



**Republic v Otuoma & 3 others (Criminal Case 28 of 2014)
[2023] KEHC 2648 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 28 OF 2014
WM MUSYOKA, J
MARCH 24, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

RAMADHAN OTUOMA 1ST ACCUSED

SAIDI MUSUNGU ASMAN 2ND ACCUSED

KELVIN AMO MAPESA 3RD ACCUSED

CHARLES MWALO ASERA 4TH ACCUSED

RULING

1. Ramadhan Otuoma, Saidi Musungu Asman, Kelvin Amo Mapesa and Charles Mwalo Asera are charged with murder contrary to section 203 of the *Penal Code*, Cap 63, Laws of Kenya, as read with section 204 of the *Penal Code*. The particulars of the offence allege that on 1st October 2013, at Masaba village, Shirotso Sub-Location, Butere District, within Kakamega County, they murdered Lillian Atieno Odera, hereinafter referred to as the deceased. They pleaded not guilty to the charge, on June 18, 2014, and a hearing ensued, where 14 witnesses testified, on diverse dates between May 20, 2015 and February 4, 2020, both dates inclusive.
2. PW1, Joseph Samson Owino, was a paternal uncle of the deceased, who identified the body of the deceased for post-mortem purposes.
3. PW2, Gertrude Mukhwana, testified that she operated a chang'aa drinking place at her home. On October 1, 2013, at 6.30 PM, the 1st and 3rd accused, who lived in the neighbourhood and were her regular customers, came to her compound, ordered chang'aa, and were served. Later, her daughter, Farida Ambani, PW3, informed her that the 2nd accused was leaving their house with the deceased. The 1st accused left the house, and confronted the 2nd accused, asking him where he had gotten the



deceased from. The deceased was brought into the house, and was asked to sit on a bench, but she fell down instead. The deceased was dirty, as she had cow dung on her hands. PW2 proposed to prepare a place for her to rest, as she appeared weak. The evidence at this point is recorded in a rather confusing manner, as it reads that “she left with accused 1. They boarded a motorcycle for accused 2 ... Accused 1 left the girl to accused 2.” The next morning, PW2, as she was walking towards the home of the 1st accused, she found a crowd of people in a certain farm. When she got there, she found the deceased lying there, in the same clothes she had been wearing the previous day. The maize plants around there were disturbed, and packets of condoms were lying nearby. She saw the 1st accused in the crowd, and he instructed him to remove her from the farm, and to take her to hospital, otherwise she would inform the authorities. She left, and when she came back, she found that the deceased had been removed from the scene. She said that the deceased was dressed in clothing, but was not wearing shoes.

4. During cross-examination, she stated that she saw the 1st, 2nd and 3rd accused persons at her home. They arrived at about 6.45 PM. She said that she did not know how the deceased died, and that she did not know prior to that day. She said that the deceased appeared weak, when she saw her at her home. She said that she saw the 1st accused at the scene the next day, at the road, and not near the deceased. She said that she saw white condoms, and she could not tell who used them. She added that she did not see the 1st and 2nd accused persons mistreating the deceased. She said that the 1st, 2nd and 3rd accused persons came together on motorcycles. She stated that it was the 2nd accused who first had the deceased, behind the house, then the 1st accused went to where they were, to quarrel the 2nd accused. The deceased left the compound with the 2nd accused, on his motorcycle. She explained that the 2nd accused was left behind at her compound by the 1st and 3rd accused, and he left after 10 minutes, with Mohamed and Ibrahim.
5. PW3, Ambani Farida Lukoye, was a daughter of PW2. She testified that on October 1, 2013, she was at home, at 7.00 PM, making supper. As she was taking food to the main house, she saw the 2nd accused holding the deceased, who she did not know then, and they were coming from behind the house. The deceased was unable to walk, and the 2nd accused was taking her towards the road. PW3 alerted PW2, who got out of the house, together with her customers. The 1st accused began to quarrel the 2nd accused, complaining that he was seducing his girl. It emerged, according to her, that the 1st accused had come together with the deceased, and hid her behind the house, where the 2nd accused went to seduce her. The 1st accused then put her on his motorcycle, and they left, accompanied by the 3rd accused. She said that she did not see the 4th accused at their home on that day. The next day she heard that the deceased had died.
6. During cross-examination, she stated that she did not see the accused persons come to their compound, and did not see the deceased come in either. She said she did not know what might have happened to the deceased, but she saw her being supported by the 2nd accused, as it seemed that she could not walk by herself. She could not tell whether she was drunk. She said she saw the 1st and 2nd accused quarrel, but did not see either of them assault the deceased. She said she saw the 3rd accused at their home, but she did not hear him say anything about the deceased, and when he left on his motorcycle, it was not him who carried the deceased. She said that after the 1st and 3rd accused left, she did not know where the 2nd accused went to, as she did not see him leave. He did not have a motorcycle.
7. PW4, Peter Otweya Omushieni, testified that he heard that a woman was lying at a maize farm, and he went there. He saw a woman, who was still alive, but was not talking. The owner of the farm asked them to remove her from his farm, which was done. It was agreed that she be taken to hospital. A person called Mapesa, not the 3rd accused, offered his motorcycle, and it was the 1st accused who rode it. PW4 was among the persons who took her to hospital. He said that he did not know about the other 3 accused persons.



8. PW5, Philip Samachi Asira, was the area village elder. He got information, on October 2, 2013, from the owner of the land where the deceased was lying. PW5 went to the scene, and found the deceased atop a motorcycle as she was being removed for hospital. He said that the deceased was fully dressed, but had no shoes. He tried to talk to her, but she was not talking. She could also not support herself. He said that he was the one who requested PW4 to accompany her to hospital. After the deceased was taken away, PW5 did some investigations, which led her to the home of PW2. He said that PW2 mentioned that the deceased had been to her home, with the 1st and 3rd accused. She also mentioned the 2nd accused as having been present, but the 4th accused was not there. He said that he did not know who killed the deceased, nor how she met her death.
9. PW6, Jared Opondo Odera, was a brother of the deceased. He was among the person who identified her body, for purposes of autopsy. He explained that she had a depression problem, and had had an appointment with a doctor at Kisumu, on September 27, 2013. She saw the doctor on September 27, 2013, and went to stay at Kibos, with a relative. He further explained that her depression problem began in 2006, she was treated, and was able to go through Maseno University for 4 years without incidence. She relapsed after graduation, when she failed to get employment. He said that when she left Kibos, no one knew where she was going. He also said that she used to have memory lapses. He said that her home was a walking distance from where she was found lying.
10. PW7, Mwanaisha Musa Khanda Machengo, was a grandmother of the 1st accused. On the morning of October 2, 2013, she served him with porridge. She later saw the 1st accused atop a motorcycle, with the deceased on it, and she understood that he was taking her to hospital. She did not know the accused. She said that the incident she described was at the road, and not within her compound.
11. PW8, Fatuma Wamalwa Abuti, saw the 1st accused person, on October 2, 2013, at 8.00 AM, running very fast, while holding a cup, from the scene where the deceased was. When she spoke to him, he said that he was helping his visitor. She also rushed to the scene, where she saw the deceased lying, dressed. She left for the home of the likuru, she did not find him. When she came back, she found that the deceased had been removed from the farm to the road. She saw the 1st accused on a motorcycle, and the deceased on the pillion seat, leaning on his back.
12. PW9, Richard Anjawa Onyachi, he testified that the 1st accused went to his compound on October 3, 2013, carrying a small bag, whose contents he did not know, but which turned out to be a pair of sandals, which he said belonged to the 1st accused, and were thrown to a rubbish heap by his wife. He said that he was interrogated by the police about the shoes.
13. PW10, Dr. Dixon Mchana Mwaludindi, was the pathologist, who conducted post-mortem on the body of the deceased, on October 8, 2012. He stated that externally the body had no bruises, no fractures, and no signs of chronic illnesses, but there was evidence of medical intervention. Internally, there was froth on the airways of the lungs, tiny spots on the upper part of the heart, swelling on the right ovary, and discharge from the birth canal. There was nothing detected from the scalp. PW10 opined that the cause of death was heart failure. He took a number of samples for further testing, to confirm whether or not the deceased had been sexually assaulted. He said that he only noted a discharge from her birth canal, and he wanted to establish whether or not there was semen or infection. He explained that discharges are common and are a common complaint among females. He attributed the death to heart failure. He stated that there could have been mental trauma, which prompted the heart failure. He explained that sexual assault could trigger or cause trauma and eventually death. He said that there was need to rule out sexual assault, hence the samples that he took and handed over to the investigating officer. He stated that he never saw, thereafter, a report from the Government Chemist on that. He said that he advised the investigating officer to carry out a deoxyribonucleic acid (DNA) test,



- but he was not aware whether blood samples were taken from the accused, adding that there could be no DNA match without samples from the 2 parties. He further explained that a person could die from depression, if they had not taken the medication. He said depression was a mental disease, and can lead to loss of memory. He said that he did not find any medicine in the stomach of the deceased, and that was 1 of the reasons for which he took specimens for analysis. He said he was not able to determine depression, but said depression could lead to death, and rape could lead to depression in a woman. He explained at post-mortem, the pathologist picks out the physical things, and discharge was one of them, which could arise from rape without a condom.
14. PW11, Apolo Khasakhala Chuma, was the person on whose farm the deceased was found lying on the morning of October 2, 2013. He explained that there was a rural road running near his farm, and that on that morning he was informed by some women that there was a woman lying on his farm. He rushed there. He found her. She was not talking. He rushed to and made a report to the likuru. When he and the likuru got to the scene, they found villagers placing the woman on a motorcycle to remove her to hospital.
 15. PW12, Lornah Ayako Oketch, was a relative of the deceased. She testified that the deceased, who was her cousin, visited her on September 26, 2013, at Kibos, where she worked, as she was due for a doctor's appointment. After seeing the doctor, she stayed with her until October 1, 2013. She left her at home, as she went to work, but when she came back she did not find the deceased, and when she asked around no one appeared to know where she had gone. She later got information that the deceased had died, and her body was at St. Mary's Hospital mortuary. She could not tell whether the deceased got home at all, at Butere, before she was killed.
 16. PW13, Atsulu Mohamed Issa, testified that he was a pillion passenger on a motorcycle being ridden by the 1st accused on October 1, 2013. He said that the 1st accused picked a woman along the way, whose name he did not know. The 1st accused talked to her and they agreed on the fare. He alighted along the way, and left the 1st accused with the deceased, who had said that she was going to Butere. 2 days later he was contacted by the police, who wanted him to tell them what had transpired.
 17. PW14, Alfred Etalany Chiliswa, was among the persons who were drinking chang'aa at the home of PW2, on October 1, 2013. The 1st and 3rd accused persons came to the home, and found him there. They were on 2 motorcycles. He said that PW3 then called PW2, and informed her that a girl, who was outside there, was the one who used to go out with the 2nd accused. Whereupon the 1st accused left, and came back with the girl, who fell on the floor. He asked the 1st accused what had happened, as the girl looked ill, and he said that she was his customer. He left the chang'aa place and went home. The next morning, he saw the 1st accused carrying the same girl on his motorcycle. He said that he later heard that the girl was killed. He explained that the 1st and 3rd accused arrived at the chang'aa place at about 7.45 PM, and it was just the 2 of them. He said the 2nd accused was present, but he did not arrive together with the other 2 accused persons. He said that he saw the deceased entering the chang'aa place, and she looked like someone who was ill.
 18. The case for the prosecution was closed on November 1, 2022, after the Republic was unable to avail the investigating officer. None of the parties made submissions, on whether a case to answer had been established or not.
 19. At this stage, I am required, by law, to decide whether to put the accused on their defence or not. I should determine whether the Republic has made out a prima facie case to warrant putting them on their defence. What amounts to a prima facie case was stated in *Ramanlal Trambaklal Bhatt vs. R* (1957) EA 332 (Sir Newnham Worley P, Sir Ronald Sinclair VP & Bacon JA), to be what a reasonable court, properly directing its mind to the law and the evidence, would convict on, if no explanation



was offered by the defence. See also [Republic vs. Silas Magongo Onzere alias Fredrick Namema](#) [2017] eKLR (Nyakundi, J).

20. The elements of the offence of murder, as set out in section 203 of the *Penal Code*, are the fact of death, the cause of the death, the role of the accused person in the cause of the death, and the fact that the death is caused by the accused with malice aforethought.
21. From the material before me, there is prima facie proof that the deceased in fact died. 2 of the witnesses were her relatives, who identified her body for autopsy purposes; and PW10 was the pathologist who conducted the post-mortem on her body, after identification.
22. On the cause of death, PW10 opined that it was due to a heart attack. He did not note any physical injuries on the body, both internally and externally. The pathologist picked out 3 things: froth in the lungs, spots on the heart and a discharge in the birth canal. He could not tell whether the deceased had depression. He did not indicate whether or not there was evidence of sexual assault, although he mentioned that the discharge could have had something to do with it. To confirm it or rule it out, he took samples from the body for chemical analysis, and gave them to the investigating officer. The investigating officer did not testify, and, therefore, there was no evidence on what he did with the samples. Equally, no chemical analyst testified. PW10 stated that the heart attack could have been triggered by depression, and opined that sexual assault could be a trigger of such depression. However, without examination of the samples taken, there is no evidence on what could have triggered the depression that caused the heart attack. There is a gap, therefore, in the medical evidence, as there is only evidence that death was caused by a heart attack, which does not just happen, for there must be something that triggers it. Culpability would attach only upon evidence being presented on the trigger of the heart attack being linked with an act by the accused.
23. On whether the accused caused the death, or had a role in the causation, there is no evidence, flowing from what I have found and held above. Culpability can only attach upon evidence that the trigger for the heart attack had anything to do with some act by the accused persons, whether singly or severally. There is no evidence that the accused persons did something to her that could have triggered the heart attack. The post-mortem report was not conclusive on whether or not the deceased was sexually assaulted. There was the discharge on her birth canal. However, PW10 did not attribute it to sexual assault. He stated that he took samples to establish whether or not the discharge could be linked to sexual intercourse. He pointed out that even then, there was need to take blood samples from the accused, for analysis also, so that upon the testing of the samples taken from the deceased, to link the accused to whatever would have merged from the analyses of those samples. The prosecution did not present evidence on whether the samples from the deceased were subjected to analyses, and, therefore, there was no explanation for the discharge, and without such explanation, there was nothing linking the accused to the discharge. The analysis would have been critical, given that it was said, by PW10, that sexual assault or sexual contact without consent could trigger trauma in females, which could cause depression, which could trigger a deadly heart attack.
24. There was evidence that the deceased suffered from depression. She had visited a doctor over the same on September 27, 2013. She disappeared from Kibos, on the day when she was sighted in Butere, without informing PW12. She was seen by PW13, minutes before she was seen at the home of PW2, and PW13 said that she was talking as she could negotiate fares, but PW2 and PW14 described her as weak and ill. The prosecution ought to have led some evidence on her medical history, to shed some light on how badly she was doing, and on the medication she was under, and on what the consequence of not taking those drugs could be.



25. It could be that she encountered the 1st accused when she was not badly off, and he did something to her, either before they went to the home of PW2 or after they left the home. It could also be the case that she was doing very badly, with respect to her depression, so much so that she was seen visibly unwell at the home of PW2, hence she died of natural causes. The burden was on the prosecution to lead evidence that would have sealed any gaps, so that it could be ruled out that she died of natural causes, and that she died due to an act or conduct of either 1 or all the accused persons.
26. The last consideration is on malice aforethought. Whether there was malice aforethought on the part of the accused would depend on the cause of death being certain, for criminal liability cannot attach on an accused person, where the cause of death is not determined, for the role of the accused in the causation is linked to the cause of death being determinate, and the question of malice aforethought depends on both. In this case, the cause of death is clear, heart attack, but there ought to be proof of the trigger of the said heart attack, for it cannot just happen. The trigger could be natural causes or it could be induced by conduct of a second person. In this case, the trigger of the heart attack was not brought out. It was not established whether it was the depression condition that the deceased was battling since 2006, which would have pointed to a natural cause, or whether it was sexual assault by the accused, which would have pointed to culpability on their part. I have pointed out above, that the prosecution could have done more. By getting the samples that PW10 had harvested analysed, and the results placed before the court, to confirm or rule out sexual assault, and also presenting evidence on the medical history of her depression, by possibly calling the doctor who had attended to her on September 27, 2013. The failure to do both, weakened the case by the prosecution, and the case against the accused persons now rests only on suspicion, which is not enough to found a conviction.
27. Of course, going by the material presented, it would appear that the person to be suspected ought to be the 1st accused. He is the boda boda operator who was seen ferrying the deceased, after they negotiated and agreed on a fare with her. He did not take her to her destination, instead she ended up with him at a place where chang'aa was being sold. He left that place with her, and there was no evidence as to what happened thereafter. The evidential burden shifted to him to explain what happened after he took her away, however, that did not amount to shifting the legal burden of proof to him. The role of the other accused is tenuous. The 2nd accused was only featured at the home of PW2. He did not bring the deceased to the scene, his only link to her was his unsuccessful attempt to take her away from the home. The 3rd accused was with the 1st accused when he came to the home of PW2, and when he left, although PW13 did not see the 2 of them together when the 1st accused picked up the deceased. None of the witnesses mentioned the 4th accused in any of the scenes that they testified on.
28. In the end I find and hold that I do not have, before me, material upon which I can convict the accused persons, were they not to offer any explanation. I am not satisfied that a prima facie case exists, to warrant their being put on their defence. That being the case, I, accordingly, find the accused, Ramadhan Otuoma, Saidi Musungu Asman, Kelvin Amo Mapesa and Charles Mwalo Asera, not guilty, and acquit them, under section 322 of the *Criminal Procedure Code*, Cap 175, Laws of Kenya, of the charge of the murder of Lillian Atieno Odera, contrary to section 203, as read with section 204, of the *Penal Code*. They shall be set free, should they be still in remand custody, unless they are otherwise lawfully held.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
.....24th DAY OFMarch..... 2023**

WM MUSYOKA

JUDGE



Mr. Erick Zalo, Court Assistant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Osango, Advocate for the 1st and 2nd accused persons.

Mr. Elung'ata, Advocate for the 3rd and 4th accused persons.

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