



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. 11 OF 2014**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**ELIZABETH ANYANGO OJWANG.....ACCUSED**  
**JUDGEMENT**

1. The accused **ELIZABETH ANYANGO OJWANG** was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the night of 8<sup>th</sup>/9<sup>th</sup> January 2014 at Tassia II Estate Area in Embakasi within Nairobi County murdered **MICHAEL MOSES OTIENO**.

2. She first appeared in court on 22/1/2014 before Koriri J. and on 30/2/2014 took her plea before Mboghli J. when a plea of not guilty was entered for her. After several adjournments, on 12/4/2016 the trial commenced before me and to prove its case the prosecution called a total of seven (7) witnesses. When put on her defence the accused tendered in sworn statement of defence and called no witness having been unable to secure the attendance of her son (JO) a minor as a witness on her defence.

**PROSECUTION CASE**

3. The prosecution case as per the evidence tendered before court was that the accused was employed by the deceased and his wife as a house help and was living with them together with their three children at their home in Tassia the scene of the murder as at that time. The week before the death of the deceased the wife and their three children had travelled to their rural home in Bondo for the purposes of taking one of their daughters to boarding school thereby leaving the deceased and the accused in Nairobi.

4. According to **PW4 JOSEPH ANDIGO OGONDA alias "JAPOLO"** the prosecution star witness and the first person at the scene, the marriage between the deceased and his wife was very rocky and that at some stage in their marriage, the wife now deceased, had deserted the matrimonial home and got married to another man only to return back to the deceased when very sick and about to die. The wife was fairly rich and wealthy who owned almost everything they owned including land (plots), houses and cars all which were registered in her name. She constantly told the deceased that he would never inherit her wealth which according to her had been registered in the names of their children. They constantly used to fight and the witness who was the best friend of the deceased, neighbour and a fellow worshipper had to mediate and help them settle their disputes from time to time.

5. The wife of the deceased had employed a driver one Dancun Oketch who used to drive her along and for which she gave him a room in one of their buildings, adjacent to their home. The deceased suspected that they were lovers and would constantly complain to the witness about it.

6. On 9<sup>th</sup> January, 2014 **PW4** was called by **PW6 JAO** the first born daughter of the deceased at 4.00 p.m. on phone with information that she was unable to reach the deceased and he told her that he did not know where the deceased was before her mother took the phone and told him to rush to their house since the deceased was there bleeding. He proceeded to the house where the accused opened for him the gate. She told him to go check on the deceased in the bedroom upstairs only to find the same dead in bed with blood stains everywhere and then called his wife and son to come and witness what had happened and they recovered a laptop and a mobile phone of the deceased which was still ringing at the time. They then reported to the police and handed over these items.

7. **PW6 JAO** testified that they went to Bondo on 2<sup>nd</sup> January 2014 and on 8<sup>th</sup> took her sister to a boarding school before proceeding to Rongo where they were upto the 9<sup>th</sup>. She wanted to talk to the deceased but he did not answer his cell phone. She then called the accused at about 2.30 p.m. who told her that she was on her way to Kayole. She directed her to go back to the house and take her phone to the

deceased so as to talk to him. She then called **PW4** who stated that he had not seen nor heard from the deceased. At 4.00 p.m. the accused then called her mother with the information of the death of her father. She confirmed under cross-examination that her father and mother were not in good terms and that they were not sharing the same bedroom at the time of his death.

**8. PW3 PC EDWARD INDECHE** was on 9/1/2014 at 4.30 p.m. instructed to proceed to the scene which was a house secured by a perimeter wall and found the body of the deceased on the bed with a polythene paper on top of the mattress. It had a stabbed wound on the neck and was naked. He arrested the accused since she was alone in the house with the deceased and there was no sign of break-in. The accused under interrogation stated that at night she heard dogs barking and they checked outside and found nobody. It was his evidence that the first police officer at the scene was the OCS.

**9. PW5 CORP. ERASTUS OGADA** was instructed to take over the investigation of the case and proceeded to the scene where they found dried blood stains within the compound towards the house and that there were drops of blood stains as you moved towards the bedroom where the body was. In the bed room items were scattered everywhere as there was a struggle. He interrogated the accused who told him that the previous night they heard dogs barking and the deceased went out to check what was happening and that thereafter the deceased came back and went upstairs. When she asked him whether he had been injured he said may be he had been pricked by a nail and that when the accused was arrested she had no injuries neither did she have any blood stains on her clothes.

10. In cross-examination he confirmed that the deceased wife and the driver were arrested but later on released. He confirmed that the accused visited the children in Kayole where her children were on the material day.

**11. PW7 INSP. EDWIN MANYEKI** a scene of crime investigator visited the scene, took photographs and measurements and confirmed that there was a section of incomplete wall between the two buildings owned by the deceased and his wife and that from the top of the incomplete building you could access the deceased compound. **PW1 PC MUSYIMI MWANZAI** attended the postmortem examination conducted by **PW2 DR. DOROTHY NJERU** who confirmed that the body had an incisions, right angle of the mouth, anterior aspect of the neck with marked pallor of skin and severed left external jugular vein. As a result of the said examination she formed the opinion that the cause of death was exsanguinations due to sharp force trauma (incisor) to the neck.

#### **DEFENCE CASE**

12. When put on her defence the accused stated that on 8<sup>th</sup> they took supper and after watching 9.00 p.m. news the deceased went upstairs to sleep while she slept downstairs. They were only two people in the house. The deceased had two dogs and at 3.00 a.m. they heard the dogs barking. She switched on security lights and the deceased came down stairs and went outside. She heard him say that he had seen someone. The deceased then patrolled the compound before entering the house when she noticed blood drops, she called the deceased to find out whether he needed assistance but he did not respond, she then called him on phone and he said he was okay. Since she had been instructed not to go upstairs she decided to sleep upto 5.00 a.m. when she woke up and proceeded with her duties upto 11.00 a.m. having prepared breakfast which she put on the table. She then got a phone call from a friend to the effect that her son wanted to talk to her which he did with information that one of her child was sick. She then called the deceased on phone and since he had not woken up and did not respond she decided to go to Kayole to check on the child. She left one pair of keys for the deceased.

13. On the way from Kayole, she received a call from the cell phone of the deceased wife but talked with her daughter **PW6** who wanted to talk to her father. She went back to the house and called the deceased on phone but he did not answer, she decided to go upstairs against instructions and found the deceased on bed and a pool of blood. She then went downstairs and called the wife of the deceased. She was then instructed to call **PW4** who came to the house. At that time she had only worked for the deceased wife for four (4) months. She confirmed that wherever there was a fight between the deceased and his wife, she would hear her tell him that all the properties were hers and that the deceased would die before her without inheriting them.

14. She denied committing the crime since she had nothing to gain and that she could not have killed the deceased alone as he was stronger than her. She stated that the deceased wife had two cars and the deceased would never drive any of them. She stated the first time she went upstairs she did not enter the bedroom where the deceased was and only entered the room in the presence of Japolo. She stated that the wife of the deceased used to go to the property where the driver was living through the wall and that if she could climb over, it was possible for someone else to do so. It was her evidence that **PW6 JAO** who was very close to her father had earlier declined to travel to the rural home with the mother who insisted on her going and both herself and the deceased had to intervene to let her accompany the mother.

#### **SUBMISSIONS**

15. On behalf of the accused it was submitted that the case against the accused was purely based on circumstantial evidence and that to sustain a conviction it must be watertight pointing to the accused person to the exclusion of any other person. It was submitted that the conduct of the accused person was not consistent with that of a guilty person, she was the first person to contact the wife of the deceased and the neighbour **PW4**, she waited for the police to come and arrest her at the scene and upon arrest no injuries were noted on her body. She had gone to Kayole and had opportunity of taking her children and disappearing from the scene but she came back to the scene from where she was arrested.

16. It was submitted that it was not possible for the accused to commit the offence alone and that the investigation were not proper since the deceased wife and her driver never recorded statements with the police. It was submitted that the evidence of Japolo painted a picture of strained relationship between the deceased and his wife and that her action of taking the children away leaving the accused and the deceased created a picture of plan by the wife to remove the family and leave the accused and the deceased alone for ulterior motive. It was submitted that there was a gap in the prosecution theory of the deceased being the last person seen with the deceased as there must be other factors that points to the guilt of the accused for which the cases of:-

It was submitted further that the accused gave a reasonable explanation of the circumstances leading to the death and therefore the doctrine of last seen fail.

17. The prosecution opted not to make any final submission but relied on the submission at no case to answer that is to say the deceased was attacked in bed and that the assailant had sufficient time to try and cover the trail by covering the mattress with a black polythene bag to avoid soiling blood onto it. It was submitted that the bedroom was disturbed an indication of a search for valuables within the house. It was submitted that an attempt by the accused to frame an alibi by going to Kayole to see her child in school was orchestrated to introduce a doubt of another person entering into the compound.

### **ANALYSIS AND DETERMINATION**

18. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code** the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence:-

**a. The fact and the cause of death of the deceased.**

**b. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person - “actus reus”.**

**c. That the said unlawful act of omission or commission was committed with malice aforethought - “mens rea”.**

19. The fact and the cause of death of the deceased was proved beyond reasonable doubt by the evidence of **PW4, PW1, PW3** and the accused person. The cause was confirmed though the evidence of **PW2 DR. DOROTHY NJERU** who conducted a postmortem examination thereon and produced postmortem report confirming the cause of death as prosecution exhibit number 1.

20. The only issue in dispute is whether the said death was caused by unlawful act of omission or commission on the part of the accused person. As submitted by Mr. Amutala, the prosecution case against the accused person was purely based on circumstantial evidence. There was no eye witness produced by the prosecution to the alleged murder of the deceased and the only link between the accused and the offence is that she was the only person with the deceased in the house at the time.

21. For the prosecution to sustain a conviction on circumstantial evidence the Court of Appeal in the case of **SAWE v REPUBLIC [2003] eKLR** had this to say:-

**“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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”**

22. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances get snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “*may be true*” and “*must be true*” and the same divides conjectures from sure conclusions, see **NAVANEETHA KRISHNAN v THE STATE BY INSPECTOR OF POLICE – SUPREME COURT OF INDIA, CRIMINAL APPEAL NO. 434 OF 2013**.

23. From the line of authorities on circumstantial evidence the court has to judge the total cumulative effect of all the proved circumstances each of which reinforces the conclusion of the guilt of the accused person and if the combined effect of such circumstances is taken to be conclusive in establishing the guilt of the accused the conviction would be justified.

24. In this case the only circumstantial evidence linking the accused to the commission of the crime is the doctrine of last seen. As stated herein, the deceased wife and children together with her driver had gone to their rural home in Nyanza leaving the accused and the deceased in the house. This doctrine has been discussed in the Supreme Court of India case of **ANJAN KUMAR SARMA v STATE OF ASSAM, CRIMINAL APPEAL NO. 560 of 2014** submitted by the defence in which the following principles were set out:-

**“18. The circumstances of last seen cannot by itself form the basis of holding the accused guilty of the offence . . . There must be something more establishing connectivity between the accused and the crime.**

**21. It is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point to the guilt of the accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.”**

25. It is not in doubt that the accused is the last person to have been with the deceased and to have seen the deceased alive. It is her evidence that they had supper on the fateful night and as is common among the Kenyan households they watched 9.00 p.m. TV news before the deceased retired to bed in his room upstairs. In the course of the night she heard dogs barking and the deceased came down stairs to check on what was happening. The deceased went outside and checked on the alleged intruder and when he came back she noticed that there were blood drops on his trail. She inquired of him as to whether he had been hurt and whether he needed medical assistance but he declined. It was her evidence that she had been strictly instructed not to go upstairs by her employer the deceased wife. She then called the deceased on phone to find out if there was any assistance he would need and he said it was okay.

26. The following morning the accused carried on her duties as per instructions and prepared breakfast for the deceased before leaving for Kayole to check on her sick child. She left breakfast on the table for the deceased which was confirmed by the evidence of **PW4 Japolo** and **PW3** the first police officer at the scene who testified in court and **PW5** the investigating officer.

27. At the close of the prosecution case, there remained a doubt in the mind of the court as to what was the time of death of the deceased. Did the same die as a result of the injuries he allegedly sustained when he went out of his house to check on the alleged intruder into the compound or did he die between the time when the accused left the house to go to Kayole to check on the health of one of her children? Did the accused clear the house and if she did where did the blood stains found on the house come from? Did somebody enter the compound and stay there until she left for Kayole or did the deceased take away his own life?

28. From the evidence tendered before the court it is clear that there was possibility of somebody entering into the deceased compound through the uncompleted building behind the house. This was confirmed by the evidence of **PW7 EDWIN MANYEKI** and the accused who testified that the wife of the deceased used to cross over the compound to go to the incomplete building where the driver had been housed and therefore the possibility of somebody scaling the wall into the deceased compound was not eliminated.

29. In cases like this where the prosecution case is solely based on circumstantial evidence it is very important for the prosecution to establish motive as one of the chains linking the accused to the crime. Where the prosecution is not able to establish a motive behind the alleged crime it assumes importance as the proof of motive on the part of the accused person to commit the offence satisfies the judicial mind about the authorship of the crime. In the absence of motive the court is then required to have a deeper search into the circumstantial evidence tendered so as to link the accused to the crime.

30. As submitted by Mr. Amutala for the accused, the same had only worked for the deceased and his wife for less than one year. She had nothing to gain by the death of the deceased. There is no evidence that anything was stolen in the deceased house and as per the evidence of **PW4** the only person who had something to gain by the said death was the wife who had sworn that he would not inherit her vast wealth. From the evidence of the investigating officers **PW5**, the wife together with her driver were arrested and later on released and no reason was given as to why they were eliminated as potential suspects. There was no any evidence produced of any grudge between the accused and the deceased and his family or any ill will towards the same.

31. I have also taken note of the conduct of the accused person. She woke up in the morning prepared breakfast for the deceased which she left on the table as per instructions. It was a weekend and the deceased was used to sleep until late in the morning. She called the deceased on phone to inform him that she wanted to go to Kayole and check on her children but the same did not answer. She then made a decision to rush to Kayole and came back to the house. She went to Kayole and when called by the daughter of the deceased with information that she wanted to talk to her father voluntarily went back to the scene. It is only when she went upstairs to take the phone when she found him dead on bed. This to my mind is an action consistent with innocent mind. The accused as per the evidence of the investigating officer co-operated with them throughout. It was further the evidence of the investigating officer that the accused could not have committed the offence alone and no effort was made to link the accused with the alleged joint offenders.

32. It is also clear to my mind that very vital witnesses were never called and vital evidence not produced in court by the prosecution. The OCS who was the first police officer at the scene was never called. The first scene of crime officer was never called. **John Owino Anyango** of Joy Valley Children Home whose statement was produced as defence exhibit number 2 and who confirmed that the accused went there on the 9<sup>th</sup> was never called. The cell phone of the deceased and the laptop which were recovered from the room where the body of the deceased was found by **PW4** together with his son were never produced in evidence. No statement was recorded from the wife of the deceased and her driver and both were released without an explanation thereby leading the court to make an inference that they might have been adverse to the prosecution case.

33. Whereas the accused had an opportunity to commit the crime herein, the evidence tendered before court does not exclude the reasonable possibility of anyone else being the real culprit with the accused only being the fall lady. I have taken into account the evidence of **PW4 Japolo** whom I found a very credible witness and in particular his account of the relationship between the deceased and his wife and find and hold that the prosecution failed to eliminate the strained marital relationship between the deceased and his wife as a possible reason for the cause of death of the deceased. The prosecution did not further eliminate the possibility of the deceased dying from the injuries sustained after he went to check on the alleged intruder to the compound.

34. Finally there is the issue raised by Mr. Amutala to the effect that based on the evidence on record and in particular the pool of blood found in the deceased bedroom there was no evidence that any blood stains were found on the accused and or her clothes and there was no evidence to the effect that she attempted to destroy any piece of evidence being the only person who was in the house and with ample time to do so. I am therefore not persuaded by the prosecution theory that the blood droppings from the main bedroom down the stairs casing towards outside were from the murder weapon which the accused wanted to hide as this is not supported by any evidence. The prosecution further failed to dislodge the accused alibi defence as they were in law required to do.

35. In the final analysis I find and hold that the circumstantial evidence herein taken cumulatively do not form a chain so complete that there is no escape from the conclusion that within all human probability the crime herein was committed by the accused and none else. I have taken into account the accused statement under inquiry which I find consistent with her evidence in court. The fact that the prosecution has failed to adduce any evidence on record to prove motive on the part of the accused to commit the offence herein has convinced me to draw an adverse inference against the prosecution case and come to the only logical conclusion that mere suspicion however strong cannot provide a

basis for inferring guilt which must be proved by evidence. See **MARY WANJIKU GICHIRI v REPUBLIC, CRIMINAL APPEAL NO. 17 OF 1998.**

36. There are various lacunas in the case of the prosecution in establishing the chain of circumstantial evidence against the accused, neither did the prosecution establish last seen evidence beyond any reasonable doubt nor any motive on the part of the accused for the commission of the offence and have come to the conclusion that the case against the accused was not proved beyond reasonable doubt and thereby acquit the accused of the charges levelled against her. The accused shall be set free forthwith unless otherwise lawfully held.

37. It is sad to say that this case was not properly investigated as the police seem to have been satisfied once they had arrested the accused to charge her without further investigations the possibility of a conspiracy in the commission of the offence herein. Once they came to a conclusion that the accused could not have committed the offence alone, it is sad that her mobile phone data, that of the deceased, his wife and her driver were never subjected to investigations and or analysis and if the same was done that vital evidence was never presented to court.

38. I had the advantage of seeing the accused at the dock and whereas looks can deceive she did not look to me as a person who could have committed the murder herein and have given her the benefit of her innocent look. It is further sad that the wife of the deceased had to die before this case was concluded so as to hear what **PW4 Japolo** had to say about their life.

39. The acquittal of the accused herein should be a wakeup call to the investigators and to the prosecution that every murder case is a complex case which should be subject to thorough and professional investigations. All witnesses are relevant and ought to be produced in court so as to help the court establish the truth and must be alive to the enormous responsibility placed upon their shoulders.

40. The state has right of appeal.

**DATED, DELIVERED and SIGNED at Nairobi this 7<sup>th</sup> day of June, 2018.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

Miss Wegulu for the State

Mr. Amurallah for the accused

Accused present

Court Assistant – Karwitha