



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. E006 OF 2020 [MURDER]

STATE.....PROSECUTION

VERSUS

JOHN OCHIENG OCHIENG.....ACCUSED

JUDGMENT

Introduction

1. The accused person **JOHN OCHIENG OCHIENG** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of Laws of Kenya). The particulars of the Information dated 18th November, 2020 are that on the 20.10.2020 at around 2030hrs at Simur Village, Simur sub-location, in Ugenya Sub-County, Siaya County, the accused murdered one **CATHERINE ANYANGO OCHIENG**.
2. The accused pleaded not guilty to the charge. The prosecution called five witnesses to establish a prima facie case against the accused person who was placed on his defence. The accused gave unsworn testimony in defence and called no witness.
3. The evidence adduced by the prosecution witnesses can be summarized as follows:
4. **PW1 JULIUS OCHIENG**, the deceased's husband and father to the accused testified that on the 20.10.2020 at 7.30pm he returned home to find that the cows were still outside the homestead which was shocking because he had left people at home. He testified that he then saw the accused running and looking shocked and unresponsive when he called him.
5. PW1 testified that he went to the door of his house and opened it which alerted his wife, the deceased, who called out to him and told him, "*your son Ochieng has killed me. He has given me poison.*" PW1 then called his nephew David Agar and informed him of what had happened upon which his nephew assisted in seeking for help. He stated that Alice and Wilfrida also arrived. It was his testimony that it had rained heavily and that milk was bought from the shop and given to the deceased who vomited. He informed the people that the accused was still around so his nephew went out and looked for the accused person and managed to find him before taking him to Siringa Police Post where the Ukwala Police picked him up.
6. PW1 testified that the deceased told him that the accused took her from her house, raped her, returned her to the house where he strangled her using a cross chain and gave her gladiator poison to drink. It was his testimony that the deceased informed him that the accused raped her claiming that it was her who had chased away the accused person's wife. PW1 testified that it was raining heavily so they helped the deceased onto a motorcycle to hospital at Ukwala Sub-County.
7. PW1 further testified that the deceased died after one week, on the 27.10.2020. He testified that his wife and the accused were in very good terms and that on that specific day, the deceased had made lunch for the accused.
8. In cross-examination, PW1 stated that on the 20.10.2020 he left home at about 3pm for a walk at the centre leaving his wife in the homestead with the accused and PW1's elderly mother who was in her home that was 15 metres away. He further stated that he could not remember when he had recorded his statement with the police but that he freely wrote a further statement on the 28.10.2020 when he realized that he had previously not indicated that the accused was running away from his house when PW1 was returning home.
9. PW1 further reiterated that he was shocked when he arrived home and found the cows outside and found his wife who told him that the accused had "killed her". He further stated that the cross chain was removed from the deceased's neck by the police officers. He stated that his wife died of poisoning but that he saw evidence of strangulation on her neck.
10. He reiterated that he knew that it was the accused who killed his wife as he saw him escaping from the house where he found his wife. He further stated that though he did not witness the accused poisoning the deceased, he was sure the accused poisoned his wife as the accused also took the same poison and was hospitalized. He stated that the deceased recorded her statement on the 23.10.2020 while she was

hospitalized.

11. **PW2 WILFRIDA OWITI** testified that on the 20.10.2020 at 8pm she was at her house when PW1's nephew, David, arrived with Alice and told PW2 that PW1 was calling her and that when she arrived at PW1's house, she found the deceased lying in bed vomiting poison. She did first aid to the deceased by giving her sugar and milk and that the deceased was now vomiting heavy blood and food. She saw clothes scattered all over in the deceased's bedroom. She advised PW1 to settle and watch over the deceased overnight as it had rained heavily making the roads muddy and impassable. PW2, in the company of Alice and David then set out to look for the accused whom they found in a neighbour's house, sitting in the bedroom on a bed and behind a curtain after which David called the police who arrived and interrogated the accused. She stated that the accused revealed to the police that he had bought the poison from the center and had already thrown away the bottle which they were able to trace after the accused had been taken to the police.

12. PW2 later visited the deceased in hospital on a Thursday and found her having closed her eyes but that the deceased was able to identify PW2 as Nyadoto. It was her testimony that the deceased told her that the accused beat her up, picked her to his house where he raped her. She inquired from the deceased whether she had informed the doctors but the deceased started crying. PW3 informed the doctors of what the deceased had told her and the doctors took the samples/specimen from the deceased.

13. In cross-examination, PW2 stated that she did not converse with the deceased on the 20.10.2020 but on the 22nd October 2020. She stated that she could not recall when she recorded her statement with the police though it showed that she recorded it the same day the deceased passed on, on the 27.10.2020. She responded to a question by counsel that statement did not include the deceased's revelation to her on what the accused had done to her. She reiterated that the accused also took poison and was taken to hospital. She stated that she had known the accused for about 2 years but she could not tell whether he had disagreed with the deceased and further that she could not tell if the deceased took the poison on her own volition but heard from the deceased on what had happened to her.

14. In re-examination, PW2 stated that when she visited the deceased in the hospital, the deceased told her to tell the doctors what had happened and that PW2 also witnessed the doctors call the police who went to the ward and recorded the deceased's statement.

15. **PW3 DR. BIKO OPIDI** carried out the autopsy on the deceased's body at Ukwala Sub-County Hospital Mortuary on 29.10.2020. It was his testimony that the body he examined was that of an African female of good nutrition whose body was preserved in formalin and whom rigor mortis had set in. He stated that the time of death was 3-5 days earlier. On examination of the deceased's respiratory system he noticed the throat was inflamed and that there were fibrous tissues in the chest walls indicating inflammation. The lungs were normal. His examination of the cardiovascular system revealed that the heart-pericardial space and great vessels were normal. He found a torn blood vessel in the iliac region. He examined the digestive system and found the small intestines hyperemic indicative of blunt trauma whereas the liver was massively enlarged indicative of chronic illness. He further stated that there was ecchymosis in the pelvic region indicative of blunt trauma. In the Genito-Urinary system, there was fibrous over the uterus indicative of pelvic inflammatory disease and that the kidney when removed, looked pale. He stated that the head was normal and that there was no intercranial hematoma in the nervous system. He further testified that the spinal column and spinal cord were both normal. It was his testimony that there were ligature marks showing strangulation by another person and that the multiple injuries seen and other running conditions could have compounded the death of the deceased. He stated that the injuries showed an assault.

16. As a result of his examination, he opined that the cause of death was assault with multiple injuries with poisoning. He stated that a toxicological examination was required to ascertain poisoning as a cause of death so he removed the whole stomach, liver, kidneys, spleen and small intestines. He produced the post-mortem report as P Ex 1.

17. PW3 further testified that prior to her death, the deceased had been admitted in the Ukwala sub county hospital alleging to have been raped on the 20.10.2020 by her step-son after a domestic quarrel. He testified that she had no tear or stains on the cloth. It was his testimony that the physical examination revealed that she was sick looking with ligature marks on the upper neck and bite marks on the posterior neck. He further testified that at the time of admission, the deceased's pupils were constricted and not reacting to the light.

18. He further testified that the thorax and abdomen of the deceased were tender and an x-ray showed dilated loops of intestines. He also noted that parasythesis and blood were in the abdomen so the deceased was send for surgical intervention at Siaya County Referral Hospital. It was his testimony that the approximate age of the injuries was one week and the probable cause of the injuries was:

- a) Organ Phosphate poison
- b) A string ligature causing strangulation
- c) Blunt object causing abdominal injuries.

19. It was his testimony that the deceased received treatment of antibiotics, atropine, intravenous fluids and omedrazole and that he assessed the degree of injury as grievous harm. It was his testimony that there was whitish vaginal discharge on the opening of the vagina which when placed under the microscope revealed red blood cells indicating inflammation, as well as tears on the lateral walls of the vagina while the cervix had a lesion that was bleeding to the touch. He further testified that he found the nature of the offence to be rape. He further stated that the vaginal examination was done 30 hours after admission and about 38 hours after the rape hence the sperms could not be found. He produced the P3 form for the deceased dated 26th October, 2020 as Pexhibit 2.

20. On cross-examination, PW3 stated that he was not a pathologist, but a doctor who attended to sick patients. He reiterated that he examined the deceased 36-38 hours after the assault and noted that she was very ill. He stated that he filled the P3 form on the 26.10.2020 and concluded that the deceased had suffered grievous harm because of the poisoning and blunt abdominal trauma which required surgical intervention.

21. He further stated that he signed the post-mortem report and stated that there were many causes of death. He further stated that the injuries on the deceased's neck were not fatal but that the abdominal injuries and hyperaemic intestines as well as other causes caused her death. He further stated that the deceased was seriously injured and had constricted pupils indicative of poisoning.

22. In re-examination, PW3 stated that although he was not a pathologist, he was qualified to perform a post-mortem as the post-mortem form provided that a medical officer can perform the post-mortem. He stated that the deceased did not die of natural causes and further that the assault alone could still have caused her death even if poisoning was excluded.

23. **PW4 JANE NABUTUTU WAYA** the Government Chemist from Kisumu testified that she received the following exhibits and Exhibits Memo from Ukwala Police Station on the 2.11.2020.

- a) A black plastic container marked "A" containing liver and small intestines.
- b) A black plastic container marked "B" containing stomach, kidney, liver and spleen.

24. It was her testimony that they were requested to ascertain whether the exhibits had any comparison with exhibit B1. She testified that after her analysis, she found that there was no chemical substance on the exhibits forwarded but noted that the exhibits had been preserved in formalin which was wrong as analysis would only show formalin and not any other chemical and thus even if the deceased was poisoned, the poison would not have manifested. She produced the exhibit memo as PEx3 (a) and the Government Analyst Report as PEx 3 (b).

25. In cross-examination PW4 reiterated that the specimen showed no chemical poisoning as they were preserved in formalin which they noticed on arrival of the specimen. She further stated that she received the specimen on 2.11.2020 and did the report on 12.2.2021.

26. **PW5 NO. 69126 CPL NIXON LUKWA** the investigating officer from Ukwala Police Station testified that on 23.10.2020, the deceased's husband reported that his wife had been seriously assaulted by his son and both were admitted at Ukwala Sub-County Hospital. He testified that in the company of P.C. Sharon Wafula, they proceeded to the hospital where they found the deceased and accused in different wards.

27. It was his testimony that when he visited the deceased in hospital, she narrated to him that on the 20.10.2020 at around 6pm, she was alone in her house when the accused burst into her house armed with a panga, threatening and questioning her why she had chased his wife. That the accused dragged her to his house where he forced her to remove her clothes as he removed his, strangled her then raped while threatening to kill her until she became unconscious and when she came to, she found herself in her house where the accused again accosted her and forced her to drink gladiator pesticide twice before he ran away.

28. It was PW5's further testimony that the deceased told him that shortly after 7pm, her husband arrived and she explained to him what had happened and with the help of members of the public, they managed to trace the accused who hid at a neighbour's home and took him to Siringa Police Post where the police advised them to escort the accused to hospital as it was claimed that the accused had also taken poison.

29. PW5 testified that when the accused was released from hospital, they arrested him and on the 26.10.2020 they registered charges of rape, attempted murder and attempted suicide in Criminal Case No. 530/2020 against the accused. PW5 produced the initial charge sheet in Criminal Case No. 530/2020 as PExhibit 4.

30. PW5 further testified that on the 27.10.2020, the deceased died while undergoing treatment. It was his testimony that the deceased had recorded her statement with P.C. Sharon Wafula on the 23.10.2020 while in hospital, which statement was produced as PEx 5. He further testified that at the hospital, the deceased gave him a piece of string with a cross which she stated that the accused used to strangle her with, which PW5 produced as PEx 6. PW5 testified that when he went to the scene he was able to recover the white bottle of poison – gladiator, which he took to the Government Chemist in Kisumu together with specimens removed from the deceased.

31. In cross-examination, PW5 stated that members of the public informed them that both the accused and the deceased took gladiator. He reiterated that he charged the accused at the Ukwala Law Courts with attempted murder, attempted suicide and rape. He further stated that he was the one who forwarded the exhibits memo and exhibits to the Government Chemist and that he also took the photographs of the deceased whilst she was in hospital.

32. He further reiterated that the deceased's statement was recorded by P.C. Sharon Wafula on the 23.10.2020 in his presence and that the deceased passed on on the 27.10.2020, a week after being assaulted and forced to take poison. He stated that he was aware that the Government Chemist report came out negative. It was his testimony that the deceased's typed statement was not signed. PW5 stated that the charges before the Court in Ukwala were withdrawn after the deceased died. He further stated that he discovered that the deceased and accused had bad blood as the accused claimed that the deceased chased away his wife.

33. In re-examination, PW5 stated that he was present when the deceased's statement was being recorded.

34. On being questioned by the Court, PW5 stated that the deceased's statement was handwritten then typed later. He also stated that the statement was recorded in English though it was given in Dholuo and translated to P.C. Sharon by a patient who was admitted next to the deceased. He further stated that the handwritten statement did not show who recorded the statement.

Defence Case

35. Placed on his defence, the accused elected to give an unsworn testimony and called no witness. The accused stated that PW1 was his

father and that his mother had died in 2003 and that the deceased herein was his step-mother. It was his testimony that he had good relations with the deceased and never quarrelled with her. He testified that he used to work in Kibuye and that on 20.10.2020 he was at Ukwala Health Centre. It was his testimony that on 17.10.2020 he left home to collect parcels and returned at 6.30pm and went to his house. He stated that the deceased called him and gave him porridge after which he returned to his house and rested till the following day.

36. DW1 testified that on 18.10.2020, he found himself in hospital at Ukwala Sub-County where he was arrested and taken to Ukwala Police Station where on the 23.10.2020, he was charged with the offence of attempted murder which case was later withdrawn for lack of evidence. He further testified that on 27.10.2020 his step-mother died. The accused further testified that while in hospital, he was told that he had taken gladiator pesticide which he denied buying. The accused denied killing his step-mother and stated that despite his father's testimony, he had only seen his father on the 17.10.2020 before he went to collect parcels.

Analysis & Determination

37. I have considered the evidence as adduced by the prosecution witnesses and the defense proffered by the accused person and in my view, the main issue for determination is whether the prosecution have proved their case against the accused person beyond reasonable doubt to sustain a conviction for the offence of murder as charged.

38. Section 203 of the Penal Code provides that:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

39. In **Anthony Ndegwa Ngari v Republic [2014] eKLR** the Court of Appeal held that:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

40. In the instant case, this Court is to establish whether the prosecution evidence as a whole proved beyond reasonable doubt the following elements of murder:

- a) ***That there was the death of the deceased and the cause of the said death***
- b) ***That the death was caused by unlawful acts or omission***
- c) ***That the accused committed the unlawful act which caused the death of the deceased***
- d) ***That the accused had malice afore thought***

41. On whether there is proof of death and the cause of the said death, it is not in dispute that the deceased herein died. The testimony of all the prosecution witnesses was that after her attack by the accused, the deceased was taken to hospital on the 21.10.2020 and subsequently succumbed on the 27.10.2020. PW3 Dr. Biko Opidi testified that he treated the deceased prior to her death and subsequently carried out the autopsy on her body at Ukwala Sub-County Hospital Mortuary on 29.10.2020.

42. On what was the cause of death of the deceased, PW3 testified that as a result of his examination, he opined that the cause of death was assault with multiple injuries with poisoning. He further stated that the deceased was seriously injured and had constricted pupils' indicative of poisoning. PW3 reiterated that the deceased did not die of natural causes and that the assault alone could still have caused her death even if poisoning was excluded. I therefore have no doubt that the deceased subject of this case died and the cause of death was established to be assault with multiple injuries.

43. On whether the death of the deceased was caused by an unlawful act or omission and whose unlawful act or omission it was, as stated above, there is no doubt that the death of the deceased was caused by the injuries she sustained as a result of her attack and possible poisoning. However, as stated by the Government analyst, the specimens taken from the body of the deceased for analysis could not establish any poison in the body of the deceased because the specimens had been preserve din formalin which should not have been the case. It therefore follows that the cause of death of the deceased as stated by Dr. Okidi remains assault with multiple injuries.

44. Therefore on whether those injuries were caused by an unlawful act or omission and by who, I observe that there was no eye witness who saw the deceased being assaulted. However, the injuries seen on the body of the deceased and described by PW1,2, 3 and 5 cannot in any way be self-inflicted. They must have been inflicted by a third party. The act cannot be said to be lawful in any way as there was no evidence that the deceased committed suicide or that whoever assaulted her and inflicted on her those multiple injuries was acting in absolute self-defense or defense of their property. There was no justification for the said act. Article 26 (1) of the Constitution of Kenya 2010 guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by the Constitution or other written law.

45. Besides, the aspect of when an act causing death can be said to be lawful has been recognized from the time immemorial. In **Gusambizi Wesanga v Republic [1948] 15 EACA 65** the Court stated:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in

defence of property.”

46. The evidence before this Court irresistibly points to an unlawful act that led to the death of the deceased.

47. On whether the prosecution have proved beyond reasonable doubt that it was the accused person herein and not any other person who committed the unlawful act which caused the death of the deceased, from the evidence tendered before this Court, it is clear that none of the prosecution witnesses saw the accused person or any other person assault the deceased. The accused in his defence testified that on 18.10.2020, he found himself in hospital at Ukwala Sub-County and that he was subsequently arrested and charged firstly with attempted murder, attempted suicide and rape and subsequently after the deceased passed on, with her murder. PW1 and PW2 found the deceased already injured assisted her to receive medical attention. Accordingly, there is no direct evidence to prove that the accused indeed caused the death of the deceased. There is only circumstantial evidence explaining how the deceased met her death.

48. The question therefore is whether there was sufficient circumstantial evidence linking the accused person with the unlawful killing of the deceased. The conditions for circumstantial evidence to sustain a conviction in any criminal trial were laid down in **Abanga alias Onyango v Republic CR. App NO. 32 of 1990(UR)** where the Court of Appeal held:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

49. In **Sawe v Republic [2003] KLR 364**, the Court of Appeal further stated that:

“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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shifts to the party accused.”

50. In the instant case, PW1 testified that he arrived home on the 20.10.2020 to find that the cows were still outside the homestead despite the fact that he had left people at home. It was his testimony that he then saw the accused running and looking shocked and unresponsive when he called him. PW1 testified that he went to the door of his house and opened it which alerted his wife, the deceased, who called out to him and told him, “*your son Ochieng has killed me. He has given me poison.*” It was his testimony that he sought for help and his nephew David and other members of the public were able to locate the accused who was found hidden in a neighbour’s house.

51. PW2 testified that on the 20.10.2020 she received news that the deceased had been poisoned so she took 2 eggs and sugar and proceeded to the deceased’s house where she found the deceased vomiting heavy blood and food. She gave her sugar and milk. When she visited the deceased in hospital, the deceased recognized her and that she told the witness that the accused beat her up, took her to his house where he raped her.

52. PW3 testified that as a result of his examination, he opined that the cause of the deceased’s death was assault with multiple injuries with poisoning. On cross-examination PW3 stated that the deceased was seriously injured and had constricted pupils indicative of poisoning. In re-examination he stated that the deceased did not die of natural causes and further that the assault alone could have still caused her death even if poisoning was excluded. PW3 had earlier on treated the deceased for rape and other physical injuries including abdominal injuries and evidence of strangulation. The P3 form produced as Pexhibit 2 shows that the deceased had prior to her demise been admitted at Ukwala Subcounty Hospital undergoing treatment for rape, assault and had ligature mark on her upper back with bite marks on posterior neck. The abdomen had injuries suspected of being caused by blunt object. Her vagina had tears and was bleeding with whitish discharge.

53. PW5 testified that the deceased revealed to him that the accused had attacked, raped and forced her to ingest poison. He further testified that prior to her death, the deceased had recorded her statement with P.C. Sharon Wafula on the 23.10.2020 while in hospital, which statement was produced as PEx 5 and in which statement the deceased stated that the accused had attacked her, raped her then forced her to ingest poison.

54. I note that PW1, PW2 as well as PW5 testified that the deceased made a dying declaration in which she named the accused as the person who had assaulted her. Under **section 33(a)** of the **Evidence Act**, a statement made by a deceased person relating to his cause of death is admissible in evidence the section provides:

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

55. In **Philip Nzaka Watu vs Republic [2016] eKLR**, the Court of Appeal stated the following on admission and reliance on a dying declaration:

“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his

death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

56. In this case, the deceased repeated her dying declaration to PW1, PW2, and PW5. In all the instances, the deceased identified her step-son, the accused herein as her attacker. The accused was well known to the deceased and the accused in his defence too stated that she was his step mother hence there could have been no mistake about the person the deceased was referring to when she was in her house and in hospital. Therefore, it was clear that the deceased was referring to the accused as the person who had assaulted her. The dying declaration having been consistently repeated to several witnesses, identifying the person who assaulted the deceased as the accused herein, the dying declaration was sufficiently corroborated and was safe to rely on. Further, it is worth noting that there is no time limit within which a person must die after making the declaration so as to make the declaration valid in law. See the Court of Appeal case of **David Ngugi Gichuru v Republic [2011] eKLR**. In the instant case, I find that the oral dying declaration made by the deceased to PW1, PW2, and PW5 was well corroborated, even without the deceased recording a formal statement with the police since there is no indication in the deceased's statement allegedly made to PC Sharon Wafula that it was PC Sharon Wafula who recorded it, and the fact that PC Sharon Wafula did not testify to be subjected to cross examination. In addition, there is no indication of the language the deceased gave her statement to PC Sharon Wafula. Furthermore, the typed statement which is not signed indicates that the recorder of the statement was CPL Nixon Lukwa and not PC Sharon Wafula as stated by PC Lukwa. I therefore disregard the statement produced by CPL Lukwa.

57. Taking all the above into consideration, I find that the circumstantial evidence adduced by the prosecution witnesses weighed against the defence proffered by the accused person point towards the accused to the exclusion of everyone else, as the deceased's attacker. The evidence of poisoning was inconclusive in view of the use of formalin to preserve the body and body parts of the deceased but the Doctor who examined the deceased prior to her death and carried out a post-mortem examination on her body was clear that the physical injuries, poisoning aside, were sufficient to cause the death of the deceased. I therefore have no hesitation in finding and holding that the prosecution proved that it was the accused herein and no other person who committed the unlawful act of attacking and seriously assaulting Catherine Anyango Ochieng, the deceased that led to the deceased's death.

58. On Proof that the said unlawful act was committed with malice aforethought, Section 206 of the Penal Code defines malice aforethought as follows:

“206. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.”

59. The Court of Appeal in the case of **Joseph Kimani Njau v R (2014) eKLR** concurred with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, that:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

60. The Court further stated that:

“In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -

There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to

kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR...)

61. And in the case of **Mary Wanjiku Gitonga v R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)** the Court of Appeal stated as follows:

“We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed.... Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.

In the circumstances we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record. (Emphasis added).”

62. In this case, malice aforethought can be gleaned from the events as they unfolded towards the death of the deceased. There is the evidence that the accused blamed the deceased for chasing his wife. The dying declaration statement by the deceased made to PW1, PW2, and PW5 confirmed as such. There is also the nature of injury suffered by the deceased. PW3 testified that the cause of death was assault with multiple injuries with poisoning as the deceased had abdominal injuries and hyperemic intestines as well as constricted pupils indicative of poisoning. The post mortem report and P3 report produced by PW3 showed the multiple injuries sustained by the deceased in her vagina, her abdomen and her neck including a bite. PW3 in re-examination reiterated that the deceased did not die of natural causes and further that the assault alone could still have caused her death even if poisoning was excluded. The Government analyst report was negative on possible poisoning for the reason that the deceased’ body was preserved in formalin prior to extraction of the specimens for analysis hence the poison could not be detected.

63. Taking all the above circumstances into account, I find that there is a clear manifestation of malice aforethought. The nature, severity and multiplicity of the injuries leave no doubt in the mind of this Court that the accused person was determined to end the life of the deceased or to cause her grievous bodily harm. This is covered under Section 206 (a) of the Penal Code. I therefore find and hold that the prosecution proved malice aforethought against the accused person, beyond reasonable doubt.

64. In the end, I find and hold that the prosecution has proved all the ingredients of the information of murder against the accused person beyond reasonable doubt. I find the accused person herein **John Ochieng Ochieng** Guilty of the Charge of Murder of the deceased **Catherine Anyango Ochieng** as per the Information dated 18th November, 2020. I hereby convict him as charged under section 203 of the Penal Code. Sentence will be after records and mitigation.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 16TH DAY OF NOVEMBER, 2021

R.E.ABURILI

JUDGE