



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 29 OF 2017

PROSECUTOR REPUBLIC

VERSUS

ISAAC OLUOCH 1ST ACCUSED

BILLY ONYANGO 2ND ACCUSED

JUDGMENT

The accused persons, **ISAAC OLUOCH** and **BILLY ONYANGO**, were charge with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

1. The particulars of the Charge were that the accused persons unlawfully murdered **HELLEN AUMA ADUDA**, on the 26th of October 2017, at about 2000 hours. The offence is said to have been committed at Kaluoch Village in Kisumu West Sub-County.
2. At the trial, the prosecution called four witnesses.
3. Thereafter, when the accused were put to their defences, each of them gave sworn testimonies. However, the accused persons did not call any other witnesses.
4. **PW1, BERYL ATIENO OMONDI**, was a daughter to the deceased, Hellen Auma Aduda.
5. She testified that on the material day, the deceased left home at about 6.30pm, to go and buy cooking oil and sugar at Lela.
6. At that time, **PW1** was together with her older sister, **EVERLYNE ADHIAMBO**, who testified as **PW2**.
7. When the 2 sisters felt that their mother had overstayed, **PW2** used her phone to call her mother's phone.
8. **PW1** testified that although **PW2** called the number three times, the phone was not being answered.
9. **PW1** and **PW2** decided to go out and look for their mother. They went upto Lela, but they did not find her. They then returned home.
10. After staying at home for about 30 minutes, the sisters rang the sister to the deceased, inquiring about the deceased. They were informed that the deceased was not at her sister's place.
11. The said sister volunteered to find out if the deceased could have been at the home of the parents of the deceased. After making inquiries, the sister of the deceased phoned **PW2** and informed her that the deceased was not at the home of **PW2's** grandmother.
12. Thereafter, **PW1** and her sister walked back home. Once they reached home, they stood at the gate.
13. After a couple of minutes the two sisters saw the two accused persons passing by. According to the sisters, the accused persons were sharing a cigarette.
14. The accused persons asked the sisters why they were still outside, yet children were supposed to be asleep.
15. Thereafter, the two sisters decided to walk along the path which the accused persons had come from. They did so, whilst continually ringing their mother's phone-line.

16. At some point, they heard the sound of a phone ringing. When they went in the direction where the phone was ringing, the sisters found their mother's phone, which was still ringing.
17. A little distance away from the phone, the sisters found the body of their mother.
18. They screamed, and that attracted many people to the scene.
19. Whilst at the scene, the sister saw one red shoe.
20. Both of them testified that the said shoe belonged to Isaac, the 1st accused.
21. **PW1** described the shoe as unique, and she said that Isaac liked to wear that pair.
22. During cross-examination **PW1** insisted that the shoe was red in colour, although she conceded that it was not the same kind of red as was on the calendar hanging on the wall of the court-room.
23. I noted that the colour of the shoe was close to a "*faded red*", or something closer to brown.
24. **PW2, EVERLINE ADHIAMBO**, largely re-stated what her sister (**PW1**) had said when testifying in court.
25. She said that it was Isaac who spoke to the two sisters, rudely asking what they were doing at their gate, at a time when the two sisters ought to have been sleeping.
26. Both **PW1** and **PW2** said that the route from which the accused persons emerged, was not used often. Indeed, whilst the sisters were at the gate, nobody other than the accused persons, followed that route.
27. When the sisters had found their mother's body, they screamed, thus attracting many people to the scene. **PW2** testified that both the accused persons were in the crowd of people who went to the scene after the sisters had screamed.
28. When she was asked questions about the shoe that was found at the scene, **PW2** said that Isaac used to wear that pair of shoes regularly.
29. During cross-examination, **PW2** said that it is only Isaac who used to wear the said shoes in that area. She added that even on the material, she saw Isaac wearing the same pair of shoes, earlier in the day.
30. Whilst one shoe was recovered on the material night, the other half of that pair was recovered on the next day, after the body was removed from the scene.
31. **PW3, JOSHUA NYAMBUNE**, is a pastor, who hails from the same village as the two accused persons.
32. On the material night, at about 8.30p.m, **PW3** heard shouts. He left his home and went to the place where the shouting was coming from.
33. At the scene, **PW3** found both **PW1** and **PW2**, who told him that their mother had been killed.
34. **PW3** saw the body. He also saw one red shoe, at the scene.
35. When those who were present at the scene asked one another whose shoe it was, some "*manambas*" identified it as belonging to Isaac.
36. During cross-examination, **PW3** said that whereas the pair of shoes may not be unique, the only person who he had ever seen wearing such shoes, was Isaac.
37. **PW4, PC CHARLES MOMANYI**, was the Investigating Officer.
38. On the evening of 26th October 2017, Maseno Police Station received a report about an incident of murder. The information was relayed through phone, by the area chief.
39. **PW4** went to the scene of crime, in the company of other police officers.
40. They called the scene-of-crime officer from Kisumu, who took photos at the scene.
41. **PW4** testified that a brown shoe and a white scarf were recovered from the scene.
42. He also said that Isaac was arrested by members of the public, who had seen him near the maize plantation where the body of the deceased was recovered from.
43. The body of the deceased was taken to the Masaba Hospital Mortuary, where the post-mortem examination was conducted by Dr.

DICKSON MUCHANA MWALUDINI.

44. The post-mortem Report was produced as an exhibit, through the Investigating Officer. The Report indicated that the cause of death was;

“Spinal shock 2 – Unstable Neck

Fracture, following Assault.”

45. During his testimony, **PW4** said that Billy was arrested after Isaac had told the members of the public that he, (Isaac) had been together with Billy Onyango.

46. The said Billy surrendered himself at the Police Station, as he feared that he could be killed,

“because of what he had done the previous night.”

47. But, during cross-examination, Billy refused to record any confession about his alleged involvement in the incident.

48. After the Investigating Officer testified, the prosecution closed its case.

49. When Isaac was put to his defence, he categorically denied the allegation that he had murdered Hellen Auma Aduda.

50. He told the court that his father was a brother to Hellen’s husband. He knew both **PW1** and **PW2**.

51. However, he described their testimonies as untruths. He had never owned any red shoes.

52. He said that he first visited the scene of crime after he had heard people wailing. It is then that he found the body of the deceased at the scene.

53. Isaac said that although he did meet **PW1** and **PW2** on the material day, the meeting did not take place at their gate. He said that the two sisters met him along the route leading to his home, as they were walking in the direction that was opposite to the direction he was walking.

54. And whilst **PW1** and **PW2** had testified that they met Isaac and Billy between 7.30p.m and 8.30p.m, Isaac said that they met earlier, between 6p.m and 7p.m.

55. On his part Billy said that the allegation that he had killed Hellen, was a big lie.

56. He testified that at 6p.m. on the material day, he was still working at a construction site, which was at Lela Centre.

57. He met Isaac at about 6.30p.m, and the two of them walked together, heading home.

58. Whilst Billy and Isaac were walking home, they met **PW1** and **PW2**.

59. Billy said that at the time he and Isaac met **PW1** and **PW2**, it is he (Billy) who was smoking. He said that Isaac was not smoking.

60. Thereafter, Billy testified that he got home, where he watched news. After the said news bulletin. He heard noise. The noise attracted his attention, and he went to the place where it was coming from.

61. When he got there, he found a large crowd, and the body of Mama Hellen was lying on the ground.

62. Billy remained at the scene until after the body was removed and was taken to the mortuary.

63. During cross-examination Billy said that because he met Isaac at 6.30p.m, it was possible that at 6p.m Isaac could have been at home.

64. I have carefully evaluated the evidence on record. First, there is clear evidence that Hellen Auma Aduda is dead.

65. The cause of death is spinal shock, due to unstable neck fracture, following assault. In a nutshell, Hellen was assaulted: she suffered a neck fracture, which led to her death.

66. None of the prosecution witnesses saw the assault upon the deceased. Therefore, all the evidence tendered was circumstantial.

67. Both accused persons confirmed that on the material day, they were together, at some point in the evening.

68. They confirmed having met the two daughters of the deceased.

69. Although the particulars of the exact place where they met is not agreed upon between the prosecution and the defence, I find that that is not significant.
70. In other words, whether they met at the gate to the home of the deceased or along the path near that home, is not material.
71. The important fact, conceded all round is that the two sisters, (**PW1** and **PW2**) met the accused persons on the material evening.
72. Again, it is noted that Billy was smoking a cigarette at the time of the said meeting. Whereas the two sisters said that Isaac was sharing the cigarette with Billy, I find that whether or not the two accused persons shared the cigarette is not material.
73. I find that the meeting took place before the two sisters discovered the body of their mother.
74. Isaac said that the meeting was between 6p.m and 7p.m. Meanwhile, Billy said that he met Isaac at 6.30p.m.
75. Since Isaac and Billy were together when they met **PW1** and **PW2**, they would imply that the meeting took place between 6.30p.m and 7p.m, if the accused are to be believed.
76. But the two sisters made it clear that the deceased only left home at about 6.30p.m; and that the sisters went out to look for her, after 7p.m. As the two sisters did not meet the accused persons when they first went out to search for their mother, that would imply that the meeting could not have been at about 7p.m.
77. I note that in his evidence-in-chief, Isaac started by saying that on the material day, he was at home between 6p.m and 8p.m.
78. But during cross-examination Isaac said that he reached home at 7.30p.m.
79. Obviously, if he only got home at 7.30p.m, he cannot have, simultaneously, been at home between 6p.m and 8p.m.
80. In other words, the evidence of Isaac is so inconsistent in itself, that the said accused cannot be believed.
81. **PW3** heard screams and wailing at about 8.30p.m. I find that that evidence about the time, corroborates the testimony of both **PW1** and **PW2**, who had said that they found the body of the deceased after they had set out to look for their mother, at about 8p.m.
82. In effect, the two accused persons were not at their respective homes, at the hour they have alleged. They were away from home, and they encountered **PW1** and **PW2**.
83. I also find that the shoe which was recovered at the scene, on the material night belonged to Isaac.
84. I so find because two reliable prosecution witnesses testified that Isaac used to like wearing that particular pair of shoes. He was the one person within that Village who was known to be wearing that kind of shoe.
85. Indeed, **PW2** even saw Isaac wearing the same pair of shoes on the material day.
86. One shoe was recovered near the body, on the material night. The second shoe was recovered on the next day, from the spot where the body had been lying.
87. I find that the presence of the said pair of shoes, at the scene of crime, placed Isaac squarely at the crime scene.
88. Isaac and Billy both said that they were together during the early part of the evening when Hellen was murdered.
89. However, as I have held, the two accused persons were not truthful witnesses. I am unable to ascertain, from the evidence tendered by the prosecution, whether or not Billy was in the company of Isaac all through the time when the crime was committed.
90. And in the absence of any material evidence linking Billy to the crime or the scene of crime, I hold the considered view that the available circumstantial evidence cannot cause the court to arrive at the conclusion that Billy was guilty. There is a possibility that he may or may not have been in the company of Isaac at the time when the offence was committed.
91. But as for Isaac, there is absolutely no doubt that he committed the offence.
92. Although all the witnesses said that there had never been any know grudge between the deceased and Isaac, that does not necessarily translate into the absence of mens rea.
93. The deceased was assaulted, causing her to suffer a fracture on her neck. I find that the person who assaulted the deceased intended to either cause her death or to do grievous harm to her.
94. But even if the perpetrator was indifferent as to whether or not his actions would cause death or cause grievous harm, pursuant to the provisions of **Section 206** of the **Penal Code**, that perpetrator had malice aforethought.

95. In the result, the prosecution has proved beyond any reasonable doubt that Isaac Oluoch, assaulted the deceased, leading to her death. The prosecution has also proved that Isaac had malice aforethought.

96. I therefore find Isaac Oluoch guilty of the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

97. As for Billy Onyango, I find that the prosecution failed to lead sufficient evidence to prove his guilt. Accordingly, I find Billy Onyango, Not Guilty. I order that, unless he is otherwise lawfully held, he should be set at liberty forthwith.

DATED, SIGNED and DELIVERED at KISUMU This 6th day of May 2020

FRED A. OCHIENG

JUDGE