



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL CASE NO. 6 OF 2017 [MURDER]

STATE.....PROSECUTION

VERSUS

ELIJAH AGUTU OGUTU..... ACCUSED

FINAL JUDGMENT AND SENTENCE

1. The accused person herein **Elijah Agutu Ogutu** was is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information dated 1st April 2019 signed by David Mogunde Okachi Senior Principal Prosecution Counsel gives particulars of the charge that the accused person, on the night of 21st and 22nd day of March 2019 at Matera Village, Ochieng 'a Sub location of Rarieda Sub county within Siaya County he murdered one **Susan Awino Omolo**.

2. The accused person took plea on 23/9/2019 and pleaded not guilty to the charge of murder.

3. An initial plea of not Guilty was entered on **23/9/2019** after a long period of time as the accused upon being taken to Jaramogi Oginga Odinga Teaching and Referral Hospital for mental assessment was initially misdiagnosed with a mental illness leading to the court referring him to Mathari Hospital for mental treatment. Later it was discovered that the accused had no mental illness or history of any mental illness prior to the incident giving rise to this case and therefore the same Doctor Psychiatrist who had misdiagnosed him re-examined him and gave him a clean bill of health on 30/7/2019 vide Medical Report signed by Dr. Edwin Nyaura, Consultant Psychiatrist at Jaramogi Oginga Odinga Teaching and Referral Kisumu dated 30/3/2019.

4. The initial mental assessment was done **on 2/4/2019**.

5. The prosecution had lined up nine (9) witnesses to testify against the accused person when the accused person offered and the prosecution in consultation with the family of the deceased Susan Awino Omolo, represented by her elder sister Eunice Atieno accepted a plea bargain from the accused person and on 23/1/2020 a plea bargaining agreement was signed by the accused, his advocate Mr. Oduol Victor Gneiss Aluoch and the Prosecution represented by Mr. David Okachi Senior Principal Prosecution Counsel. A fresh plea was taken for the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code in accordance with the plea bargain agreement.

6. On 26/2/2020, full facts of the case herein were read out to the accused after he pleaded guilty and he admitted the facts to be correct. The court upon being satisfied that the facts as read out to the accused person and exhibits produced in evidence disclosed an offence under Section 203 of the Penal Code; and that the plea of guilty was unequivocal, proceeded to convict the accused person which the offence of murder Contrary to Section 203 of the Penal Code.

7. The exhibits produced are as per the exhibits list and these are:

(1) Wooden stick used to assault the deceased by the accused.

(2) Blood stained white camisole

(3) 2 photographs of the deceased showing her body lying on the floor and with the frontal injuries comprising a deep cut on the head.

(4) A grey blood stained vest belonging to the accused;

(5) Post mortem report of the deceased

(6) Exhibit memo

(7) Government Chemist report showing that the DNA profiles generated by the blood stains from the piece of timber (4) used to assault the deceased, the deceased's t-shirt A; and the accused person's gray vest (2) matched the DNA profile of the deceased Susan Awino Omolo.

(8) The accused person's 157 mental assessment report.

(9) The accused person's 2nd mental assessment report

8. The facts which the accused person admitted as being correct when read to him and comprising the exhibits above stated disclosed that the deceased was a younger sister in-law to the accused who was her guardian. She was a younger sister to the accused person's wife, Eunice Atieno.

9. The accused person who lived with deceased summoned her into his house and inquired from her about a telephone call she had received from a certain man and that a quarrel ensued and in the process the accused got agitated and assaulted the deceased using a wooden plank (Exhibit 1) on her head. She started bleeding (Exhibit 3b a closer facial view of the deceased shows a cut wound on the forehead of the deceased) and when the people who were in the house tried to intervene, he threatened to assault them. The deceased crawled into the kitchen while bleeding. One Raphael Agutu went and performed first aid on her by cleaning the cut wound and giving her Panadol as she complained of severe pain in her head and the abdomen.

10. The deceased was then left sleeping in the kitchen and at about 5a.m when the accused person's son Fredrick Adhiambo Agutu went to check on the deceased who was his aunt, he found her lifeless body. He screamed and alerted other people who went to the scene and confirmed that the deceased was indeed dead. The police were alerted, they went to the scene from Aram Police Post and recovered the exhibits produced including clothing and the wooden plank and removed the deceased's body to the mortuary at Madianyi Sub County Hospital after taking photographs by the Scenes of Crime Personnel (Exhibits 3a and 3b).

11. The accused was arrested at Bondo and was found dressed in a grey vest which was found to have been stained with blood stains which was recovered and escorted to the Government Chemist for analysis and a report produced in court as an exhibit showed that the DNA profile generated from the said vest matched the DNA of the deceased. (See exhibits 6 and 7).

12. A Post mortem carried out on the body of the deceased revealed that the deceased's cause of death was due to haemorrhage (bleeding) due to blunt force to the head.

13. All the above facts upon being read out to the accused, he admitted them and as earlier stated, a plea of guilty was entered and he was convicted accordingly.

14. The prosecution led by Mr. Ng'etich stated that he had no previous records of the accused and that he should be treated as a first offender.

15. In mitigation the accused person through his advocate Mr. Oduol submitted that the accused was a first offender, is remorseful for the offence and prays for leniency and mercy of the court. That he seeks for forgiveness and that he had co-operated with the court to ensure that expeditious justice is served. That the accused person does not justify what happened. That he labours from a condition that triggers a lot of anger in him which pushed him to make improper decision. That he is a father of nine children who depend on him and that he is of lowly means.

16. In addition, the accused was given a chance to speak out and mitigate and he added that he takes care of an aged mother, his brother is bedridden and that if given custodial sentence, it should be one that he can serve and return home to care for his children who are school going.

17. The court also heard from Eunice Atieno Agutu, the elder sister to the deceased and wife to the accused and she stated that both her parents (**of the deceased as well**) were deceased and that she lived with the deceased who left behind two children in her custody. That the deceased had been married in Ringa and had gone visiting her when this unfortunate incident took place.

18. She asked the court to forgive the accused person for the murder of her sister and stated that even if the accused was not her husband, she would have forgiven him although she is pained by her death.

19. The court ordered for a Probation Officer's Report to be filed in court and set the matter for mention on 17/3/2020 for sentencing.

20. As fate would have it, Covid -19 pandemic set in and changed the landscape of court operations.

21. The Probation Officer was unable to interview the accused and other significant persons of interest and hence this matter had to be mentioned on 2/6/2020 for directions on the way forward. To date, the Probation Officer has not filed any pre-sentencing report on the accused person.

22. I have however, considered the circumstances under which the offence herein was committed, the mitigations by the accused, and the fact that the accused has saved the court's time by pleading guilty to the charge under a plea bargaining agreement.

23. Albeit a social inquiry – Pre Sentencing Report was not filed due to the Covid-19 situation, I observe that there is a report on Pre Bail Assessment filed and dated 20/11/2019 which reveal that the deceased lived with the accused as an in-law and that she used to bring young boys to the accused person's house and that the accused was not happy with the character of the deceased, stating that he had young kids who

were to learn bad behavior from the deceased.

24. The home environment was said to be conducive for non-custodial rehabilitation. The accused is also said to be a family man of 8 children, most of whom attend school and depend on him as he is from a poor background.

25. The Probation Officer had begged the court to grant the accused free bond as he had a known abode and a stable family that would guarantee that he attends court.

26. Having considered all the above, I find that life is sacrosanct. Article 26 of the Constitution guarantees every person the right to life and no person has any right to deprive another of life. Anger kills. The deceased was under the care of the accused and his wife who was her elder sister. He also takes care of the deceased's children.

27. From the facts of the case, the accused was disciplining the deceased for bringing her boyfriends into his house when he used excessive force and killed her.

28. A precious life, a mother to two very young children was lost forever. Those children are too young to understand what happened to their mother. They are left orphaned yet their only hope now is in the hands of the accused person's wife who called on this court to forgive her husband so that he can take care of her, their children and the deceased's children.

29. The accused seeks for mercy and leniency of the court and he does not justify what he did. Albeit post conviction and Presentencing Report was not filed, based on the Pre-Bail Assessment Report and the mitigation, I find and hold that the appropriate sentence to be imposed on the accused person is non-custodial.

30. I hereby sentence the accused person **Elijah Agutu Ogutu** to serve three years on probation for him to be counselled on anger management. He is ordered to abide by the probationary conditions that shall be imposed without fail and in default he shall be brought before the court for custodial sentence.

31. Orders accordingly

Dated signed and Delivered in open court at Siaya this 8th Day of June 2020.

R.E ABURILI

JUDGE