



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL (MURDER) CASE NO. 12 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

WILLIS OBURA ODERA.....ACCUSED

JUDGMENT

1. **Willis Obura Odera (the accused)** herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

The particulars are that:

On the 30th December, 2017 at Buoye area, Kisumu East Sub-County, within Kisumu County murdered Josephine Adhiambo

2. The prosecution summoned a total of 4 (four) witnesses in support of its case while the defence called only the accused.

Prosecution Case

3. **PW 1 Holden Ouma Ogonya** husband to **Josephine Adhiambo (deceased)** recalled that on the 30.12.17, he was going home from a Power of Jesus Around the World crusade with the deceased when the deceased alighted from the vehicle they were travelling in at Nyamasaria and informed him that she was going to the market at Mowlem. At about 09.30 pm, the deceased who was groaning in pain called him and stated that she was admitted at Kisumu County Hospital. That shortly thereafter, the accused who was a choir member in their church also called him, informed him that his wife had been injured and urged him to go to hospital immediately. The witness rushed to hospital where he found his wife with severe burns on her body and she allegedly told him that she had been burnt by the accused. Deceased died on 20.01.18 and accused was arrested and charged with causing her death. In cross-examination by Mr. Mwamu advocate for the accused, the witness conceded that his wife had lied that she was going to the market while in fact she had gone to accused's house. He therefore conceded that he was doubtful about the deceased's allegation that she was burnt by the accused. He also conceded that the deceased used to go away from home frequently and would sometimes sleep out leaving their one-year-old child unattended and that he had after her death learnt that she had been having a love affair with the accused.

4. **PW 2 Bishop Washington Ogonya Ngede**, PW1's father stated that she visited the deceased in hospital after she was injured and she informed her that she was burnt by the deceased on 22.01.18 identified the deceased's body to the doctor that conducted a postmortem at Kisumu Hospital Mortuary.

5. **PW 3 Nancy Kananu**, neighbour recalled that on 30.12.17 at about 09.00 pm, she heard screams from accused's house and the sound of people quarrelling. She stated that she went out about 30 minutes later and didn't see anyone but noticed smoke bellowing from accused's house.

6. **PW4 PC Simon Gikandi** the investigating Officer stated he received accused on the night of 30.12.17 and it was reported that he had burnt a lady at Buoye area. He visited the deceased in hospital and recorded her statement on 03.01.18 in which she admitted that she had been having an extra marital affair with the deceased. In her statement she stated that accused called her to his house and burnt her for threatening to part ways with him. After investigations, he concluded that accused had caused the deceased the fatal injuries and caused him to be charged. With the consent of defence counsel, the witness produced the deceased's post mortem form **PEXH.3** filled by Dr. Oduor which shows she died of severe burns secondary to open flame.

The Defence Case

7. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put him on his Defence.

8. Accused recalled that he was at a crusade with the deceased and others on 30.12.18 and that the deceased was incensed when she saw him take photographs with other ladies. He stated that he had informed the deceased that his wife was visiting him on 30.12.18 and that they ought to end their relationship but deceased did not take it kindly as a result of which she grabbed his house keys and went away with them. He stated that the deceased and her husband left the crusade at about 06.00 pm and she called him at about 08.00 pm and threatened to commit suicide in his house. He stated that on his way home at about 09.00 pm, deceased called him and told him that she was admitted at Kisumu District Hospital. He went to check on her and found her with severe burns and she asked him to inform her husband that she was admitted in hospital which he did inform her husband that deceased was admitted in hospital. He stated that upon returning home, he found items in his house burnt. He was later arrested and charged.

9. **Rose Adhiambo**, accused's mother recalled having seen the deceased visit the accused one evening in November, 2018 and she told her that she went to the same church with the accused. She recalled that about a month later, accused arrived home after 10.00 pm and he told her that the deceased had been constantly visiting his house and he did not want to continue with their relationship. She stated that she called the deceased and told her to stop pestering the accused and also reported the matter to a pastor in the church the deceased used to attend.

ANALYSIS AND FINDINGS

10. 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 VS REPUBLIC [2014] eKLR**, the main elements of the offence of murder were listed as follows: -

(a) That the death of the deceased occurred;

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

11. The death of the deceased has been proved by the accused, and all the prosecution witnesses. The deceased's postmortem form **PEXH. 3** confirms that deceased died of severe burns secondary to open flame.

12. None of the prosecution witnesses witnessed the murder. The foregoing leaves the Court with no option but to make reasonable deductions from the dying declaration and available circumstantial evidence.

13. In order to establish the accused's culpability, the prosecution led evidence from PW1 to PW2 who stated that deceased informed them that she had been burnt by the deceased. The prosecution also relied on the deceased's dying declaration in which she stated that accused had burnt her.

14. The principles on admissibility of the evidence of a dying declaration are well illustrated in the case of **Republic v Andrew [1987] AC 281** where

(1) Can the possibility of concoction or distortion be disregarded.

(2) To answer this, ask if the event was so unusual, startling or dramatic that it donated the thought of the victim causing an instinctive reaction without the chance of reasoned reflection, on conditions of approximate but not necessarily exact contemporaries.

(3) To be sufficiently spontaneous the statement must be closely connected with the event causing it.

(4) There must be no specific features making concoction or distortion wisely.

(5) There must be no special features likely to result in error for example drunkenness.

15. The court of appeal in the case of **Chogo v Republic [1985] KLR** set out the admissibility of the dying declaration in the following passage:

“The general principle on which a dying declaration is admitted in evidence is that is in a declaration made in extreme when the matter is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

16. The predecessor of the court of appeal in the case of **Pius Jasunga S/O Akumu v Republic [1954] EACA 333** succinctly held as follows:

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval...it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (Republic v Eligu S/O Odel & Another [1943] 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. But it is generally speaking, very unsafe to base a conviction

solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration.”

17. The Court of Appeal emphasizing the need for caution and necessity for corroboration in relying on a dying declaration extensively cited the principle from **the 7th Edition on Evidence by Field** as follows:

“The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The deceased may have stated his inferences from facts concerning which he may have omitted important particulars from not having his attention called to them.”
(Republic v Olulu S/O Eloku [1938] 5 EACA 39, Republic v Muyovya bin Msuma (Supra).

18. The issue in question is whether there are reasonable grounds to believe the testimony of PW1 and PW2. It is evident that PW1 and PW2 did know how deceased was injured. In their testimonies, they conceded that it was not difficult to be suspicious of the deceased's implication of the accused for the reason that on the very day that she was injured, she had lied to her husband (PW1) that she was going to the market while she was in fact going to accused's house. Indeed, her husband, conceded that the deceased used to go away from home frequently and would sometimes sleep out leaving their one-year-old child unattended and that he had after her death learnt that she had been having a love affair with the accused.

19. It is not in dispute that the deceased had over 50 % burns on her body. According to PW1 and PW4, the deceased had difficulty communicating due to pain. This is the same period PW4 allegedly recorded the dying declaration.

20. Given the severity of the injuries inflicted upon the deceased it would have been prudent that the doctor at Kisumu County Hospital be called as a witness to certify about the fitness and condition of the deceased at time the statement was made to PW4. The prosecution failed to call the doctor and the court is therefore entitled under the general law of evidence to draw an inference that the evidence of the witness if adduced would have been adverse to the prosecution case. See **Bukenya & Others v Uganda [1972] EALR 549 at 551.**

21. The evidence on record leads to the possibility that the deceased might have lied to cover up the love affair she had with the accused or that as stated by the accused, she may have committed suicide after accused threatened to end their love affair. PW2 stated that she did not see accused in his house on the material night but that she heard screams and people quarrelling in accused's house. Accused stated that he had informed the deceased that he was expecting his wife on the same day. The prosecution did not investigate the possibility that the deceased could have gone to accused's house and finding his wife, a quarrel ensued as a result of which she suffered the fatal burns.

22. From what is stated hereinabove, I find that the dying declaration is suspicious and the benefit of doubt should be resolved in favour of the accused. In view of the circumstances of this case the dying declaration allegedly made by the deceased does not inspire confidence to this court as being true and voluntary statement admissible in evidence under section 33 (a) of the Evidence Act.

23. Concerning the circumstantial evidence, the court in **REPUBLIC –VS-TAYLOR WEAVER AND DONOVAN (1928) 21 CR. APP. R. 20** stated that:

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

24. In the case of **SAWE –V- REP [2003] KLR 364** the Court of Appeal held:

- 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.**

25. In the case of **ABANGA ALIAS ONYANGO V REPUBLIC CA CR. A NO. 32 of 1990 (UR)**, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,**
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused**
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.**

26. None of the prosecution witnesses witnessed the murder. PW3, accused's neighbor did not see accused in his house on the material date and time. Accused stated he found deceased at the Kisumu County Hospital. The circumstances in this case do not form a chain so complete with a definite tendency unerringly pointing to the conclusion that the crime was committed by the accused and none else.

Disposition

27. Accordingly, I have come to the conclusion that the state has failed to prove its case beyond reasonable doubt. Accused is hence found **NOT GUILTY** of the offence of murder and is accordingly acquitted. Accused shall be set at liberty unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED THIS 11th DAY OF *December* 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant

Accused

For Accused

For the State