



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 4 OF 2019[MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL OTIENO WASONGA.....ACCUSED

JUDGMENT

1. The accused herein **MICHAEL OTIENO WASONGA** is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence as per the Information dated 28th March 2019 are that on the day of 28/1/2019 at unknown time at Ndori Sub location Gem sub county within Siaya county the accused murdered **Margaret Atieno Ogola**. He pleaded not guilty to the charge.

2. The prosecution called six witnesses in support of their case which is summarised herein below.

Prosecution Case

3. PW1 Wellington Odhiambo Ogola testified that on the night of 28.1.2019 he was at home with his mother, Margaret Amolo Ogola as well as Akulo. He further testified that he went to sleep in his house and left his mother and Akulo awake. Mr. Ogola further testified that after he left for his house, he heard his mother screaming from her house and thought she was screaming because something had happened at a neighbour's home so he slept until morning.

4. Mr. Ogola testified that when he woke up in the morning and saw his mother's house door open, he thought she had gone to the farm but when he went to her house, he found her dead, lying under the bed. He testified that he did not see injuries at that time. Mr. Ogola testified that his mother's chicken were also missing from her house.

5. Mr. Ogola further testified that he went to his Uncle Rasto's home and told them what had happened after which they came and saw her dead body. Mr. Ogola testified that he had known Akulo for a very long time as he was a neighbour's son and used to sleep in his elder brother, Lucas Otieno Ogola's house. He further testified that since the material night he had not seen Akulo and only saw him in court.

6. In cross-examination Mr. Ogola testified that he left Akula with his Mother in her house and that there was no other person in that house. He further testified that indeed he heard screams from his mother but did not go to establish why she was screaming. That the scream was once and inside the house. Mr. Ogola also testified that he did not see Akulo leave his mother's house and did not know what time he left his or whether Akulo left with his Mother's chicken. Mr. Ogola testified that he found his mother's body in her house.

7. **PW2, Angelina Ogonga Lango** testified that on the 29.1.2019 at about 6.00 a.m. she was milking her cow outside her house when she saw Michael Otieno, the accused, who is also known as **Akula** carrying a sack but she could not tell what was inside. She testified that she greeted Akula who told her that the mother of Ngesa, Margaret Ogola had given him some chicken to go and sell. PW2 stated that she heard some chicken crying inside the sack that Michael a.k.a Akula was carrying. She testified that after Akula had passed, the son of Margaret Ogola by the name Wellington Odhiambo (PW1) went and told her that his mother had died to which she went to the house of Margaret and found her body lying under the bed and her chicken were missing. She further testified that the deceased's body was taken to Bondo mortuary by Police Officers from Akala and that when an autopsy was carried out Margaret Ogola's son went to identify the body.

8. In cross-examination she testified that she did not know what caused the death of Margaret Ogola.

9. **PW3 Stephen Odume Ouma** from Gem Kotia and a Jua Kali Artisan testified that he does casual work of carrying luggage at Akala Market and that on 29.1.2019 at around 7 a.m. he was at Akala Market when he met his colleague Morris Wasonga who used to stay at his grandmother, Margaret Ogola's home for about 2 years as a caretaker. He stated that on that morning, Wasonga (the accused person herein)

went to him while he was at the Market at Akala and told him that he had been sent money by his uncle so he was going to withdraw it. He stated that Wasonga had a Nokia phone which he (PW3) knew to be his grandmother's (deceased's) phone. He further testified that he knew that the accused had no phone but that he knew his grandmother's phone very well. He also testified that he did not see the accused with anything else after which they parted ways and he went about his business.

10. That after about one hour, he received a report from one of his workmates at the road that his grandmother was dead. He testified that he closed his business and followed a Land Cruiser from Akala Police Station going towards their home where he found that it had taken the body of his grandmother to Akala Police Station. He stated that he did not know what caused his grandmother's death.

11. PW4 Dr. Okon'go Eric Obwage testified that he was not the author of the postmortem report as it was done on 14.2.2019 at Bondo sub-county Hospital at 10.30 a.m. by Dr. Ochieng Odhoch who was transferred to Migori County with whom he had worked with for one month and as such he could interpret his book and knew his handwriting.

12. The deceased is said to have suffered a cut wound on the forehead about 2cm by 1cm, lacerations on the left zygomatic area about 4cm by 2cm. se ad a fracture of the skull at the temporal bone with temporal Haematoma. There was increased intracranial pressure. Dr. Obwage testified that the conclusion of Dr. Odhoch was that the cause of death was cardio Respiratory failure due to head injury resulting from blunt trauma and that a Death Certificate No. 08934, 26 was issued.

13. In cross-examination Dr. Obwage testified that respiratory failure can occur due to pre-existing condition and it can occur naturally and further that there was no indication in the conclusion by his colleague as to what caused blunt trauma.

14. In re-examination, Dr. Obwage testified that from the Post-Mortem report there was evidence of bleeding of the brain due to injury to the head – fracture of the bone of the skull and as such there must have been external force applied to the head leading to fracture of skull and bleeding in the brain.

15. PW5 Daniel Okoth Ogola from Gem, Ndori Sub-Location, a Jua Kali artisan testified that Margaret Amolo Ogola was his mother and that she died on the night of 28.2.2019 at her house. He further testified that on 14.2.2019 he was at Bondo Hospital where he witnessed the post-mortem being performed on his mother's body.

16. In cross-examination Mr. Okoth Ogola testified that he saw his mother's body and noticed that she had a fractured skull. He testified that he did not know the cause of her death and only identified her body to the doctor who did post mortem.

17. PW6 No.119733 P.C. Muchenye Godfrey based at Akala Police Station testified that on 29.2.2019 a sudden death incident was reported at 9 a.m. after which he accompanied the reportee and a member of the Public to the scene at Kotiang village, Ndori in Gem. P.C. Muchenye testified that on arrival they entered the house of Margaret Atieno Ogola where they found her body lying on her back on the floor beside her bed, fully dressed.

18. He testified that they examined the scene of crime but found no exhibit and that they further examined the deceased's body but could not see any visible injury. He further testified that they interrogated the public but received no information after which they took the body to Mortuary for autopsy to ascertain cause of death.

19. P.C. Muchenye further testified that on the same day he received information from three witnesses who came to the police–Wellington Odhiambo Ogola alias Ngesa, PW2 Angelina Lango and PW3 Steven Odume.

20. P.C. Muchenye stated further that during the post-mortem on the deceased he was able to see a fracture on the skull of the deceased which the doctor stated was the cause of death. He further testified that they began investigations, looked for the accused person who was at large and on 18.3.2019, they received information that the accused had been arrested by members of the public at Kondele in Kisumu and handed over to Kisumu Central Police Station so they went and collected him. P.C. Muchenye further testified that he also recorded the accused person's plain statement.

21. In cross-examination P.C. Muchenye testified that when he first visited the scene there was nothing to show how the deceased had died and her body appeared normal and further that at that time no member of the public told him of the cause of death. He further testified that he received information from PW1 on the whereabouts of the accused about 2 weeks after the incident.

Defence Case

22. The accused gave a sworn statement of defence denying the charge and stated that he used to live in Kisumu, Bandani, and Kogonyi Location. He recalled that on the 29.1.2019 he was working in his new hotel at Kicomi near Stage B where motor cycles Park when his cousin Otieno Mbogo a Prisons Officer based at Kodiaga passed by on a motor bike and asked him about the shamba the accused wanted to sell to him at Akala however they did not agree on the price.

23. He further stated that the deceased was his mother's sister and that she had told him not to take deposit of purchase price from his cousin as part payment for the land that he was to sell him. The accused further testified that Omondi, the deceased's grandson wanted to buy the land from the accused and that the deceased wanted him to sell it to Omondi so he could advise him on how to use the proceeds of sale.

24. The accused further testified that he was not in Akala on the 29/1/2019 but in Kisumu and that his cousin Otieno told him that the deceased had passed on and asked why he had not gone to her funeral and as such he must have known what happened.

25. The accused further stated that they then went to Central Police Station Kisumu where he recorded his statement. He further testified that

on the 15.12.2018 he went home after Omondi called him and told him that the deceased had been involved in an accident so he went to assist her. The accused testified that the deceased had fallen and injured her face, had stitches and that he took her to hospital twice for review and further that he also returned on 25.12.2018 and took the deceased to hospital.

26. The accused further stated that the last time he was at home with the deceased was on 30.12.2018 when he slept at the deceased's son's house and left on 31.12.2018. The accused refuted ever disagreeing with the deceased.

27. In cross-examination, the accused stated that he is known as "Jangoma" in Kisumu but in Akala he is known as "Akula." He further testified that Wellington Odhiambo Ogola was a son to his grandmother and that he knew him. The accused further testified that Angelina Lango was married with Margaret in the same home and that he knew her. He further testified that he has never disagreed with any of them.

28. The accused maintained that he was in Kisumu on 28th and 29th January 2019 with his wife Eunice Adhiambo and children. He further testified that his wife could not come to give evidence as he had not been in touch with her for 7 months. He further testified that he had neighbours among them, Ken and Mama Uzima but since he did not have their telephone contacts he could not call them as his witnesses.

29. The accused further stated that he never told his advocate that he would call his neighbours to testify in his favour. He further testified that whenever he went home, he slept at the house of the deceased Margaret Ogola.

30. In re-examination the accused stated that he would not call his neighbours as witnesses as he did not have their telephone contacts. The accused also reiterated that he would not call his wife to testify because he had not been in touch with her for 7 months.

Submissions

31. In his written submissions filed on 3rd March 2020, Mr. Ochanyo counsel for the accused person submitted that there was no dispute that there was death. However, that there was no eye witness to the killing of the deceased and that the circumstantial evidence relied on by the prosecution is not sufficient to prove the charge of murder against the accused person beyond reasonable doubt. He cited **Sawe v Republic [2003] KLR 364**, on the requirements for justifying circumstantial evidence. Further reliance was placed on **Abanga v Republic CA No. 32 of 1993** on the principles applicable in testing circumstantial evidence. According to counsel for the accused, the evidence available is [purely based on suspicion and that there was no evidence that he deceased was killed by the accused herein or that he had any motive to kill the old lady. He further submitted that according to PW4, the deceased at 91 years could suffer cardiorespiratory arrest which was natural death. Finally, counsel submitted that malice aforethought was not proved as stipulated in section 206 of the Penal Code. He urged the court to acquit the accused person of the offence charged.

32. The Prosecution did not make any submissions.

Analysis and Determination

33. I have considered the evidence on record as adduced by the prosecution witnesses and defence and the submissions by Mr. Ochanyo Advocate for the accused person.

34. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari v Republic [2014] eKLR**, the elements of the offence of murder were listed as follows:

(a) The death of the deceased occurred;

(b) That the accused committed the unlawful act which caused the death of the deceased; and

(c) That the accused had malice aforethought.

35. The offence of murder is committed when any person who of malice aforethought causes death of another person by an unlawful act or omission as provided under Section 203 of the Penal Code. This definition clearly demonstrates the ingredients of murder that the prosecution must prove to the standard of beyond reasonable doubt before an accused person charged with murder can be convicted. The prosecution must prove death of a human being has occurred, the act or omission causing that death and the unlawfulness of that act or omission, the person that unlawfully acted or omitted to act and the intention (malice aforethought) of the person who so acted or omitted to act. Malice aforethought has been defined under Section 206 of the Penal Code in the following manner:

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

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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. 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.”

36. The death of the deceased was proved by the testimonies of PW1, Willington Odhiambo Ogola and PW2 Mrs. Lango who found the deceased body lying under her bed, PW5 Daniel Okoth Ogola who identified the deceased's body prior to the postmortem, as well as P.C. Muchenyeye who attended to the scene of crime at the first instance. The post mortem report produced as exhibit showed that there was death.

37. The next issue is whether the accused persons caused the death of the deceased person. There was no eye witness called by the prosecution to the alleged murder of the deceased. For the prosecution to sustain a conviction on circumstantial evidence the Court of Appeal in the case of **Sawe v Republic [2003] eKLR** had this to say:-

“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.”

38. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances get snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “*may be true*” and “*must be true*” and the same divides conjectures from sure conclusions, see **Navaneetha Krishnan v The State by Inspector of Police – Supreme Court of India, Criminal Appeal No. 434 OF 2013**.

39. From the line of authorities on circumstantial evidence the court has to judge the total cumulative effect of all the proved circumstances each of which reinforces the conclusion of the guilt of the accused person and if the combined effect of such circumstances is taken to be conclusive in establishing the guilt of the accused the conviction would be justified.

40. In the instant case considering the testimony of PW1 Willington Odhiambo Ogola the accused was the last person with the deceased. Mr. Ogola testified that before he slept he heard his mother screaming but ignored it thinking she was it was because of the neighbours. Mr. Ogola testified that when he found the deceased he also noticed that the deceased's chickens were missing. PW2 Mrs. Lango testified that the following day she encountered the deceased who was carrying a sack of chickens and he told her that he was going to sell them on instructions from the deceased which chickens were making noise in a sack. PW3 Mr. Ouma also testified that on the 29/1/2019 he also met the accused, whom he knew had no phone, with the deceased's Nokia phone which the accused alleged he was going to withdraw some funds.

41. PW6 P.C. Muchenyeye also testified that when investigations began he noticed that the accused had run away and only traced him on the 18.3.2019 when he received information that the accused had been arrested by the public at Kondele in Kisumu and handed over to Kisumu Central Police Station.

42. Upon being put on his defence the accused denied being in Akala on the 28th and 29th January 2019 and state that he was with his wife Eunice Adhiambo and children in Kisumu however he testified that his wife could not come to give evidence as he had not been in touch with her for 7 months and further that his neighbours who could vouch for him could also not come to give evidence in his support since he did not have their telephone contacts.

43. The accused gave an alibi that he was not at the scene of the crime. The Court of Appeal in **UGANDA V SEBYALA & OTHERS [1969] EA 204** adopted a decision made in the same year by Georges, CJ in **TANZANIA CRIMINAL APPEAL 12 D68** thus:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is then an alibi which is not particularly strong it may very well raise doubts.”

44. The Court of Appeal in the case of **LEONARD ASENATH VS REP (1957) EA 206** adopted with approval an English decision, **REP. VS JOHNSON 46 CR. APP. R. 55[1961] 3ALL E.R. 969** which held:

“Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity or diminished responsibility and is analogous to a defence such as self-defense or provocation. A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the prisoner in such a case.”

45. The accused has no burden to prove his innocence or adduce any evidence to prove his alibi is true. However, I have considered the entire evidence before court including testing the circumstantial evidence adduced and the accused alibi defence to draw my conclusions. I am satisfied that the prosecution has cogently and firmly established the circumstances from which an inference of guilt is sought to be drawn. I am satisfied that those circumstances unerringly point towards the guilt of the accused. I am also satisfied that the circumstances taken cumulatively forms a chain so complete that there is no escape from the conclusion that within all human probability it is the accused and no one else who committed the offence herein. The accused gave obvious falsehood that he never went to the deceased's house on the night of 28th and 29th yet PW1 was with him in the deceased's house that night and on the morning of 29th /1/2019 PW2 saw him leaving the deceased's house very early in the morning while carrying a sack containing live chicken and she greeted him and he said he was going to

sell chicken for the deceased. He admits being a relative to the deceased and knows PW1 and PW2. PW3 too met him at Akala Market. There is nothing in the evidence of all the prosecution witnesses suggestive of mistaken identity of the accused person who was last seen with the deceased and was last seen leaving the deceased's house only for her to be found dead. PW1 heard the deceased scream on the material night but he assumed that she could have heard of something bad to have happened to a neighbour. That in my view was her last scream as she breathed her last courtesy of the accused person herein, who had just been left with the deceased in her house, by PW1.

46. From the above evidence both for the prosecution and defence which I have considered, I am not persuaded that the alibi by the accused is plausible. PW1,2,3 all knew the accused very well as he used to live with the deceased who was his aunt and on the material night PW1 was with the accused in the house of the deceased then he left him therein. On the morning after PW2 met the accused going away with the sack containing chicken and they spoke when he told her the deceased had send him to sell chicken for her. PW3 met the accused at Akala Market with a phone he recognized as belonging to the deceased who was his grandmother. There is no evidence that all these witnesses could gang up to frame the accused with such a heinous offence. I heard and saw them testify and I am persuaded that they were telling the truth.

47. In my humble view, there were no co-existing circumstances that could destroy the inference of guilt. In **VENANZIO NZIVO –V- REPUBLIC CRA NO. 81 OF 2003** the Court of Appeal laid the test for circumstantial evidence as follows:

“For our part, we think the appellant is on firmer ground here. As the entire case is dependent on circumstantial evidence the tests laid by this Court on many occasions readily come to mind:

“In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on Evidence – 10th Edition P.31). It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference – Teper v. The Queen [1952] AC 480, at page 489. – See James Mwangi v. R [1983] KLR 327 at pg.331.”

48. I have considered all the circumstances of this case and I am satisfied that there are no co-existing circumstances that could negate or destroy the inference of guilt. The accused in my view came out with a long theory of being away in Kisumu and bringing in issues of land transaction with a grandson of the deceased to cover up his heinous act. I am persuaded that the evidence adduced by the prosecution witnesses displaced the alibi defence of the accused person. I reject his alibi defence as being made up to escape justice.

49. The next issue is whether there was malice afterthought. Under section 206 it 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

c. An intention to commit a felony.”

50. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a) to (e) is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

51. In the **Ogelo v Republic [2004] 2KLR 14** the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of **Ernest Bwire Abanga Onyango v Republic [1990] Cr. Appeal No. 32 of 1990**. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.

52. While giving directions on the matter the Court of Appeal in the case of **Nebart Ekaita v Republic [1994] eKLR** stated as follows:

“It remained a matter of questioning whether or not the appellant knew that there was a serious risk that death or grievous bodily harm would ensue from his sustained assault on the deceased. The possibility therefore that the appellant killed the deceased by a sustained unlawful assault but without the intent necessary to constitute legal malice requisite to the proof of the offence of murder contrary to section 204 of the Penal Code cannot be excused. In the circumstances we are unable to uphold the appellant's conviction for murder.”

53. There was no evidence of bad blood between the accused and the deceased. However, the accused was found to have taken the deceased's chicken and was going away with them to sell.

54. There is every indication that the accused silenced the deceased in order for him to steal her chicken and her phone which were never recovered. The deceased was found to have a fractured skull caused by blunt trauma. The use of a heavy object on a person's head, a 91 year

old lady which leads to fracture of skull is evidence that whoever did it intended to cause her grievous harm or death of the deceased person which is evidence of malice aforethought. Albeit Mr. Ochanyo submitted that the deceased could have died of natural causes, the doctor's evidence was clear that the deceased had injuries which were not consistent with a natural death.

55. I am satisfied that malice aforethought has been established against the accused person herein. The prosecution has discharged the burden of proof of beyond reasonable doubt that the accused herein and no other person, with malice aforethought unlawfully caused the death of the deceased. I find the accused person guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 4th Day of May 2020 via skype due to Covid-19 situation.

R.E. ABURILI

JUDGE

Mitigation:

Mr. Ochanyo Advocate

The accused is a first offender and married with children dependent on him. He did hotel business to sustain his family. There is a relation between the accused and the deceased. The accused is remorseful. He has been in remand throughout. He regrets his action that caused the death of the deceased. The Court should temper justice with Mercy.

R.E. Aburili J.

The accused Michael Otieno Wasonga

My family is suffering. I pray to be assisted by the court because my children depended on me.

R.E. Aburili – J.

Mr. Ng'etich

The accused is a first offender but without provocation killed an innocent old lady. He hit her on her skull. She died a very painful death. The accused then took her belongings including a phone and chicken. These are actions of cold blooded killers. I call upon the court not to let the accused person back into the society.

R.E. Aburili – J.

SENTENCE

I have considered the mitigation by Mr. Ochanyo counsel and the accused person. The deceased died a very painful death. There was no evidence of provocation. Every person has a right to life. Live and let live. No person has any right to deprive another of life.

The accused is a cold blooded murderer due to greed for very minute things like chicken and a mobile phone. He does not deserve the mercy of the court. The dead too deserve justice. Section 204 of the Penal Code provides for death sentence upon conviction for murder but as the sentence is not mandatory, I exercise discretion and sentence the accused to serve life imprisonment. Right of Appeal is 7 days of today explained.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 4th day of May, 2020.

R. E. ABURILI

JUDGE