



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO 92 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

SUSAN MORAA OKETCH.....ACCUSED

JUDGEMENT

INTRODUCTION

1. The accused **SUSAN MORAA OKETCH** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on 17th day of September, 2015 at about 8.00 a.m. at Kiambui Slums in Kamukunji Sub-county within Nairobi County murdered **JOB OKETCH OINO**.

2. She first appeared in court on 5/10/2015 before Lesiit J. when her plea was deferred to the 12/10/2015 at which a plea of not guilty was entered. After several false start at hearing by a Ruling dated 5/5/2016 Mutuku J. released her on bond pending trial and on 12/12/2016 the bond terms were reviewed thus enabling the accused to be released from remand custody.

3. On 3/4/2017 her trial commenced before me wherein the prosecution called a total of seven (7) witnesses while the accused when placed on her defence tendered a sworn statement of defence without calling any witnesses. As evidence of our slow criminal justice system, the Judgement herein is being delivered almost one year from the date the trial commenced.

4. The following facts emerged from the trial as supported by the evidence tendered and analyzed in this Judgement:- the accused and the deceased were married and were living together as husband and wife at Kiambui slums wherein they owned rental houses, were selling *chang'aa* to the slum dwellers as well as drinking it themselves. They also had a *boda boda* (motor cycle) transport business and were considered successful couples in the area. They had a child who was living with them but their marriage was not blissful being characterized with constant quarrels and fights.

PROSECUTION CASE

5. PW4 KEEN CYRUS ONWONGA testified that on 17/5/2015 while in his Chemist at Kiambui slums he received a call from the accused who was his general friend that she had a sick person she wanted him to attend to. He went to her house and found the deceased together with his sister called Joyce. The accused told him that the deceased had consumed two liters of *chang'aa* and blacked out but when he checked on his chest he noticed that he had marks caused by a blunt object to which the accused stated that the deceased had fallen on tomato crates. He advised her to give him raw eggs and milk before taking him to the hospital. He stated that the condition of the deceased at that time was serious since he was unable to talk but confirmed that he was alive.

6. PW 1 KAREN OMWERI a sister-in-law of the accused and the deceased met a sister of the deceased called Joyce who informed her that the deceased was sick. She went to his house and found him lying down on a chair while the accused was sitting on the bed. When she called out the deceased he did not respond forcing her to check on his pulse and there was none. When she checked on the body she noticed a wound on the chest, scratch marks on the neck and human bite marks on the shoulder.

7. PW2 BEN WILLINGTON OINO stated that **PW1** called him with information on the deceased and he advised them to take him to the hospital. **PW1** informed him that he might not be able to see his brother alive and advised him to check on his body when he got to see him which he did at Mama Lucy Kibaki Hospital and confirmed that he had injuries on the chest caused by a blunt object, human bite on the shoulder, nail mark on the neck and stab wound on the rib cage. When he asked the accused what had happened she informed him that the deceased had consumed three (3) litres of *chang'aa* and lost consciousness. She further told him that she had called on **PW4** who had advised her to give the deceased raw eggs.

8. PW3 JARED MOGAKA OMWARE a Clinical Officer and a relative of the deceased went to Mama Lucy Hospital where he met with the accused who informed him that the deceased had gone to buy a stock of *chang'aa* which he consumed and fell asleep never to wake up again. When he examined the body of the deceased, he noticed finger nail marks on the neck, dark spot on the chest and human bite on the back. Based on this observation the accused was arrested and locked up at Buruburu Police Station.

9. PW6 PC KENNEDY KIRWA on 18/9/2015 went with the accused to the scene and made inquiries where he established that the deceased had a quarrel with the accused which led to a physical fight from which he sustained injuries. A minor son of the accused confirmed the fight. He stated that the accused was interrogated and recorded her statement under inquiry by Inspector Jacob Kisaine in which she did not deny the fight. In cross-examination he stated that he did not see the jerrican of *chang'aa* when he visited the scene. He confirmed that as per the statement of the son of the accused who could not be traced to testify, the deceased had slapped the accused and that there was no tomato crate at the scene.

10. PW5 PC RICHARD OSOI attended postmortem examination on 19/9/2015 which was conducted by **PW7 DR. PETER NDEGWA** who found that the deceased had symmetrical bite marks on the left shoulder, four finger nail bruise marks on the left lateral laceration on the right chest wall oozing blood, petechal on the eye. There was also contusion on the whole of anterior chest wall, bruised neck muscles and brain contusion on the frontal lobes. As a result of the said injuries he formed an opinion that the cause of death was asphyxiation due to manual strangulation and chest compression. In cross-examination he stated that he did not analyze the blood sample.

DEFENCE CASE

11. When put on her defence the accused gave a sworn statement of defence and stated that on 17/9/2015 she left the deceased in the house with four (4) customers who wanted *chang'aa*. When she came back from school, she found the customers and the deceased quarreling over the accounts when she asked them to settle the disputed amicably, the deceased slapped her causing her to leave the house and go outside. In the process the deceased allegedly fought with one customer biting him on the ear who pushed the deceased onto a box of tomatoes causing him to hit his chest on the same. The deceased then entered into the house and took five (5) litres of *chang'aa* he was selling into his hand while holding a knife. His sister asked him why he was attempting to kill himself through alcohol to which he replied that he was enjoying his wealth. He then fell down and was carried into the house and placed on the bed.

12. She stated that the sister of the deceased suggested that they buy him soup which was done. She then went for a doctor who was not available at that time. When found the doctor told her to give him milk and egg which they did but the deceased did not vomit out the alcohol. He was then taken to Mama Lucy Kibaki Hospital where he died while undergoing treatment. She was then taken to the police station where she explained that the deceased had consumed alcohol. She was in police custody for fourteen (14) days.

13. In cross-examination she stated that there was no grudge between her and the neighbours. She confirmed that the deceased did not look at his sister. It was her evidence that the deceased had been beaten by his customers when they disputed the price of *chang'aa* he had sold to them. In cross-examination she stated that they took the deceased to the hospital while alive and that if he had been strangled he would have died instantly. She stated further that she was not represented at the postmortem. It was her contention that whereas there were tooth marks on the body of the deceased those too could not have killed him.

SUBMISSIONS

14. At the close of the defence case both the prosecution and defence opted not to file any final submissions but relied upon their evidence on record.

ANALYSIS AND DETERMINATION

15. As been stated severally to sustain conviction on a charge of murder, the prosecution is required to prove beyond any reasonable doubt the following elements of the offence under **Section 203** of the **Penal Code**:-

- a. The fact of the death.**
- b. The cause of death of the deceased.**
- c. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused.**
- d. That the said act of omission or commission was caused with malice aforethought.**

16. The fact of the death of the deceased is not in dispute. The same was confirmed and proved beyond any reasonable doubt at the close of the case herein through the evidence of **PW1 CAREN OMWERI** a sister-in-law to the deceased and the accused, **PW2 BEN W. OINO** a brother, **PW3 JARED MOGAKA OMWARE** his cousin and **PW5 PC RICHARD OSOI** who attended the postmortem examination. The accused in her defence confirmed that the deceased died at Mama Lucy Hospital where he was referred to for treatment. After his death the accused was taken to Buruburu Police Station where she was locked up before being charged with the offence herein. As I have said before, whereas the court believes in miracles, as at the time of this Judgement, the deceased was very dead.

17. The cause of the death of the deceased is in dispute. The prosecution through **PW7 DR. PETER NDEGWA** advanced the theory that the cause of death was asphyxiation due to manual strangulation and chest compression. The accused on the other hand stated that the deceased died as a result of over consumption of alcohol which was not eliminated by Mr. Ndegwa. Under cross-examination: **PW3 JARED MOGAKA OMWARE** a clinical officer and relative of the deceased confirmed that the accused had told him that the deceased had died as a result of over consumption of *chang'aa* and that no sample were taken to overrule this as the cause of death. He stated that one could die

as a result of multiple causes and that intoxication as a cause of death was ruled out since the body of the deceased finger nail mark and human bite marks.

18. PW4 KEEN CYRUS ONWONGA corroborated the evidence of the accused that he went to her house on request and advised her to give the deceased raw egg and milk if he was over intoxicated to vomit them out before taking him to the hospital as his condition was serious. He further stated that whereas the deceased could not talk when he attended to him the same was alive as he was snoring.

19. From the evidence tendered before the court there still remains a doubt in the mind of the court as to the cause of death of the deceased. I have noted that one vital witness who would have shed light as to the condition of the deceased and the cause of his death his sister called Joyce was not called by the prosecution in line with the case of **BUKENYA v UGANDA** - this court is left with no otherwise than not draw an inference that if called her evidence would have been adverse to the prosecution case as to the actual cause of death of the deceased. I therefore find and hold that the cause of death was not proved beyond reasonable doubt.

20. On whether the said death was caused by unlawful act on the part of the accused person, save for the evidence of the accused person, there is no direct evidence tendered by the prosecution connecting the accused with the injuries on the deceased. **PW1** testified that she did not ask the accused what had caused the visible injuries on the deceased, she only told the brother of the deceased **PW2** to check on the said injuries. It was his evidence that the accused told him that the deceased had over consumed *chang'aa* which was consistent with what she had told **PW4**.

21. Whereas there was an allegation of a fight between the accused and the deceased as per the evidence of **PW6 PC KENNEDY KIRWA** the investigating officer, once again one vital witness the minor son of the deceased and the accused who would have shed light on this fight was never called as a witness and whereas his statement which was consistent with the accused account was read by the said witness under cross-examination, this evidence was never tested by way of cross-examination. It is of note that the said statement confirmed that the deceased after the fight consumed a jerrican of *chang'aa* thereby corroborating the Defendant's evidence in her defence. Since this witness was never called by the prosecution once again the court makes an adverse reference thereon.

22. The issue for determination is whether the deceased died as a result of the injuries inflicted upon him during the fight with the accused or whether the deceased died as a result of over consumption of *chang'aa*? There is also the two theories of the deceased having been beaten by one of his customers in addition to falling on a tomato crate while running after the accused. At the close of the case herein there remains doubt in the mind of the court as to the actual cause of death of the deceased and whether it was as a direct result of the fight between the deceased and the accused. Whereas there is suspicion that the death might be as a result of the acts of the accused the law is very clear in respect of criminal matters. The burden of proof must be beyond any reasonable doubt and mere suspicion however strong cannot be a basis for conviction. See **MARY WANJIRU GICHIRA v REPUBLIC CRIMINAL APPEAL NO. 17 OF 1998**.

23. When called upon to offer her defence the accused tendered in sworn evidence explaining the circumstances under which the deceased sustained some of the injuries indicated by **PW7**. There was no evidence tendered by the prosecution that the accused had strangled the deceased and the accused account of a fight between the deceased and his customers were not rebutted by the prosecution. The law is clear that where an accused person offers an explanation under the provisions of **Section 111 of the Evidence Act** – the same is only on a balance of probabilities and in this case there is no evidence tendered to enable the court doubt the story of the accused.

24. It is also clear that whereas the prosecution is not required to establish motive for the offence, the same is required to establish malice aforethought which is defined under **Section 206 of the Penal Code** as:-

a. An intention to cause the death or do grievous harm to any person.

b. Knowledge that the act or omission causing death will probably cause death or grievous harm.

25. I have taken into account the prosecution evidence and the accused account in her defence and have come to the conclusion that the prosecution has failed to prove beyond reasonable doubt that the accused had intention to cause the death of or to cause grievous harm to the deceased. Whereas the deceased lost his life, I am satisfied that the prosecution has failed to prove its case against the accused beyond any reasonable doubt having noted that the prosecution failed to produce before the court two vital witnesses hereby raising doubt on the prosecution case the burden of which I have no option than to give to the accused.

26. Other than mere suspicion that the accused killed her husband, the prosecution did not adduce evidence to support the charge against the accused beyond reasonable doubt and only relied upon the evidence of the relatives of the deceased who were not material witnesses. Having found that the prosecution failed to establish a case against the accused, the only available remedy is to find the accused which I hereby do, not guilty and accordingly acquit the same of the charge of murder. The accused shall be set free forthwith unless otherwise lawfully held.

27. The prosecution has a right of appeal.

DATED, SIGNED and DELIVERED at Nairobi this 9th day of May, 2018

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J. WAKIAGA

JUDGE

In the presence of:-

Miss Wegulu for the State

Mrs. Odhiambo for the accused

Accused present

Court Assistant – Paul