



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Odhiambo & 3 others (Criminal Case E018 of 2021)
[2023] KEHC 20286 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E018 OF 2021
WM MUSYOKA, J
JULY 17, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

BONIFACE ODHIAMBO 1ST ACCUSED

MUSA OLWETE 2ND ACCUSED

EVANS OCHIENG MLEFU 3RD ACCUSED

ROBERT MURUAI KWESI 4TH ACCUSED

JUDGMENT

1. The accused herein, Boniface Odhiambo alias John Opama, Musa Olwete, Evans Ochieng Mlefu and Robert Muruai Kwesi are charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya, the particulars being that on September 12, 2021, at Kiwanja Ndege area, Amerikwai Sub-Location, South Teso Sub-County, within Busia County, with others not before the court, they jointly and unlawfully murdered Anne Achieng Mung'ayo.
2. 11 witnesses testified. PW1, Boniface Ojiambo Osogo, testified that the 1st accused person came to his home, claiming to be a meter reader, sent by Kenya Power. As he was suspicious, he telephoned PW2, of Kenya Power, who came and they took him to the Kenya Power offices, where it was established that he was an impostor. He was taken to the police, who searched him, and a bag, that he was carrying, and a national identity card belonging to the deceased, were found on him. PW2, Elyas Obuyu Malomba, was a brother of the deceased. He was called by PW2 to his home, to confirm whether the accused was a Kenya Power employee. As he could not verify that fact, he took the 1st accused to the Kenya Power offices, where the in charge said he was not, and asked them to take him to the police, where, upon being searched, he was found with a national identity card belonging to the deceased. PW3, Selina Okinda Sanya, had spent the night with the deceased, at her home, before she was killed that



- morning. She left the deceased at her house, and went to church, and when she came back, she found that she had been killed. PW4, No 63582 Police Sergeant Barakali Luli, and PW5, No 61401 Police Constable Elkana Rono, arrested the 1st accused, on September 17, 2021, after he was brought to the police station, by PW1 and PW2, on claims that he was pretending to be a Kenya Power metre reader. When they searched him, they found him in possession of a mobile phone and a national identity card belonging to the deceased. The matter was referred to the Directorate of Criminal Investigations.
3. PW6, Dr Griffins Atika, conducted a post-mortem on the body of the deceased. There was a deep cut on the left side of the neck. He opined that the cause of death was haemorrhagic shock, due to excessive bleeding from that neck injury. PW7, No 61853 Police Corporal Gabriel Koskei, visited the scene of the murder of the deceased, on 12th September 2021. He found the body lying in bed, face up, with a cut on the neck, and took photographs. PW8, Gloria Joyce Akinyi, was a daughter of the deceased. She got information about the incident, and when she got to the home of the deceased, she found that the body had been moved to the mortuary. She identified the mobile phone and the national identity card, recovered by the police, as belonging to the deceased. PW9, No 232150 Chief Inspector of Police David Ng'etich, recorded a confession from the 1st accused. PW10, No 55706 Police Sergeant Samson Biwott, was the investigating officer. He detailed the steps he took in the course of the investigations. PW11, No 85522 Police Constable Douglas Adika Ndonye, was from Safaricom. He extracted and analysed call data from a phone belonging to the deceased, allegedly recovered from the 1st accused.
 4. The accused were found, by Karanjah J, to have a case to answer, and were put on their defence, in a ruling delivered on February 14, 2023. They opted to give sworn statements. The defence hearing happened on March 22, 2023, before me.
 5. The 1st accused testified as DW1. He stated that on September 17, 2021, he was arrested at his farm, where he was working. He was given a bag to hold, while he was being transported to the police station. He stated that the bag did not contain anything belonging to him. The bag was searched, at some point, and was found to hold documents, a mobile phone and a national identity card. He stated further that the police also asked him to sign documents, whose contents he did not know, and he signed the same, after he was forced to. He said that he was tortured, he was assaulted, his testicles tied with a rope, and the rope was pulled, and his fingers struck with nails. He said that he did not know his co-accused, and that he met them for the first time in court, when they were arraigned. He stated further that he did not know the deceased, and had no reason to kill her. He said that he could not recall where he was on September 12, 2021.
 6. The 2nd accused testified as DW2. He said that he was arrested on September 19, 2021, at his home. He was not informed of the reason for his arrest, and he only got to know the reasons when he was charged in court. He said that he did not know the deceased, nor her home. He said that he did not know the 1st accused, and was unaware that he had confessed. He said he met DW1 for the first time in court. The 3rd accused testified as DW3. He said that he too was arrested at home, on September 19, 2021. He said he did not know the deceased, nor where she came from. He said that he spent the September 12, 2021 at the market buying groundnuts. He said that he did not know DW1, and that he saw him in court for the first time. DW4 is the 4th accused. He said that he was arrested the same day with DW2 and DW3. He said that he did not know DW1, and did not know about the confession that he allegedly made. He met him for the first time in court. he said that he could not recall where he was on September 12, 2021, adding that he must have been up and about doing his usual chores. He said that he knew nothing about the killing on September 12, 2021.
 7. The parties submitted in writing.



8. On who caused the death of the deceased, the prosecution points at the confession by the 1st accused, and submits that the answer to who did it lies there. On malice aforethought, it is submitted that the very fact of stabbing the deceased on the neck meant that the accused knew or ought to have known that such act would or could cause death or grievous harm, and, therefore, the accused persons had the requisite malice aforethought. On circumstantial evidence, it is submitted that there was no direct evidence linking the accused to the death, but it had been demonstrated that the 1st accused was involved in a conspiracy to murder and the ultimate murder, and *Abmed Abolfathi Mohammed & another vs Republic [2018] eKLR* and *Republic vs Jackson Namunya Tali [2014] eKLR* (Ombija, J) are cited. The doctrine of recent possession of stolen property is also cited, to submit that the 1st accused was found in possession of items recently stolen from the deceased, and he had offered no reasonable account for being found in possession. The prosecution relied on *Erick Otieno Arum vs Republic [2006] eKLR* and *Malingi vs. Republic [1988] eKLR*. On the alleged confession, the prosecution cited section 25(A)(1) of the *Evidence Act*, Cap 80, Laws of Kenya, the Evidence (Out of Court Confessions) Rules, 2009, and *Thomas Mwanzia Komo vs Republic [2015] eKLR*, to submit that the confession complied with the law.
9. On the part of the accused, it is submitted that there was no direct evidence linking the accused persons to the crime, and that the only evidence the prosecution is relying on was the alleged possession by the 1st accused of certain items, alleged to have belonged to the deceased, yet there was no concrete evidence that the said items had actually been taken from the deceased or her house by the 1st accused person, at the time of her death or immediately after that. On the evidence on call data, it is submitted that the data was allegedly mined before the mobile phone was allegedly recovered from the deceased. It is submitted that the police were already in possession of the items allegedly recovered from the 1st accused, as at the time they were arresting him on September 17, 2021. It is further submitted that the call data did not link any of the accused persons to the mobile phone. It is submitted that, other than the confession, there was no other evidence linking the 2nd, 3rd and 4th accused persons to the offence. *Choge vs Republic [1985] KLR 1*, *Boru Halkano Dido vs Republic [2019] eKLR* (Chitembwe, J) and *Waringa vs Republic [1984] eKLR*, are cited with respect to confessions.
10. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, it was with malice aforethought.
11. On whether the deceased died, I have the evidence of PW3 and PW8. PW3 was the first to see her dead body, while PW8 identified the body to PW6 for post mortem purposes. PW6 conducted autopsy on the body of the deceased, and produced the post-mortem report. The cause of death was said to be due to haemorrhage shock, caused by excessive bleeding from the deep neck cut wound. What is in contention is who stabbed the deceased; and whether that person acted with malice aforethought.
12. None of the witnesses presented witnessed the stabbing. The case against the accused persons is, therefore, circumstantial. It starts with the 1st accused being allegedly found in possession of a mobile phone alleged to belong to the deceased, and a national identity card belonging to the deceased. According to PW1, PW2, PW4 and PW5 all that happened by chance. The prosecution case is that the 1st accused presented himself at the home of PW1, allegedly to read an electricity metre there, on behalf of Kenya Power. PW1 got suspicious, and called PW2, a Kenya Power employee, to come and confirm whether the 1st accused was a genuine employee of Kenya Power. They took the 1st accused to the Kenya Power offices, where it was established, that he was not employed there, and was an impostor, and it was advised that he be taken to the police. At the police station, he was arrested, and searched, and that was when the incriminating items, belonging to the deceased, were found on him. According to the 1st accused, that was not how it happened. He said that he was not at the home of PW1, reading a power



meter, from whence the matters were escalated to the police. Instead, he was arrested at his home, by the police, and was taken to the police station. It was in the course of being transported to the police station, that a bag containing the said items was planted on him by the police.

13. So, I have these 2 contrasting tales by the prosecution and the defence. Which one should I believe? It sounds rather fantastic that the brother of the deceased would, perchance, stumble on a person who killed or was party to the killing of his sister, when the suspect is arrested over something else. Was this a scheme by the police, to explain the arrest of the 1st accused in a manner that demonstrates that he had possession of incriminating material, using PW2, and his friend or acquaintance, PW1? I cannot tell, for the only material that I have is what was presented by the prosecution. 4 witnesses were marshalled to prove that. The 1st accused gave a contrasting version of how he got arrested. There is consistency in the version by the prosecution.
14. The burden of proof lies throughout on the prosecution. See *Woolmington vs Director of Public Prosecutions [1935] AC 481* (Viscount Sankey LC) and *Dorcas Jemutai Sang vs Republic [2018] eKLR* (Waki, Mwera & Murgor, JJA). Was there burden on the 1st accused, to provide plausible evidence that he was not arrested in the manner narrated by the police? As part of his defence, there was an evidential burden to give an explanation, and if he chose to present a counter-narrative, to provide a reasonable explanation or account of that arrest, then he had a burden to adduce evidence to support the arrest in the manner that he narrated, rather than in the manner narrated by the police. It was said, in *Peter Wafula Juma & 2 others vs Republic [2014] eKLR* (Gikonyo, J), that evidential burden is the basis for the practice in criminal law, where the trial court makes a ruling as to whether the prosecution has adduced prima facie evidence, to warrant the accused person being placed on his defence. Where a ruling is made, finding and holding that a prima facie case has been established, and the accused is found and held to have a case to answer, and is put on his defence, an evidential burden is properly created against the accused, and evidential burden shifts to the accused person, to adduce evidence in rebuttal. When I weigh the account by the 1st accused as against that by the police, I am inclined to believe that by the police. The rebuttal evidence, by the 1st accused, in my evaluation, does not displace the prima facie case established by the prosecution. That would then mean that the 1st accused was indeed found in possession of the incriminating items.
15. Being found in possession of incriminating items, invites the application of the doctrine of recent possession. The items, in this case, were allegedly stolen from the deceased, on September 12, 2021, in the incident where she lost her life. PW3 indicated that some items had been stolen from the premises, and she mentioned the mobile phone of the deceased as having been among the items missing. PW8 identified the mobile phone and the national identity card as belonging to her mother, the deceased. It follows, therefore, once it is found and held that the 1st accused was in fact found in possession of the items, and that they had been stolen from the deceased, then the burden shifted to him, to explain how he came to possess the items. The explanation that he gave is tied up with his denial of the version by the police on how he was arrested. I have disbelieved his version, and believed that by the police, and it follows that his claim, that the items were planted on him at his arrest, does not hold. He has, thus, not accounted for that possession.
16. Tied up with that is the confession that was allegedly recorded from him by PW9. It is this confession that brings the other accused persons into the matter, and without it the charges against them cannot hold, for there is no other evidence that points to them. The 1st accused has recanted the confession. He concedes that he signed it, but argues that the same was procured by duress, in the sense that he was tortured to coerce him to sign it. It is within his rights to recant or repudiate the confession. However, the practice is that such a recanted or repudiated statement has to be subjected to trial within a trial, to test or evaluate whether or not it was obtained through a lawful process. When PW9 began to testify on



it, and sought to produce it as Prosecution Exhibit Number 5, Mr. Were, the Advocate for the accused persons, did not object, instead he said that he would cross-examine PW9 on it. From the record, during cross-examination of PW9, the issue of the torture of the 1st accused was not raised. The issue of the 1st accused being bound with ropes on his hands and legs, and his testicles being tied and pulled, and his hands hit with nails, was not raised during the cross-examination of PW9. These issues would and should have been subjected to a trial within a trial. It was too late to raise them at the defence stage, for the prosecution had, by then, closed its case. The only issues, that PW9 was confronted with, were with respect to the 1st accused being removed from the police station blindfolded, and taken to Tangakona, and forced to sign the confession. When he took to the witness stand, to make his defence statement, the 1st accused made no mention of being blindfolded, and taken to Tangakona. His defence against the confession can only be treated as revolving.

17. How should I treat the said confession? The alleged confession was extracted from the 1st accused after his arrest, and before arraignment. The confession statement was allegedly recorded the same day that the 1st accused was arrested. Without a trial within a trial being conducted, any challenge to the authenticity of the confession statement would be lost, and the court ought to treat it as having been properly recorded, in accordance with the Evidence Act, Cap 80, Laws of Kenya, and the relevant Rules. In that statement, the 1st accused recorded how the 2nd accused was the mastermind of the killing, how it was executed, and how the 1st accused ended up having possession of the national identity card and mobile telephone of the deceased. That confession links all the accused persons to the death of the deceased.
18. The stabbing act was attributed, by the 1st accused, in the said confession, to the 2nd accused. The confession discloses all the 4 accused as accomplices. However, the confession states that it was the 2nd accused and his brother, the 4th accused, who got into the house, leaving the 1st accused and 3rd accused outside. The 2nd accused later emerged with a knife, which had blood on it, and after the 1st accused raised issue with that, the 2nd accused went back into the house, and wiped the blood off the knife. From that, it would appear that the actual killing was done by the 2nd accused. However, the doctrine of common intention would come into play, and all the 4, being engaged in a common enterprise, would be deemed to have had a common intention, and the acts of the 2nd accused, according to the confession, bound them.
19. However, a confession made by an accused person against his co-accused is seen as weak evidence upon which to convict them, in the absence of corroborative evidence. See Anyangu & others vs Republic [1968] EA and Peter Kinyua Ireri vs Republic [2016] eKLR (Waki, Kiage & Kantai, JJA). The court may convict, despite lack of corroborative evidence, but it must warn itself of the dangers of doing so. In Wilson Kinyua & another vs Republic [1980] eKLR (Madan, Miller & Potter, JJA), it was stated that the evidence of an accomplice needed to be corroborated, before it could form basis for convicting the co-accused. Was there corroboration in this case? Other than the confession, there is no other evidence which touches on the 2nd, 3rd and 4th accused persons. It would be dangerous and foolhardy to convict the said 3 accused persons, on the basis of that confession, without more. Such conviction would be unsafe, and, consequently, the 3 accused persons are entitled to benefit of the doubt.
20. Did the accused have malice aforethought? A person who stabs another in the manner that the deceased was, can only have intended to cause her death, or to cause her grievous harm, or knew or ought to have known that such an injury could cause death or grievous harm. There was, therefore, malice aforethought.
21. There was the issue of call data from the mobile phone belonging to the deceased, allegedly recovered from the 1st accused. It has been argued that PW11 was asked to and extracted data from the mobile



phone, before the same had been allegedly recovered from the 1st accused, and it was submitted that that suggested that the police had possession of the said mobile phone, before it was allegedly recovered from the 1st accused, and that, it was submitted, implied that the police had planted the mobile phone on him. From the testimony of PW11, and the documents he produced, it is not clear whether he extracted the data from the mobile phone itself, or from records held by Safaricom. A question as to what he used to extract the data was not put to him, and he never said, at any time, that the mobile phone was ever given to him, and that he got the call data from the mobile phone itself. The suggestion, therefore, that PW11 had the physical mobile phone with him, when he extracted the call data, is without foundation.

22. In view of everything stated above, I do hereby, find the 1st accused herein, Boniface Odhiambo alias John Opama, guilty of the offence of the murder of Anne Achieng Mung'ayo, contrary to section 203 of the Penal Code, as read with section 204 thereof, and I convict him accordingly, under section 322 of the *Criminal Procedure Code*, Cap. 75, Laws of Kenya. I, however, find the 2nd, 3rd and 4th accused persons, that is to say Musa Olwete, Evans Ochieng Mlefu and Robert Muruai Kwesi, not guilty of the said offence of murder, and I accordingly acquit them, under section 322 of the Criminal Procedure Code. The 2nd, 3rd and 4th accused persons shall be set free from remand custody, unless they are otherwise lawfully held.
23. For the purposes of sentencing, of the 1st accused, I direct the Busia County Director of Probation and Aftercare Services to look into the antecedents of the 1st accused person, interview the family of the victim and the community, and file a report thereafter, within 30 days. The matter shall be mentioned thereafter, for compliance.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 17TH DAY OF JULY 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Mayaba and Mrs Chepkonga, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Were, instructed by Gabriel Fwaya, Advocate for the accused persons.

