



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 28 OF 2017

VINCENT OCHIENG OUMA.....ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

RULING ON CASE TO ANSWER

(SECTION 306 OF THE CRIMINAL PROCEDURE CODE)

1. The accused person **VINCENT OCHIENG OUMA** is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on the 6th day of November, 2017, at unknown time at Lwala Village, Mulaha Sub-Location within Siaya Country, he murdered one Teresiah Ogutu.
2. The Accused person took plea on 8.12.2017 and pleaded not guilty to the charge. The Prosecution called 7 witnesses to prove its case and closed its case. At the close of the Prosecution case, the defence Counsel Mr. Ochieng Ochieng submitted that the prosecution had not established a *prima facie* case to warrant the accused person being put on his defence.
3. Mr. Ochieng submitted that none of the 7 Prosecution witnesses testified that they saw the accused kill the deceased. Further, that MFI – 1 – 4C were shown to the witness PW2 but that the items were never produced by the Investigating Officer as exhibits yet PW2 stated that she gave the said items to the Police Officers. It was also submitted that the Investigating Officer did not testify. That the circumstantial evidence adduced was not sufficient to establish a *prima facie* case against the accused person.
4. In response, Mr. Namasake Prosecution Counsel submitted relying on the trial record and stated that the evidence adduced was sufficient to warrant a defence. He urged the Court to place the accused person on his defence.
5. I have carefully considered the defence Counsel's submission and the response by the Prosecution Counsel. I have given equal considerations to the evidence adduced by the Prosecution witnesses both in Chief and in cross-examination. The Law is clear that the onus of proof lies on the Prosecution (he who alleges) throughout the trial. That burden does not shift at any given time.
6. At the end of the Prosecution's case, this Court is enjoined by Section 306 of the Criminal Procedure Code to consider, whether there is or is no evidence that the accused committed the offence and after hearing arguments for the Prosecution or defence, record a finding of whether the accused has case to answer. If the answer is in the affirmative, the Court shall explain to the accused person the options available for tendering the defence and if the accused person has any witnesses to call, he/she may do so.
7. At this stage, therefore, what this Court is enjoined to do is to make a finding, on the basis of the available evidence, whether a *prima facie* case has been established to warrant placing the accused on his defence. To make such a finding, I must examine the evidence adduced as a whole.
8. PW1 MO a minor aged 16 years testified on oath after *voire dire* examination by the Court and stated that he was in class 8 at [Particulars Withheld] Primary School. That on 6.11.2017 in the morning hours he was at his Uncle's Lucas Odhiambo's home helping him fetch water and taking it to the Masons who were building a house for his Uncle. That very morning, he had seen the deceased who was with PW1's grandmother weeding in the farm. Later at about 7 pm PW1 went to the deceased's house and sat on a chair. He heard her phone ring from her bedroom so he went into the bedroom and on entering, he saw the deceased Teresiah Ogutu lying on the floor.
9. The phone was on her bed. It got disconnected before he picked it. He took the phone, lit his torch to see the room but the mobile's phone torch was not bright enough so he went to his mother's house and asked her (Roselyne Odhiambo) to give him a match box to enable him to put light in the grandmother's house to find out why she was lying on the ground.

10. Roselyne Odhiambo accompanied PW1 to the neighbour's house and together with the neighbour they went to the deceased's house. The neighbour lit a torch and PW1 saw the deceased lying in pool of blood with cuts on her head and hand. His mother got out and started screaming. He later recorded a statement with the Police.
11. In cross-examination by Mr. Ochieng, PW1 stated that Roselyne was his Uncle's wife but that Janet was his mother. He denied telling lies. He stated that the Police wrote that his mother was Roselyne instead of Janet. He denied seeing anyone kill his grandmother.
12. PW2 Roselyne Akinyi Otieno testified that on the material date of 6.11.2017 at 7.00 p.m. or thereabout she was in her homestead with her children when the grandson of the deceased Teresiah Ogutu, M.O. (PW1) went and told her that the deceased had fallen on the ground. She accompanied PW1 to the house of the deceased and found the deceased lying on the ground in a pool of blood. She saw household items scattered all over in the house. As it was dark, in the house, she used her torch to light the place and she saw the deceased with cuts on the head, right-hand wrist area and at her backside.
13. The mattress was on the floor. Clothes and documents were all over the place. The phone was on the floor. The deceased was naked. Blood was in the bedroom and at the door steps. She screamed and many people went to the scene. Her brother-in-law called the Assistant Chief who in turn called the Police who went to the scene and collected the deceased's body to the Mortuary. She stated that the deceased was the grandmother to her husband and that she lived with her in her house for about 2 months before she moved into her own house. She identified some items MFI 1 cooking pans and MFI 2, another pan, a green/white striped plastic striped plate MF3 and a white plastic plate with a yellow cover MFI 4 (a) and its cover MFI 4(b) with maize flour inside marked MFI 4(c). She stated that those items were found at the accused person's house on 7.11.2017. She identified the accused as Vincent Ochieng and stated that she was present when the items were recovered from his house later she recorded her statement with the Police.
14. In cross-examination by Mr. Ochieng Advocate, PW2 stated that there were items scattered in the deceased's house. That she wrote a further statement after being summoned by the Police to go and identify the items as marked but that in her further statement it does not state that she witnessed the recovery of the items at Vincent's house she confirmed PW1's evidence that they went to call a neighbour Daniel Odhiambo with whom they went to the deceased's house that night and found the deceased dead. She stated that she did not see the person who killed the deceased. She maintained that she saw the kitchen items at the Accused person's home on 7.11.2017 and on 13.11.2017 the Police summoned her to go and identify them at Siaya Police Station.
15. In re-examination she restated that she used to know the utensils as she used them for cooking at the deceased's house.
16. PW3 Masilus Murunga is the Assistant Chief Mulaha Sub-Location. He testified that on 6.11.2017 at about 6.30 p.m. when he received a telephone call from Joseph Owino Oteyo that the grandson of the deceased had called him to the effect that his grandmother had been murdered. He told Joseph Owino to go to the deceased's home and confirm the position as he lived nearby. PW3 proceeded to the Police Station at Siaya and reported. He was accompanied by the Police to the scene where they found the deceased lying on the ground, dead in a pool of blood. The body was photographed and that moved to Siaya Mortuary.
17. Later that night he received a call from Lucas Odhiambo who told him that the members of the Public had arrested Ochieng Ouma. He went to the scene and prevented the irate members of the Public from harming the Accused whom he and others escorted to Siaya Police Station. The Accused's clothes were muddy. Later PW3 recorded his statement with the Police.
18. In cross-examination, the witness stated that he found the suspect sited, surrounded by a mob. He could not tell if the suspect had been assaulted as he was muddy since it had rained that day. He denied visiting any home to recover some items. That he received a call at 1.00 a.m. and that the Accused only had his clothes on.
19. PW4 Daniel Dule Ochieng stated that he knew the deceased as his grandmother. He denied witnessing her killing.
20. He identified her body to the doctor who performed a post mortem on her body on 16.11.2017.
21. PW5 Alphonse Ochieng Ouma testified that on 6.11.2017 at about 2 p.m. he was grazing his animals and at about 4.30 p.m. he started returning them home as it was nearly starting to rain. After he had tied his animals, he saw Ochieng (accused) passing by going towards the place where PW5 had been grazing cattle. PW5 realized that one of his animals had remained behind so when he went for it, he saw the accused enter the homestead of Teresa and PW5 thought that the said Ochieng had gone to take shelter from the rains. He returned home tied animals and changed his clothes which had been rained on and went to his mother's homestead. He returned at about 6 p.m. and made tea, took it and went to Raresi Market to buy some foodstuffs and returned at about 6.30 p.m. Shortly as he went to his mother's place to eat dinner, he heard screams from the neighbourhood. He went to check from out of his mother's house later he left with his brother and proceeded where the screams were coming from and reached Mama Teresa's house and found her dead in the bedroom naked and bleeding from her head, lying in a pool of blood.
22. He returned to his mother's place. At 9 p.m. the Police came and removed the body. Later he recorded his statement. In cross-examination. He denied seeing the Accused kill the deceased.
23. PW6 Inspector Ayub Gati attached to Kamagambo Police Station as Deputy OCS testified that on 7.11.2017 at about 2 a.m. he was called by OCS Samuel Ngonge and told that Assistant Chief Mulaha Sub-Location Mr. Murunga had arrested a suspect. He left in a Police vehicle and went to where the Assistant Chief was. He found the Accused person. He escorted him to Siaya Police Station and placed the Accused in the cells after re-arresting him. He then left the matter to investigators.
24. In cross-examination, he denied investigating the case. He denied that accused was assaulted PW7 Dr. Biko Opidi testified that he performed an autopsy on the body of the deceased Teresa Agutu on 16.11.2017 at Siaya County referral Hospital. The body had several cut wounds, fracture and bleeding. He produced postmortem Form as Exhibit No. 1. He concluded that her death was due to severe head injury

– skull fracture of base of skull, subdural haematoma and occipital side due to blunt trauma on the head.

25. In cross-examination he denied that the injuries could have been caused by a fall.

26. The Prosecution closed its case without calling the Investigating Officer, or producing photographs allegedly taken of the scene of Murder. The re-arresting Officer does not state that the Accused had any kitchen items on him.

Determination

27. Having considered the above evidence, the question is whether the evidence links the Accused person to the Murder of the deceased.

28. On record is evidence on Oath from 7 Prosecution witnesses and none of the said witnesses saw the deceased being killed. They neither saw the accused kill the deceased.

29. The only evidence that closely links the accused to the deceased is that the accused was arrested in possession of household (kitchen wares) which PW2 identified in Court as belonging to the deceased and that she knew those items because she used them for cooking when she lived with the deceased for 2 months before she moved into her own house after getting married to the deceased's grandson. Regrettably, those items marked MFI – (4) (c) were never produced as exhibits.

30. In addition PW3 the Assistant Chief who was called at 1.00 a.m. on the same night of 6.11.2017 to go and see the accused who had been arrested by a mob in connection with the Murder of the deceased never mentioned those kitchen items and he even stated in cross-examination that he did not visit the accused person's home to recover some items. This is the witness who handed the accused to the Police. If PW2 was present when the accused was arrested and the kitchen items recovered from the accused person's house were taken to the Police, then, in my humble view, PW3 could have seen those items.

31. PW4 only identified the deceased's body to the doctor for postmortem. On the other hand, PW5 saw the accused taking shelter in the deceased's homestead at about 4.30 p.m. when it was raining. That is all that he saw, and later he learnt that the deceased had been murdered.

32. The Investigating Officer who could have shed light on the link between the items recovered and the suspect accused person, never testified to produce the said items.

33. As it is, the case remains of mere suspicion that the Accused was involved in the murder of the deceased Teresa Agutu. He may have killed her, but there is no watertight evidence linking him to the Murder.

34. Suspicion, however strong is not sufficient to warrant a charge of murder against a suspect. Circumstantial evidence available is not sufficient to connect the Accused with the murder of the deceased. I find it unsafe to call upon the accused to answer the many questions and gaps left by the Prosecution's evidence. To do otherwise is tantamount to shifting the burden of proof to the accused person. I decline to do so.

35. In the end, I find and hold that the Prosecution has not discharged the burden of establishing a *prima facie* case against the accused person to warrant him to be placed on his defence.

36. Accordingly, I find that the Accused herein Vincent Ochieng Ouma has no case to answer as far as the charge of murder of the deceased Teresia Agutu is concerned. I hereby acquit him of the charge of murder as stipulated in **Section 306 (1) of the Criminal Procedure code** and order that he shall be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Siaya this 11th Day of June, 2019.

R. E. ABURILI

JUDGE

Delivered in the Presence of:

Mr. Okachi the Senior Principal Prosecution Counsel for the State

Mr. Charles Ochieng Advocate for the Accused

Accuse person present

Court Assistants: Brenda and Modesta

R. E. ABURILI

JUDGE