on the back. But there were no

fractures.

It was the evidence of PW4 that the spleen and liver of the deceased were ruptured. There were no other injuries.

The doctor formed the opinion that the cause of death was massive internal abdominal bleeding. And, in his view, the injuries to the deceased were caused by a blunt object.

During cross-examination, the doctor said that the injuries could have been caused by a fall on a hard surface.

But in re-examination, he clarified that the injuries to the neck and the back of the deceased could not have been caused by a fall.

PW5, CALEB OKWOKO JAGOGO, was the Assistant Chief of Doho sub-location as at 11th May 2004, when he testified. Even at the time of the incident, on 14th October 2002, he was an Assistant Chief.

PW6 and Gordon Nyambogo went to the house of PW5 on the morning of 14th October 2002, at about 9.00 a.m. They told him that the accused had killed his wife, the deceased in the case. They told him that the killing had taken place at the home of PW2.

PW5 reported the incident to the police, and then three police officers accompanied him to the home of PW2. At the said home, they found the body of the deceased lying near the pit latrine.

There were no stones near the body, nor was it lying on any stones. The body was lying on earth.

When the body was being carried to the police vehicle, PW5 noticed blood in the rib cage or abdomen.

PW5 inquired from some villagers, how the deceased had met her death. He was told that it was the accused who had killed her.

When the accused was walking away, PW5 arrested him about 8- meters away from where the body of the deceased had been lying down.

During cross-examination, PW5 said that he would not know if there were stones inside the house of PW2. He also did not know how many times the deceased could have fallen down. But he was clear about the fact that there were neither tree stumps nor stones within the home of PW2.

PW6, SHADRACK NYAMWANGA OYUGI, was a village elder in Nyamboka village. He said that on 14th October 2002, PW2 went to his home to inform him that the accused had killed the deceased.

After receiving the information, PW6 went to the scene, where he found the body of the deceased lying on the ground, close to a pit latrine. PW6 did not observe injuries on the body.

On the material day, PW6 did not see the accused.

PW7, CPL JOHN LANGAT, was a police officer, who was attached to the Dudi Police Patrol Base, Butere, at the time of the incident.

At about 10.00 a.m., PW7 was at the office, when PW6 arrived there to make a report.

According to PW7, the report by PW6 was to the effect that on 13th October 2007, the accused had fought the deceased. Following the fight, the deceased went to spend the night at the home of PW2.

On the following morning, the accused is said to have gone to the home of PW2, while armed with a walking stick. PW6 reported to PW7 that the accused found the deceased outside the house of PW2, and he started beating her. When PW2 raised an alarm, the accused is said to have run away, leaving the deceased unconscious.

After receiving the report, PW7 went to the scene, where he found the deceased lying next to a pit latrine. PW7 observed injuries on the neck, back and ribs of the deceased.

The police removed the body from the scene. They also arrested the accused and escorted him to Yala, for safe custody.

Later PW7 had the accused examined by a doctor. The doctor certified the accused as being of sound mind.

Thereafter, the police charged the accused with murder.

Significantly, the accused did not cross-examine PW7 at all.

When the accused was put on his defence, he chose to give unsworn testimony. He said that the deceased was his wife. He also said that on the night of 13th October 2002, the deceased did not sleep at home.

On the morning of 14th October 2002, the accused found the deceased at the home of PW2. He says that when he found the deceased, she was inside PW2's house, lying on a mattress.

It was the accused's testimony that the deceased was with another man, who was cuddling her tightly, as the two of them drunk alcohol.

Because of what he saw, the accused got annoyed. He therefore went out the house and got a stick from a tree which was part of the fence. He then used the stick to hit the deceased.

Thereafter, the accused left the deceased at PW2's home, and he went to Kisumu to withdraw money from the bank; the money was intended for use in plastering the house of the accused.

Upon his return from Kisumu, the accused was arrested by the Assistant Chief and 3 youth wingers. He was taken to Yala Police Station, where he spent 2 nights in the cells, then he was taken to Butere Police Station, where he spent 5 nights. Thereafter, he was charged with murder.

After the close of the defence case, Mr. Anziya, learned advocate for the accused made submissions. He said that whereas the accused admits having assaulted the deceased, he had been provoked by the deceased.

The provocation was in the form of the invitation which the deceased extended to another man, inside the house of the step-mother of the accused.

According to the accused, it is the said provocation which caused him to act as he did. He therefore urged this court to find the accused guilty of manslaughter, as opposed to murder.

The accused person cited **OKWANY & ANOTHER V. REPUBLIC [2005] 1 KLR 833** as authority to support his contention that he ought to be found guilty of nothing more than manslaughter.

Having analyzed the evidence on record, I find and hold that there is absolutely not an iota of doubt about the fact that the accused beat up the deceased on the morning of 14th October 2002. Whether he did so using a stick which he got from a tree within the fence of PW2's homestead, as the accused himself asserted, or whether he used a rungu (as PW2 said), or even if he used a walking stick (as PW7 said), is not material. I so find because the accused himself admitted having beaten the deceased.

There is also no doubt at all that the cause of death was the excessive internal abdominal bleeding suffered by the deceased.

Having admitted that he beat the deceased, I deem the accused to have abandoned the defences which he had alluded to when he cross-examined the prosecution witnesses. He had, during cross-examination, appeared to suggest that the deceased was drunk and that she may have injured herself when she fell on hard surfaces, such as stones or tree stumps.

In any event, there were neither stones nor tree stumps within the homestead of PW2, where the deceased met her death.

I therefore find that the prosecution has proved beyond any reasonable doubt that the death of the deceased was caused by the beatings which the accused meted out on her.

Having beaten the deceased, by his own admission, the accused abandoned her, and went to Kisumu. He left for Kisumu shortly after 7.00 a.m., and returned at about 4.00 p.m. To my mind, that indicates that the accused did not care at all about what might befall the deceased, yet he left her when she was already unconscious.

The only issue to be determined in this case is whether or not there was provocation.

As far as the accused was concerned, just because he had armed himself with a stick, which he used to beat up the deceased, should not be a reason enough to find that he was guilty of murder.

In his understanding, the appellants in **OKWANY & ANOTHER V. REPUBLIC** were found guilty of manslaughter, even though they had been armed with more weapons than what the accused herein had. Those appellants had a jembe, a spear and a panga, compared to the accused who had only a stick.

With all due respect to the learned advocate for the accused, I do not think that just because the accused herein was armed with a stick whilst the appellants in the authority cited by him had more weapons, would be a basis for finding that he was provoked.

The Court of Appeal expressed itself thus, at page 836;

“The deceased, his wives and son had gone to cultivate on a disputed portion of land. It was resisted by the appellants and an attempt was made through Opondo Okwany to report the incident to the authorities. There was uprooting of crops and there was evidence that during the incident the deceased was armed with a rungu. In view of these, there was an issue of provocation.....”

Perhaps it is because of that finding that during cross-examination the accused tried to suggest that the deceased herein was also armed with a stick.

Having given careful consideration to the evidence on record, I note that whilst the accused had, during cross-examination, alluded to a number of possible defences, at no time did he ever suggest to PW2 that the deceased was in the company of a man inside PW2's house. Therefore, I find and hold that the attempt to introduce a man onto the scene, when he was testifying, was nothing more than the accused's belated attempt to justify his actions.

PW2 said that the accused was outside her house. The accused did not challenge that piece of evidence. He also did not challenge PW7's evidence that he found the deceased outside the house of PW2, where he started to beat her.

Having not challenged that evidence, it cannot also be true that the accused found the deceased inside PW2's house, lying on a mattress whilst having alcohol, in the company of a man who was cuddling her tightly. I reject the defence as being nothing more than an afterthought calculated to try and justify the actions of the accused.

In the result, the defence of provocation is rejected. I find the accused person guilty of murder and do hereby convict him accordingly.

Dated, Signed and Delivered at Kakamega, this 29th day of January 2009

FRED A. OCHIENG

J U D G E