



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 10 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

DENNIS ODHIAMBO ABONYO.....ACCUSED

JUDGMENT

1. Dennis Odhiambo Abonyo is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 17th day of June, 2011, at Kogelo-Kalanya area, in Homa Bay District of Homa Bay County, murdered Dorcus Atieno Obel.
3. The prosecution case was that the accused fatally stabbed the deceased and then set her body on fire in her house.
4. Dennis Odhiambo Abonyo, the accused, contended that he did not know the deceased and that at the time of the alleged offence, he was in Nairobi where he was working.
5. The issues for determination are:
 - a) Whether the accused was in a relation with the deceased;
 - b) Whether he was present at the scene at the time of the offence or not; and
 - c) Whether the offence of murder has been proved against him.
6. Dorcus Atieno Obel, the deceased herein was a widow. After the death of her husband, she continued to reside in her matrimonial home. According to the evidence of Margaret Okeyo Ondiek, her mother-in-law PW1, the accused inherited her and the two were staying in her home. This fact was confirmed by the evidence of Thaddeus Otieno Oroba (PW2), Titus Okeyo Osimbo (PW3) and Charles Adibo Midibo (PW5).
7. I therefore find that, in spite of the contention by the accused that he did not know the deceased, the deceased and the accused were cohabiting.
8. The accused in his defence pleaded an alibi. In the case of **Kiarie vs. Republic [1984] KLR** where the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

I am aware that throughout the burden remains on the prosecution. I will therefore endeavour to find whether the prosecution discharged this burden.

9. The evidence of Margaret Okeyo Ondiek (PW1) was that the accused was that on the evening of 16th June, 2011 the accused was in the home. In the afternoon of 16th June, 2011 Thaddeus Otieno Oroba (PW2) testified that he had seen the accused in the home. His evidence is that his home was about 50 metres to the home of the deceased. Charles Adibo Midibo (PW5) also testified to have seen the accused that evening in the home of the deceased.

10. Though the accused contended that he was away in Nairobi, his alibi was displaced by the evidence on record. I accordingly dismiss this defence.

11. When the offence was committed, there were no eye witnesses. The evidence against the accused is therefore circumstantial. Circumstantial evidence was restated in the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

The Court of Appeal in the case of **Sawe vs. Republic [2003] KLR 354**, held as follows:

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

12. The evidence of Margaret Okeyo Ondiek (PW1) and that of Thaddeus Otieno Oroba (PW2) was that though the house was bolted from inside, the bedroom window was open. PW2 added that the window was big enough for a person to enter or leave through.

13. Titus Okeyo Osimbo (PW3) testified that when the fire was quenched, he entered with police officers. His evidence was that the body of the deceased was covered with parts of a mattress and cupboard which had burnt and a knife was stuck on the left side of the body.

14. This gave an impression that the deceased was stabbed before her body was set on fire and the perpetrator escaped through the open window.

15. Margaret Okeyo Ondiek (PW1) and Charles Adibo Midibo (PW5) testified of a troubled relationship between the accused and the deceased. PW1 testified that the deceased constantly complained to her that the accused threatened severally to kill her. Indeed PW5 testified to have been invited to arbitrate between the two.

16. After the deceased was found dead, the accused went underground until when he was arrested six years later. This conduct is not compatible with innocence. The entire evidence on record is incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

17. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

18. The evidence on record does not indicate whether the accused had malice aforethought or not. We may not know what transpired between the two before the killing. The prosecution has not therefore proved malice aforethought against the accused. I therefore, find that the prosecution has not proved the offence of murder against the accused. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit him of the charge of murder. I find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED AND SIGNED AT HOMA BAY THIS 2ND DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE