



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 18 OF 2015[MURDER]

REPUBLIC.....PROSECUTION

VERSUS

DMO.....ACCUSED

JUDGMENT

1. The accused **person DMO** was first charged before Kisumu High Court vide Criminal Case No. 29 of 2012 but the file was transferred to this court upon the establishment of the high Court in 2015. The apparent delay in disposing of this case was occasioned by the fact that the accused person was admitted at Kenyatta National Hospital and Mathari Hospital for a period of about six years due to a mental illness and it was only after he was discharged with a certificate of mental fitness that the hearing of this case commenced on 18th September, 2018 and concluded on 9/12/2019 due to the fact that the accused had to be taken back to Mathari Hospital for further treatment.

2. The accused person **DMO** stands charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of Information dated 3rd May 2012 by Meroka J.R. State Counsel for the Director of Public Prosecutions are that on the 22nd day of April, 2012 at Mitundu Sub location, Mageta Island, Bondo District, Siaya County, within Nyanza Province, he murdered one Lydia Ogere Matengo.

3. Plea was taken on 5th February 2013 before Hon Justice H. Chemitei at Kisumu High Court, with the accused person denying committing the offence.

4. The prosecution called six (6) witnesses to establish their case and the accused was placed on his defence. He called one witness, a medical doctor.

The prosecution's case

5. PW1, **No. 39415 Police Constable Juma George Matole** testified on oath and **stated that he** was at the material time attached to Usenge Police Station at Mageta Police Patrol Base. Presently, he was at Ukwala Police Station. He recalled that on 22/4/2012 at about 22.30 hours, he was in the Report Office at Mageta Patrol Base when he received a report from the area Assistant Chief of Mitungu Sub-location, a Mr. Gabriel Ouma Oyoo who reported that in his area of jurisdiction there was DMO who had killed his wife Lydia Matengo. The witness booked the report in the Occurrence Book and informed his in charge Corporal Joshua Maundu of the happenings.

6. PW1 further testified that at about 23.58 hours, the named Assistant Chief brought in the station the accused person. PW1 rearrested him and charged him with the offence herein after investigations were carried out he identified the accuse person in court.

7. In cross Examination by Mr. Ochuka counsel for the accused, PW1 stated, materially, that when the accused person went to the station, he complained of feeling very cold and that he had a blanket wrapped around him and that he also appeared sick. The witness also his left him to have shoes on as he placed him in the cells.

8. **PW2, No. 45987 Sergeant Josiah Maundu** from Kabete Police Station, Nairobi who was also the investigating officer in this case testified on oath and stated that on 22/4/2012 at 10.00 pm, he was at Mageta Police Post in Usenge Police Station in the Lake Victoria Island when one Gabriel Oyoo, he Assistant Chief of Mitundu Sub-location brought the accused person herein on a motorcycle saying that the accused had killed his wife. PW2 called his Officer in charge at Usenge and briefed him. They then booked the accused person in the cells and the following morning the witness left with PC John Matole, PW1 herein and together with the accused they proceeded to his home and found all windows and doors to his house removed and walls destroyed and items in his house damaged. They entered the bedroom and found his bed upside down. On the bed, they found a body of a dead woman covered in a white sheet with red flowers. They took away the body to the mortuary for preservation and postmortem as they escorted the accused person to Usenge Police Station. The witness drew a sketch plan of the scene. He produced it as an exhibit 1. He also identified the accused person as the suspect that they arrested in connection with the alleged murder of the deceased Lydia Matengo and added that the metal which was being used to destroy the house was taken to Usenge Police Station.

9. In cross examination by Mr. Ochuka advocate for the accused person, PW2 stated that they recorded statements of witnesses including that of Gabriel, the Assistant Chief of Mitundu Sub-Location. He also stated that the accused was taken for Mental Assessment as per the P3 form for the accused **DMO** dated 26/4/2012 which revealed that the accused appeared confused, and not fit to answer the charge.
10. PW3, Gabriel Omuyo the Assistant Chief Mitundu sub-location testified on oath and recalled that on 22/4/2012 at about 6.30 am, he was in the house with Amose Aliwa accompanied by his wife Felistas who told him that the accused person herein David Omullo had gone to their home at 2.00 am and destroyed the windows and doors to their kitchen where children slept. They told him that the accused person did not appear very normal. That he appeared to be mentally unstable. PW3 accompanied the couple to the Accused's home as they were all neighbours.
11. On arrival, they encountered destruction of the accused person's house, with household items scattered all over the house and windows, doors and walls damaged. They left and that at 10.00 am, he called a young child of the accused who was passing by and he came and told PW3 that he been held by his father the accused person night, pulled into the house, hit but he ran away and slept elsewhere. He said that he did not know where his mother was as he proceeded to untie goats for grazing. PW3 advised the boy to go to his sister's home to get food because there was none in the homestead.
12. PW3 further stated that at 6.00 pm, he saw a motorcycle which headed to the house of the accused person carrying the accused DM. It dropped him and left. Shortly, PW3 heard DM crying and moving away from his homestead. When PW3 followed him closely, he saw another old man move closer to him and he stopped. They started conversing. PW3 moved closer and asked the accused what the problem was and the accused herein told them that his wife was dead in the house. They persuaded him to get to his home. They accompanied him and went their way to inform other people but he did not proceed to his home. On returning to his home later they never saw him and despite calling him, he never responded. They therefore only observed the damage and left with his son.
13. After some time, PW3 saw 2 people with the Accused come and ask where the owner of the home (M) was. When PW3 asked them what the problem was, they told him that the accused had gone to Kuoyo and told them that his wife had died and was in the house. PW3 accompanied them to the house of DM and they found the wife of D lying under the bed, in an inner pant only and covered in a white/red sheet. PW3 called Police to come to the scene but he could not get them. He persuaded the accused person D to accompany him to the police. Later, the police went to the scene and took away the body. They recovered a blood stained metal bar near the body. Household items were scattered all over the house. The deceased's body had visible injuries on the neck and face. He later recorded his statement at Mageta Patrol Base. He identified the accused person in court.
14. In cross examination by Mr. Ochuka advocate for the accused person, PW3 stated that he received a report from Felistas Aliwa and her husband at 6.30 am, who reported to him how the accused person had gone to their home and destroyed the house used by their children and that they wanted compensation from the accused person. That they also told PW3 that they wanted the accused person's wife to go and witness the damage because the accused DM was not in his senses. The witness could not tell if D was normal but that he was crying. He stated that in total, three people went to his house and they included the accused person, Daniel and another person whose name he could not recall. He stated that he met Samuel Otieno Matengo, the accused person's son and that the latter told PW3 that he was shocked when his father pulled him from the kitchen where he was found sleeping but he could not tell where his parents were.
15. **PW4, Samuel Otieno Matengo** from Muhoroni working as a builder testified that he was aged 20 years old. He recalled that on 22nd April 2012, he was in their home in Mageta Island with his parents comprising his father DMO (the accused herein) and his mother the late Lydia Ongere Matengo. He stated that earlier on that morning, his parents had gone to the farm to cultivate. That upon their return, the witness and his mother went to the river to bathe, leaving his father at home. That they returned, had dinner together and his mother retired to sleep as the witness left his parents in their main house as he proceeded to sleep in the kitchen.
16. PW4 further recalled that at about 2.00 am, his father went to the kitchen where PW4 was sleeping, knocked the door and removed PW4 from the kitchen and took him to the bigger house. That when they entered the big house, the accused person put the witness to sit in the accused person's chair that he was accustomed to sitting on then the accused person entered the bedroom. That PW4 then left the house and went to look for suitable accommodation, away from their homestead. He went to a neighbor's house and slept. In the morning, PW4 went looking for his mother in the farm if she had already gone to weed but never found her so he returned to the homestead to look for his mother. He stood outside the homestead and saw his father the accused person herein appearing confused and that he was moving from the kitchen and getting out and entering the big house and getting out again.
17. That PW4 left their home and went to the Beach where he informed his cousin Irene Shem, his Auntie's daughter on the unusual behaviour of his father. Irene accompanied PW4 to his home. Later, the Assistant Chief went to where PW4 was and told him to accompany him to find out if PW4's mother was there and to arrest his father. That when they reached home, in the company of Irene's husband and the Assistant Chief, they did not find his father. They therefore went to the Assistant Chief's place then his mother's church people went and informed them that his father had gone to their home and told them that his wife had slept but was not responding to his call.
18. PW4 went home at 8pm and after the Assistant Chief and Church people peeped through the window, they saw his mother lying therein. PW4 left the home and went to sleep at Irene's home until Monday the following day when he returned to their home with Irene's husband and the Assistant Chief. The following morning, in the morning, PW4 found police officers from Mahanga Police Station and that he saw his father standing in the house. He also found when his mother's body had been removed from the bedroom into the sitting room, looking swollen. He did not see any visible injuries on her. The body was taken to Bondo District Mortuary. He later accompanied his father to police station and he recorded his statement. He identified the accused person in the dock as his father.
19. On being cross examined by Mr. Ochuka advocate for the accused person, PW4 stated that the incident took place at night and that they were only 3 people in their home namely, himself, his father and mother.
20. He stated that he went to sleep at 9.00pm and that his father went knocking on his door between 2.00am - 3.00am. He further stated that he did not know if anyone else entered their home that material night. He reiterated that he went to Irene's home because it was a ten-minute

walk and that she was his relative. He denied seeing Aliwa and his wife on that material night.

21. **PW5 Dr Phelgona Kabibi based** at Bondo Sub County Hospital testified and produced the postmortem report for the deceased as prepared by Dr David Omondi who was away in Nairobi undertaking further studies. She stated that she had worked with Dr Omondi for 1 and half years and that she was familiar with his handwriting and signature. She confirmed that the postmortem report dated 25th April 2012 was done by Dr Omondi on the body of Lydia Matengo a female adult identified by Henry Otiende. The body was said to have been decomposing with blistering and peeling of the skin on the torso and the face. The death had occurred about 5- 7 days earlier and the face and abdomen were swollen. There was blood in the ears and mouth with a congested plethoric face. There were no obvious external injuries. The hands had cardiac spasm or folding of fingers tightly. Internally, there was congestion in the lungs. They were air-filled and frothy. In the cardiovascular system, there was dark blood congested in the chambers of the heart. The digestive, genitourinary and nervous systems were all normal. On the spinal column, there was unstable cervical spine.

22. **As** a result of the examination, the mortician concluded that the cause of the deceased's death was due to asphyxia due to strangulation and possible cervical compression due to unstable fracture of the cervical vertebrae. The Doctor produced the postmortem report on behalf of Dr Omondi. It was marked as PEx 2.

23. In cross examination by Mr. Ochuka counsel for the accused person, PW5 stated that the immediate cause of death was asphyxia due to strangulation but that the other possible cause was cervical cord compression.

DEFENCE CASE

24. At the close of the prosecution case, the accused person was placed on his defence. He opted to give sworn testimony and called one witness, Dr Collins Oginga. In his sworn testimony, the accused testified as DW1 and stated that he was DMO, from Mageta Bondo District. He stated that he knew the deceased Lydia Matengo as his deceased wife of 33 years.

25. He stated that he could not recall what happened on the material day of 21/4/2012 when it is alleged that he murdered his wife Lydia Matengo. He stated that on that day he was in the farm with his son Sam Otieno and the late Lydia Matengo from 7am to 10am. He stated that after taking tea from outside the house, they entered the house to rest and that in the evening his wife made dinner which they ate at about 9.00pm and his son left to go and sleep in the cottage while the accused and his wife slept in their house. He stated that he remembers leaving his house and going to some place at about 4am and that he felt wild as if he was getting insane so he walked to Mahanga and stayed there until the following day at 6pm leaving his wife alone in the house. That he was in Mahanga until the police and Assistant Chief Gabriel Oyoo went and told him to his house. On reaching the house he found many people who were saying that his wife had died. That he found his animals intact and his son was crying. He also saw his household items destroyed and that that is when he came to his senses that his wife was dead so he started screaming and walking around wildly. He stated that this was not the first time such an incident had taken place. He stated that he used to have such occurrences and was treated at Kisumu Hospital in 2011. He was then arrested and taken to hospital for mental assessment. He identified his initial mental assessment report and stated that he never intended to kill his wife. Further, that he had been in jail for 8 years and that his children had suffered. That he loved his wife with whom he went to church regularly with their children. He prayed to God to help him.

26. On being cross examined by Mr. Okachi Snr Principal Prosecution Counsel, the accused person stated that he loved his wife and therefore he could not tell why he killed his wife on 21/4/2012 as he did not know what was happening. He could not recall hitting her with an iron bar but admitted that he was all alone in the house with his wife. He stated that he did not suspect any other person to have killed his wife because he left her alone in the house.

27. On being questioned by the court, he stated that after undergoing treatment while in jail he now had no mental issues.

28. **DW2 Dr Collins Oginga** testified on oath and stated that he was a senior Medical Officer working with Siaya County and based at Madianyi Sub County Hospital in Rarieda. He stated that on 26th April 2012 he carried out a mental assessment on the accused herein DM at Bondo District Hospital. That the patient was confused, disoriented in time, place and space. That he had little insight on what was happening concerning him and reported to be a mental patient but had fallen out on treatment for a long time. DW2 concluded that the accused was not fit to answer the charges facing him as he required psychiatric follow up for some time. He produced the mental assessment report as DWEx 1.

29. He reiterated his testimony in chief on being cross examined and on being asked by the court he stated that from the history taken from the accused patient, the accused was not in his right mental faculty to know what he was doing.

SUBMISSIONS

30. Mr. Ochuka submitted on behalf that the prosecution had not proved the offence of murder against the accused beyond reasonable doubt. He submitted that malice aforethought was missing because the accused was insane when he committed the offence as confirmed by the Chief and PW4 who stated how the accused was behaving before and after the death of the deceased Lydia Matengo. That the destruction of household items and the report made to the chief by two other people show that the accused was wild and no witness stated that the accused had any issue with his late wife prior to the incident for this court to infer malice aforethought. Counsel urged the court to invoke the provisions of section 166 of the Criminal Procedure Code and acquit the accused person.

31. The prosecution Counsel relied on evidence on record and left it to the court to determine the accused person's fate.

Analysis and Determination

32. Section 203 of the Penal Code provides that:

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

33. To sustain a conviction in a murder Information, the prosecution must prove beyond reasonable doubt the following elements:

i. The death of the deceased and its cause;

ii. That the accused person committed the unlawful act which caused the death;

iii. That the accused person had malice aforethought.

34. On the death and cause thereof, it is undisputed that Lydia Matengo was the wife of the accused person and that she died. The cause of death was established through a postmortem report produced by PW6 Dr. Phelgona Kabibi on behalf of Dr. Omondi David who conducted an autopsy that the deceased's cause of death was due to asphyxia due to strangulation and possible cervical cord compression due to unstable fracture of the cervical vertebrae.

35. PW1, PW2 are police officers who received information on the demise of the deceased. They proceeded to the scene and recovered the body to the mortuary. They found the deceased's body lying in her house. It had no visible injuries until after the autopsy was carried out to establish the cause of death. They found the deceased's body lying under the bed which had been turned upside down covered in a white and red sheet. They also testified that they found the house where the deceased lived with the accused damaged. Its windows and doors were destroyed and household items damaged and scattered all over the house.

36. The evidence of PW3 Gabriel Omuyo the area Assistant Chief clear that Amos Aliwa and his wife Felistas who were neighbours to the accused went and reported to him that the accused had gone to their home at 2am on 22/4/2012 and destroyed their kitchen where their children slept and he did not appear normal and that he appeared mentally unstable. PW3 went and confirmed the damage and later that morning he went and confirmed that the accused person's wife had died and was in their house. PW3 is the person who reported the death of the deceased to PW1 and PW2.

37. PW4 Samuel Otieno Matengo was the son to the accused and the deceased. He also confirmed that his mother with whom they had eaten a meal on the material evening was found dead.

38. The only issue is whether it was the accused person who killed the deceased. PW4 Samuel Otieno Matengo was then a minor but he testified as an adult. He recalled how he had been with his parents the accused and the deceased that material night and that he went to sleep after they had dinner together only for his father to wake him up in the night, took him to their house and made him sit on the chair his father normally sat on and he left. The witness also left and went to sleep at a neighbour's house. He only learnt later that his mother had died.

39. PW1, PW2 and PW3 found the deceased's body lying under the bed and the bed was upside down. The household items had been destroyed while the walls, windows and doors were all broken. The accused had left his house that night and was roaming in the neighbourhood aimlessly. He went as far as destroying the neighbour's kitchen and this was reported to PW3.

40. There was no evidence that any other person could have invaded the accused and the deceased and inflicted injuries on her. The deceased was found lying with no visible injuries but the postmortem report revealed asphyxia due to strangulation.

41. When the accused person was arrested, he was looking confused and so he was taken for mental assessment and he was found to be unfit to stand trial hence he was committed to Mathari Mental Hospital for treatment until he got well. This is the reason for the delayed hearing and determination of this case.

42. In his defence the accused could not recall what happened and stated that what he recalls was that he loved the deceased very much hence he could not have intentionally killed her. DW2 Dr. Oginga who carried out the initial mental examination on the accused and produced the medical report testified that from the history taken of the accused, he was a mental patient for some time who had been on medication but that he had fallen off his medication. That he was not oriented in time and space and that he could not have been in his right mental capacity as at 22/4/2012.

43. In my humble view, albeit there is no witness who saw the accused person commit the offence, I am satisfied that the circumstantial evidence adduced points to none other than the accused person as the person who strangled the deceased thereby occasioning her fatal injuries.

44. That then leads this court to answer the question of whether the killing of the deceased was with malice aforethought as defined in section 206 of the Penal Code. The accused testified that he could not remember what happened to his wife the deceased. DW2 testified that the accused was not in his right mental faculties on 22/4/2012. PW1,2, and 4 were all clear that the accused person was confused. The mental assessment report found him mentally unfit to stand trial until after he was treated at Mathari Mental Hospital. The accused stated that he did not intend to kill his wife as he loved her very much. He stated that that was not the first time he had had a similar problem and had been on treatment but he fell off the treatment. The accused did not remember any reason why he would kill his beloved wife. He could not recall what happened to his wife and in cross examination he stated that he did not kill her intentionally.

45. The prosecution is under a duty to prove the guilt of an accused person beyond reasonable doubt but where an accused person claims that at the time when he is alleged to have committed the offence he was suffering from insanity, or a disease which could affect his mind and that by reason thereof he was incapable of understanding what he was doing, or knowing that he ought not to do the act or make the omission, of the intention to do so, the burden of prove lay with the accused to establish the existence of such condition or state of the mind.

See sections 9(1) as read with sections 11 and 12 of the Penal Code. See also the case of **Marri v Republic [1985] KLR 710 and Muswi s/o Musele v Republic [1956] EACA 622.**

46. The prosecution did not call any witness to show that the accused person had any issues with his wife the deceased and that he must have had a premeditated intention to unlawfully kill his wife Lydia Matengo. The mental assessment report show that he could not have been in his right mental state at the material time that he killed the deceased and he was a known mental case but had fallen off medication.

47. For that reason I find and hold that the prosecution have not proved any malice aforethought. I find that the offence of murder has not been proved beyond reasonable doubt.

48. However, there is sufficient circumstantial evidence proved beyond reasonable doubt that the accused person unlawfully killed the deceased Lydia Matengo. I therefore find and hold that the evidence adduced disclose the offence of manslaughter which is unlawful killing of a person. I therefore acquit the accused of the Information of murder and find him guilty of the offence of manslaughter and convict the accused person for the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

Dated, Signed and Delivered at Siaya this 10th Day of February, 2020

R.E. ABURILI

JUDGE

Mr. Okachi:

The accused can be treated as a first offender. We have no past records o the accused person.

R.E.ABURILI

JUDGE

Accused person stated in mitigation in Kiswahili:

I have been in prison since 2012. Iam diabetic. I pray for leniency so that I can go home and see my children and my parents.

R.E.ABURILI

JUDGE

Mr. Okachi:

I have nothing to add.

R.E.ABURILI

JUDGE

Court: Sentence:

I have considered the mitigation by the accused person and ta fact that he is a first offender. However, a precious life was lost. Nonetheless, the accused person had an illness and therefore having been in prison for nearly 8 years, I find no reason to sentence him to serve custodial sentence, now that he is free from the mental ailment but is said to be diabetic, as per his medical documents shown to the court, with copies thereof showing that he is also anemic.

I hereby sentence the accused to the period already served in prison. Unless otherwise lawfully held, the accused person David Matengo Omullo be and is hereby set at liberty forthwith. Orders accordingly.

Dated, Signed and Delivered at Siaya this 10th Day of February, 2020

R.E.ABURILI

JUDGE