



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Case11 of 2002

REPUBLICPROSECUTOR

V E R S U S

DAVID OKUSIMBAACCUSED

J U D G M E N T

The accused, *David Okusimba Odongo*, was charged with the murder of Hellen Ambani on 1.6.2001. The particulars of the charge were:-

“1st day of June, 2001 at Ingotse village, Shikunga sub-location, Marenyo Location, in Butere/Mumias District, within Western Province murdered HELLEN AMBANI”

The evidence adduced by the prosecution shows that the deceased and the accused lived together in Ingotse village in Shikunga sub-location in Butere/Mumias District as man and wife in what is popularly known as “*come we stay*” relationship. The mother of the deceased who was the only surviving parent, did not know and had not met the accused prior to the deceased’s death.

The evidence adduced in the case against the accused was circumstantial. Nobody saw the killing of the deceased. The deceased was found lying on a bed in the house where she lived with the accused with a rope around her neck. She had cuts on her hands, neck, and other parts of the body. She had bled a lot. The deceased’s mother was known as Rose Alukwe.

On 2/6/01 Gladys Nyambwetso a child of the accused ostensibly not with the deceased, went to the house of Miriam Oskoyo (PW1) in Ingotse village and told her that the accused had killed the deceased. Gladys Nyambwetso (Gladys) was not called to testify in this case. It is not known whether she lived with the deceased nor how she had come to know that the deceased had been killed.

Upon receiving the tragic news, PW1 accompanied Gladys to the deceased's house which was nearby. When they got into the deceased's house, PW1 found the deceased lying on a bed with a rope around her neck with cuts on her hands, neck, and all over the body. On discovering this, PW1 made a beeline to the house of the sub-chief of the area, one Joshua Oulo Omeno (PW2) whom she found at 6 p.m. on 2/6/01. She informed him what had transpired. PW2 visited the scene and reported the matter to the police while PW1 was left guarding the deceased's homestead. The accused was not seen in the homestead on 2/6/01 by either PW1 or PW2 and Gladys did not testify so to the court what she knew about the killing of the deceased.

At 5 a.m. on 3/6/01, the accused came home. PW1 was there. She immediately rushed and called the area sub-chief who came with police officers and the accused was arrested and taken to the police station. In her evidence, PW1 told the court that when he arrived home, the accused was in a drunken state and was wet although it had not rained. He did not talk to PW1 even when talked to by PW1. He remained mum throughout.

When the Assistant chief (PW2) received the information from PW1, he went to the deceased's house and verified the information and then proceeded to inform the police.

The mother of the deceased, Rose Alukwe (PW3) had not seen the deceased for more than one month prior to the latter's death. On 2/6/01, she was informed that the deceased had been killed. She saw the body of the deceased on the bed where the deceased lived with accused. She observed the rope on the deceased's neck and the injuries narrated by PW1 & PW2. On 8/6/01, she identified the body at the mortuary in Kakamega Provincial General Hospital to Doctor Walusiola who performed post mortem in her presence and that of the police and PW4 who was the deceased's uncle.

In his evidence, Inspector Moses Waliaula PW5 produced a handwritten note in Luhya language recovered by him beside the bed in the deceased's house addressed to the deceased's mother in-law stating that the author had killed the deceased and would take poison. This note was not proved to have been written by the accused and was of no evidential value. PW5 also produced the Report of Government Analyst as exhibit No.2 which showed that the sword and T-shirt recovered from the deceased's house were stained by blood belonging to the deceased's group "O" and the accused's blood group "A" was not found on any of these exhibits.

In his unsworn statement from the dock, the accused stated that on the night of 1/1/01, he and the deceased were attacked by a gang of armed people who alleged that they had been sent to collect the deceased. The gang took the accused 5 kilometers away from the house and questioned him where he had met the deceased. They told him that the deceased was somebody else's wife. They forced him to take a drink which made him groggy. He said he lost consciousness after a while. When he regained consciousness, he found himself in a police station and it was while he was there that his mother explained to him what had happened to his wife.

The burden of proving the guilt of the accused lain on the prosecution throughout and at no time was the accused under any obligation to prove his innocence.

The accused was arrested on 3/6/01 in the house to which he returned at 5 a.m. PW1 called the sub-chief (PW2) who in turn called the police who arrived and arrested the accused. His conduct was bizarre. He did not talk to anyone, and he appeared drunken and was soaking wet.

In a case where, as here, the evidence against an accused person is circumstantial, the court must ensure that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt (*see SIMON MUSOKE v. REPUBLIC [1958] E. A. 715 at page 716*)

In the present case, the inculpatory facts were capable of innocent explanation. The conduct of the accused in standing like a zombie and exposing himself to the police, the Assistant chief and others and the fact that he was oblivious to the prospect of being nabbed by the police or harmed by the people who

were there was more consistent with and gave credence to his defence than it did guilt. It is my finding that the incupatory facts were not incompatible with the accused's innocence.

In short, there is a possibility that the accused might not have been the murderer and consequently, there is an element of doubt the benefit of which must be given to the accused.

I do not find the charge proved beyond any reasonable doubt against the accused. For this reason I acquit the accused of the charge. Unless otherwise lawfully held, the accused shall be released forthwith and set free.

Dated, signed and delivered at Kakamega this 4th day of April, 2006.

G. B. M. KARIUKI

J U D G E