

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA

Criminal Case 13 of 2003

REPUBLIC.....PROSECUTOR

VS

AFRICANUS ONYANGO WAKHUNGUACCUSED

JUDGMENT

The accused herein, Africanus Onyango Wakhungu, is before this court on information of the Attorney General duly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 18th day of January 2003 at Lunga Village Nasewa Sub-location Lwanya Location in Busia District within Western Province murdered Topista Akoth Onyango.

The prosecution's case is to the effect that on the 18th day of January 2003, the deceased had gone to the house of Hellen Nyongesa (P.W1) to assist in receiving the visitors of P.W1. At about 7.30 p.m. P.W1 said the accused who appeared angry arrived at her homestead. She saw the accused beat and kick the deceased and this prompted her to scream thus attracting the attention of Gabriel Omondi (P.W4) who immediately rushed out of the living room of P.W1. P.W4 got hold of the accused and took him to his house. Florence Anyango (P.W2) and Dolphina Maloba (P.W3) also came out from P.W1's house when they were informed by P.W1 that the accused had assaulted the deceased. They took the deceased back to P.W1's house. The deceased informed them that she had been assaulted by her husband, the accused herein. At 8.00 p.m. P.W2 and P.W3 took the deceased to the house of her mother-in-law, Grace Nambiro (P.W7). P.W7 informed this court that the accused visited her house to inquire about the whereabouts of the deceased when he found his house locked. She said the deceased came to her house at 8.00 p.m. and left for her house shortly. P.W7 said that the accused again visited her at 3.00 a.m and that is when he informed her that he had quarreled and fought with the deceased. Later, P.W 7 said that the accused again visited her to inform her that the deceased's condition had worsened and this is when P.W7 visited the deceased whereby she found out that the deceased was unable to talk. P.W7 said she fled the homestead when it became apparent that the deceased had passed away for fear of her life. The accused later surrendered himself to the police where he was arrested and later charged with this offence. Dr. Njau (P.W6) produced a post mortem report on behalf of Dr. Maingi. In the postmortem was of the opinion that the cause of death is cardio pulmonary arrest due to respiratory failure due to strangulation.

When placed on his defence, the accused gave an unsworn statement. He claimed that when he arrived in his house at 7.00 p.m he found it locked and his children were at his mother's (P.W7's) house. He visited the house of P.W1 where he found his wife outside P.W1's compound upon which he said he requested the deceased to hand over the keys to his house. The accused claimed the accused told him she had left the keys with the children. He claimed he went back to his house where he broke the door to gain access when he was unable to get the keys. He said when the deceased arrived she got annoyed when she found the door broken down and that is when she attempted to go and wake up the children at their grandmother's house but he restrained her. The accused said they slept until 4.00 a.m when he heard the deceased fall down. He woke up and lit the fire and that is when he discovered that there was some foam on her mouth. She passed away when the accused was making arrangements to take her to hospital. There was evidence that a bottle containing some liquid was taken to the police for examination, but unfortunately the same was not produced.

At the end of the evidence, Mr. Wanyama made detailed submissions in which he urged this court to find that there was no conclusive cause of death because the possibility of the deceased having taken poison was not investigated. It is the learned advocate's submission that there was no proof that the accused had malice aforethought.

At the conclusion of the submissions, I summed up the case to the assessors and requested them to deliver their oral opinion. The assessors were unanimous that the accused killed the deceased but he had no malice aforethought.

Having considered the evidence, the submissions and the assessors' opinion, I am of the following opinion. The evidence of P.W1, PW2 P.W3 and P.W4 indicate that on the fateful night the accused was seen while he was annoyed assaulting the deceased because she was late to arrive home. The accused's mother, grace Nambiro confirmed that the deceased had slept with her husband, the accused, on the night of 18.1.2003. she also confirmed that the accused had told her that he had fought the deceased at night and that as a result the deceased got injured. The accused does not deny that he slept together with the deceased. After a careful consideration of the evidence tendered, I am convinced that the accused fatally injured the deceased in a fit of anger when she arrived home late. The accused's anger was further heightened When the deceased refused to accompany him back home after he assaulted her outside the homestead of Hellen Nyongesa (P.W1). There is no evidence that the accused had earlier disagreed with the deceased save for the fact that he found his home deserted with the children spending with their grandmother while the deceased was in the house of P.W1. I think the accused acted in a fit of anger. In the end, I agree with the opinion of the assessors that the accused is guilty of manslaughter as opposed to murder because the element of malice aforethought is lacking. The end result is that the accused is convicted of manslaughter under section 205 of the Penal code. He is however acquitted of the offence of murder.

Dated and delivered this 30th day of November, 2006.

J. K. SERGON

JUDGE