



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 5 OF 2018

REPUBLIC.....PROSECUTOR

-versus-

LINET ACHIENG JUMA.....ACCUSED

JUDGMENT

1. The lifeless body of **Willy Paul Otieno** (hereinafter referred to as '**the deceased**') was found lying at the floor of River Migori within Ombo area in Migori town in the morning of 28/02/2018. The body was dressed in the same clothes which the deceased was last seen in the day before.

2. Following police investigations, the accused herein, **Linet Achieng Juma**, who was a co-wife to the mother of the deceased was charged with the murder of the deceased. The particulars of the offence were that the accused murdered the deceased on 27/02/2018 at Ombo village, Suna East Sub-County within Migori County in the Republic of Kenya.

3. The accused denied the offence and a trial was ordered. The prosecution availed seven witnesses in a bid to prove the charge. **PW2** was **Linet Atieno Otieno** who was the mother to the deceased. The father to the deceased was **Paul Otieno Ojwang** who testified as **PW5**. A brother to **PW5** testified as **PW1** one **Moses Otieno Owuor** whereas a brother to **PW2** testified as **PW4**. He was one **Manaseh Omondi Otieno**. **PW3** was a neighbour to the deceased. She was one **Caren Atieno Nyokinda**. **Dr. Victor Awinda Omollo** testified as **PW6** and the investigating officer **No. 80167 PC Dickson Nyarangi Momanyi** attached at Migori Police Station testified as **PW7**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

4. The prosecution's case was centered on circumstantial evidence. Leading the evidence was **PW3**, **PW2** and **PW5**. In the evening of 27/02/2018 at around 07:00pm **PW3** who was in the company of her daughter one **Irene Awuor Nyokinda** (not a witness) was walking home from fetching some water at the drawing point along River Migori when they met the accused who was in the company of the deceased just some distance from the home of the accused on the road leading to the river. **PW3** saw the clothes the accused and the deceased wore and identified them in Court. **PW3** conversed with the accused who informed **PW3** that she was going to the river but she did not have any container for carrying water. The accused asked **PW3** if she would return to the river and the response was in the negative. **PW3** and her daughter proceeded home leaving the accused and deceased on their way towards the river.

5. The absence of the deceased at home in the evening of 27/02/2018 really bothered **PW2** and **PW5**. **PW2** had left the deceased at home playing with the other children as she went to a flour milling machine. That was around 07:00pm and the accused was also at home. On return the deceased was nowhere to be seen. **PW5** had by then returned home. **Jersey** (not a witness), a child from the neighbourhood, was sent by **PW5** to check if the deceased was at the homestead of **PW2**'s mother or **PW4**. **Jersey** came back and reported that the deceased was not in either home.

6. Alarmed by the absence, **PW2** and **PW5** decided to look for the deceased in the neighbourhood. They visited several homes including those of **PW1** and **PW4** in vain. At around 09:00pm, they were at the home of **PW3**. On enquiry, **PW3** informed them that she had earlier met the accused and the deceased and asked **PW2** and **PW5** to find out the whereabouts of the deceased from the accused. They quickly rushed back home and **PW5** asked the accused about the deceased. The accused stated that she could not tell where the deceased was as she had last seen him playing with her son by the road. The search was then postponed to the following day.

7. The village of Ombo joined the search in the morning of 28/02/2018 with one group searching the area towards and inside the river as other groups were dispatched in different directions. **PW1**, **PW4** and **PW5** were among the members of the group that went towards the river. Before proceeding to the river, **PW4** went to **PW5**'s homestead and learnt that the accused had been seen with the deceased the previous night, but the accused had left that home for the home of **Mama Mercy** (not a witness) who was her close relative and who also lived in the neighbourhood. **PW4** went to **Mama Mercy**'s home and found both the accused and **Mama Mercy**. **PW4** asked the accused where the deceased was and the accused maintained her earlier position rendered to **PW5** and **PW2**. **PW4** asked the accused and **Mama Mercy** to accompany him and the others in the search and she obliged.

8. The search was intensified in the fields next to the river but in vain. A decision was then made that the search be done inside the river. A

boat was organized for and PW1, **Peter** (not a witness) and others got into the river. Shortly, the people who were at the river banks called out those in the boat and told them that they had found a slipper which the deceased had worn the previous day in the river near the bank. The boat was rowed towards the point where the discovery had been made. PW1 and Peter then jumped into the river and continued with the search. It was PW1 who stepped on something like a person's leg and raised alarm. PW1 and Peter then managed to pull out what PW1 had stepped on and realized that it was the body of the deceased. They placed it in the boat and moved to the river bank. The body was lifeless.

9. Emotions ran very high and the crowd attacked the accused and Mama Mercy. They proceeded to the house of Mama Mercy and torched her house and was completely destroyed. Sensing that the accused may be killed, PW5, who had earlier on reported the disappearance of his child to the police, ran and called some Administration Police officers to rescue the accused. The police readily intervened and moved to the scene. They rescued the accused and collected the body of the deceased together with the accused, PW2 and PW5 and headed to Migori Police Station where they handed over the accused and the other persons to the police as they proceeded to Migori County Referral Hospital Mortuary to preserve the body of the deceased.

10. PW7 quickly proceeded to the Mortuary in the company of his colleagues and saw the body lying on a table inside the Mortuary but before it was preserved. He carefully observed it and took possession of its clothes. Led by PW5 and PW2, the police under the command of PW7 rushed to the river and collected another slipper which was identified as the other one which had been worn by the deceased the preceding day. The police then visited the home of the deceased and PW7 continued with the investigations.

11. PW7 recorded statements from several witnesses and managed to place the accused as the last person to have been found with the deceased alive. He further called for and received the clothes which the accused and the deceased had worn the day the deceased disappeared. He also organized for and a post mortem examination was conducted by PW6 who confirmed that the deceased did not drown but had been throttled before thrown into the water. PW6 produced a Post Mortem Report which he prepared after the examination in evidence. PW7 escorted the accused for mental examination where she was certified fit to stand trial and accordingly charged her. PW7 also produced the various pieces of clothes worn by the deceased and the accused on the day the deceased disappeared together with the accused Mental Assessment Report as exhibits.

12. At the close of the prosecution's case, the accused was placed on her defence and she elected to give sworn evidence without calling any witnesses. The accused denied committing the offence. She narrated how she saw the deceased playing with her son Gerald between their home and the road that led to the river as she went to a shop. Since she did not want the children to follow her she stood at the entrance to her home as she awaited for the children to safely go back before she proceeded. It was at that point where she saw and met PW3 and her daughter walking from the river towards their home. The accused exchanged greetings with them and as the children had then returned to the homestead, the accused rushed to a nearby shop and quickly returned home. She remained home until when PW5 came home. On learning of the disappearance of the deceased she joined the search that night and so continued the following day until the body was recovered.

13. The accused discredited the evidence of PW3 which indicated that the accused met with PW3 at some distance from the entrance to the home of the accused. She also explained why her clothes were muddy by stating that those were the clothes she had worn when she went to her kitchen garden and picked some vegetables and was stuck with some black jack seeds and since it was drizzling then her clothes were soiled. The accused closed her case.

14. At the close of the defence case the Defence Counsel filed written submissions in urging this Court to find that the accused was not the killer of the deceased as the circumstantial evidence did not meet the legal threshold to sustain a conviction of any offence relating to the demise of the deceased. Counsel relied on several relevant decisions in support of the position including Simon Musoka vs. R (1958) EA 71, James Mwangi vs. R (1983) KLR 522, Musili Tullo vs. R (2014) eKLR among others.

15. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether the accused person is guilty as charged.

16. As the accused is charged with the offence of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

17. There is no doubt that the deceased died. All the witnesses and the accused so confirmed. As to the cause of death, PW6 took this Court through the Post Mortem Report he had personally prepared and opined that the cause of death was asphyxia due to throttling. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

18. On the second ingredient as to whether the accused caused the death of the deceased, since there is no eye-witness account on how the deceased died, reliance is now on the circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;

(ii) The 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.

19. The foregone principles were set out in the *locus classicus* case of ***R -vs- Kipkering arap Koske & Another (supra)*** and have repeatedly been used in subsequent cases including the Court of Appeal cases of ***GMI -vs- Republic (2013) eKLR***, ***Musii Tulo vs. Republic (2014) eKLR*** among many others.

20. The Court of Appeal in the case of ***Musii Tulo (supra)*** in expounding the above principles expressed itself as follows:-

4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus: -

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

21. I have carefully considered the evidence on record including the defence tendered. The evidence of PW3 tendered to point a scenario that the accused was in the company of the deceased in the evening of 27/02/2018 as they headed towards the river. There is no doubt that PW3 and her daughter walked from the river towards their home at the time in issue. There is also no doubt that the two met the accused. The point of departure is where they met. The accused contended that they met at the entrance to her homestead as she waited for the deceased and her child to go back into the home before she proceeded to a shop. PW3 testified that the accused had left her home and joined the road that led to the river and met about 70 metres from the entrance to the home of the accused and that the deceased was just ahead of the accused by about 3 metres. PW3 also stated that the accused told her she was going to the river but did not have any container and that the accused asked her whether she would return to the river. PW3 informed the accused that she would not return to the river. According to PW3 the road was so well lit with electricity light from the neighbouring homes and as well as the factory which had security lights facing the road.

22. The Court visited the *locus quo* and saw the homestead of the accused and walked through the road upto the point where the body of the deceased was retrieved in the River Migori. The distance from the home of the accused to the river was agreed to be about 335 metres. It was unlikely that the deceased, then aged 3 years old, would walk to the river alone and at night. He must, and was, taken by someone there.

23. There is also the evidence of PW6 who was the Doctor who conducted the autopsy on the body of the deceased. He testified that the deceased did not drown but he was strangled before he was thrown into the river.

24. Coupled with the foregone is the relationship between the accused and PW2. They were co-wives and according to PW2 they more often than not quarreled almost on daily basis. When PW2 was married she came to PW5's home with her three children from her previous marriage and they were blessed with the deceased as the only child of PW5. At the time of the incident, the accused had been married for 5 months and had no children with PW5 although she must have been pregnant as she gave birth while in custody. According to PW7 there was intense bad blood between the two.

25. I also had a look at the clothes produced as exhibits. The clothes which the accused wore on 27/02/2018 had black jack seeds with mud. The accused explained that she had gone to the kitchen garden and picked vegetables and that is where the black jack seeds got stuck into her clothes and the mud as well since it was drizzling. PW7 also noted that the clothes worn by the deceased were soiled and had black jack seeds. When the Court visited the point where the body of the deceased was recovered in the river, it noted the presence of black jack grass although by then there were no visible seeds.

26. I carefully observed the prosecution witnesses and the accused testify before me. PW3 was very composed and narrated the events with the ease not commonly associated with some one making up a story. She shielded all questions well from all angles as they were put to her. She was consistent and very clear. I was satisfied that she was truthful and hence believed her testimony. I must also state that I was equally satisfied that the rest of the prosecution witnesses were truthful given their demeanors and the forthright and steady manner in which they all tendered their testimonies.

27. Weighing the prosecution evidence against the defence, I have come to the finding and I hereby hold that the defence did not raise any reasonable doubt in the prosecution's case. Therefore, given the short period of time from when the deceased was last seen alive and in the company of the accused on the road leading to the river and the time the deceased was reportedly lost and eventually found dead and by taking all the other evidence into consideration, I irresistibly come to the finding that the events cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the death of the deceased was occasioned by the accused and none else. I equally find that there were no other co-existing circumstances which would weaken or destroy that inference. The second ingredient of the offence of murder was therefore proved.

28. As to whether there was malice aforethought in the accused causing the death of the deceased, the starting point is the law. **Section 206** of the Penal Code defines '*malice aforethought*' as follows:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

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

29. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.

30. My Lordships in the above case went on to say that: -

In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -

There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR...

31. And in the case of **Mary Wanjiku Gitonga -vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows: -

We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed....Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention "to do grievous harm to any person....." is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.

In the circumstances we see no reason to interfere with the appellant's conviction for murder. The conviction was fully justified by the evidence on record.

32. In this case malice can be gleaned from the events as they unfolded towards the death of the deceased. It is not in doubt that the attack on the deceased was pre-planned. I say so because there is evidence of disharmony between the accused and the mother of the deceased for the 5 months the accused was married into the home of PW5. There is also the issue of the distance from the home to the river. That was a long distance of over 300 metres. The accused must have planned to kill and throw away the body of the deceased into the river and that is why she covered all that distance and at night.

33. The way the deceased met his death is also a pointer to the intention to kill and to conceal the cause of death. The deceased did not drown and the act of throwing her into the river was intended to conceal the true cause of death. There was a ridge around the neck and a bruise on the right zygomatic region which indicated that the deceased was assaulted with a blunt object before he died. The injuries caused a fracture of the cricoid cartilage on the neck. The effort undertaken by the accused to conceal how the deceased died is a clear indication that she was well aware that her actions would lead to the death of the deceased.

34. It is therefore obvious that the accused was fully aware that there was a serious risk that death or grievous bodily harm will ensue from her acts. Likewise, the acts were very deliberate and without any lawful excuse on an innocent young boy. The accused remained aware that she was exposing the deceased to the risk of death or grievous harm because of her uncalled-for acts. That was therefore a clear manifestation of malice.

35. This Court hence finds that the prosecution has likewise proved that the accused killed the deceased with malice aforethought.

36. As the prosecution has proved all the ingredients of the offence of murder against the accused, this Court now finds **Linet Achieng Juma** guilty of the murder of **Willy Paul Otieno** and is hereby convicted under **Section 322(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of December 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Owade, Counsel for the Accused.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant