



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 27 OF 2019

REPUBLIC..... PROSECUTOR

VERSUS

ANTONY PASTE OBWOLO ACCUSED

JUDGMENT

1. Antony Paste Obwolo is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 1st day of December 2019, at Okwata village Teso South sub County of Busia County, murdered Eunice Akisa.
3. The prosecution case is that the accused and the deceased who were a husband and wife fought in their house. Apparently, the deceased was fatally injured. Her body was later found in a marshy area in a state of decomposition.
4. Antony Paste Obwolo, the accused, denied the offence and contended that his wife was still alive.
5. The issues for determination are:
 - a) Whether Eunice Akisa is still alive;
 - b) If she is dead, whether the accused was involved in her death; and
 - c) Whether the offence of murder was established.
6. The accused contended that his wife, Eunice Akisa had left for her parents' home at the time of his arrest and as far as he is concerned, she is still alive. His brother, Bisantio Otubongor Ekada (PW2), testified that on 4th December 2019 when he asked the accused the whereabouts of his wife, the accused told him that she had gone to her parents. He explained that he asked him her whereabouts for they (accused and his wife) were used to be always together.
7. The investigating officer did not bother to verify whether this assertion was true or not. It would have been very simple by visiting the home of Eunice Akisa's parents and make the necessary enquiries. Such a visit could have established if indeed she went there and if so, in what state.
8. Dr. Sande Kahindi Charo (PW4) testified that he performed a post mortem on the body of Asere Anna. There was no attempt whatsoever by the prosecution to shed light on the two different sets of names. Was Asere Anna the same person known as Eunice Akisa?
9. Geoffrey Ibukui (PW3) is the only witness who testified to have identified the recovered body as that of the wife of the accused. In his testimony he said the accused was his paternal uncle. From this evidence, we can conclude that he was a close relative who by virtue of this reason and his narration, he could have been in a position to identify her.
10. The evidence of Bisantio Otubongor Ekada (PW2) the brother of the accused is that he was used to seeing the accused and his wife always together. He was however not able to identify the recovered body. Without Geoffrey Ibukui (PW3) testifying as to what led him to conclude that the recovered body was that of the wife of the accused, we can only conclude that he only assumed that it was her body.
11. The prosecution case is however redeemed by the blood stained soil sample that was collected from the house of the accused. The DNA profile generated from it and the finger nails clippings of the deceased indicated that the blood belonged to the deceased. I therefore find that the body that was recovered was that of the wife of the accused, the failure to clarify the name on the post mortem report, notwithstanding.

12. Geoffrey Ibukui (PW3) testified that the accused confided in him on that he fought with the deceased over his missing hen and that he had left her lying down in the house. This evidence was not challenged. It therefore contradicted the contention of the accused that his wife had left for her parents' home. This coupled with the blood stained soil sample collected from the house placed the scene of the incident in the couple's house.

13. Other than what Geoffrey Ibukui (PW3) testified to, the rest is circumstantial evidence. Circumstantial evidence was restated in the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

In the case of **Sawe vs. Republic [2003] KLR 354**, the Court of Appeal held as follows:

1. 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 hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

In the instant case, I find that the circumstantial evidence against the accused cannot be explained in any other hypothesis other than that of his involvement in the death of his wife.

14. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

15. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

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 flight or escape from custody of any person who has committed or attempted to commit a felony.

16. The evidence of Geoffrey Ibukui (PW3) as to what the accused told him immediately the incident occurred, does not support the offence of murder. It would appear that this was a disagreement that resulted in a fight where the deceased was fatally injured. Though no evidence was adduced as to what stage the hand of the deceased was amputated, it would appear that this was after her death probably in an attempt to dispose of the body. Had the hand been amputated in the course of the fight, more blood would have been found in the house than was the case.

17. The evidence of Bisantio Otubongor Ekada (PW2) painted a picture of a couple that was fond of each other; they were constantly together.

18. I therefore, find that the prosecution has not proved the offence of murder against the accused. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit the accused of the charge of murder. I find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED and SIGNED at BUSIA this 12th day of October, 2020

KIARIE WAWERU KIARIE

JUDGE