



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL MURDER CASE NO.24 OF 2015

STATE.....PROSECUTOR

VERSUS

TOBIAS ONYANGO OTIENO.....1ST ACCUSED

EUNICE ACHIENG ODOYO.....2ND ACCUSED

JUDGMENT

[1] Accused one (**TOBIAS ONYANGO OTIENO**) and Accused two (**EUNICE ACHIENG ODOYO**) are charged with murder, contrary to **Section 203** as read with **Section 204** of the **Penal Code**, in that on the 8th October 2015 at North Kamagak Location, South Rachuonyo District within Homa Bay County, they jointly with another not before court murdered **PHOEBE ODERO ONDIEK**.

[2] It was the case for the prosecution that the two accused arrived at the home of a grandmother to the first accused (i.e. **SUSANNA ONGONDO AGAN** (PW4) on the 7th October, 2015 at about 6.00 p.m. They prepared a meal of vegetables and in so doing, they used a knife with a blue/red and white handle to slice the vegetables.

After taking the meal, the two left the home and went away.

[3] On the following day (8th October 2015), the deceased left her home in the afternoon hours for a place called Kosele to attend a women group meeting (chama) as a member as well as the treasurer of the group. She left her daughter, **DIANA AWUOR** (PW6), behind. She (PW6) noted that the deceased had left home with a metal box kept inside a basket. She was told by the deceased that the metal box contained money.

[4] At about 4.00 p.m., a message reached the deceased's daughter (PW6) that the deceased had been killed at a bushy area near a river twenty minutes' walk from their home. She accordingly notified her elder brother, father and clan members.

The father, **PIUS ONDIEK ANDITI** (PW1), on receipt of the information proceeded to the scene and found many people gathered

there. He saw the dead body of his wife lying on its stomach on the ground and removed it to the mortuary together with police officers who arrived at the scene.

[5] The body had been discovered at the scene at about 4.20 p.m. by some children and a village elder, **BARNABAS ODHIAMBO OYUGI** (PW3), was accordingly notified. He then reported the matter to the assistant chief of the area, **DANIEL ODHIAMBO KOBE** (PW7), who referred the matter to the police and thereafter accompanied police officers to the scene where he found a pair of blood stained open sandals and a knife with a blue, red and white handle. These were taken away by the police and later recognized by the first accused's step mother, **MARY ATIENO OTIENO** (PW8), as belonging to the accused.

[6] In the course of investigating the case, **CPL. THOMAS MUTUA** (PW11), received a tip-off that the two accused may have been involved in the murder of the deceased. He later found them at a barber shop at Kosele Market and arrested them. The first accused was found in possession of a new mobile phone and a sum of KShs.1, 400/= while the second accused was found with another mobile phone and KShs.520/=.

The investigating officer interrogated the second accused and thereafter presented her before a magistrate to record a statement of admission and/or confession.

[7] The knife found at the scene was treated as the murder weapon and produced as an exhibit (**P. Exhibit 3**) together with the pair of sandals (**P. Exhibit 2**) and the items found with the accused (**P. Exhibit 9, 10, 11** and **12**).

On appearing before the Senior Resident Magistrate at Oyugis Law Court, **JOY WESONGA** (PW9), the second accused voluntarily recorded a statement under caution. It was produced in evidence (**P. Exhibit 8**) and treated as her confession for the offence exclusive of the first accused,

[8] The two accused were eventually charged jointly with the present offence which they denied.

In his defence, the first accused stated that he was alone without his girlfriend (the second accused) on the 6th and 7th October 2015, while he undertook his usual chores as a motor cycle taxi operator (boda boda) but on the 8th October 2015, police officers met and arrested him. He was later charged with the present offence which he did not commit. He contended that the murder weapon (knife) was never in his possession and that he was implicated by his step mother in this matter.

[9] The second accused in denying the offence stated that she was at Oyugis town on the material date where she hails from and worked as a salonist. She left the town on the 10th October 2015, to visit the first accused at kosele trading centre. He was her boyfriend. They were however arrested on allegation that they had killed the deceased. She denied possession of the murder weapon and knowing a person called Mariko. She implied that the first accused's stepmother (PW8) did not tell the truth in court and that her alleged confession before a magistrate was not the truth but lies. She contended that her admission before the magistrate was what she was told to say by the investigating officer so that she could be released, she maintained that she did not kill the deceased.

[10] It is clear from all the foregoing evidence that no dispute arose with regard to the murder of the deceased.

The postmortem report (**P. Exhibit 6**) by **DR. PETER OGOLA** (PW5), indicated and established that the deceased died from severe abdominal injury inflicted on her by a sharp weapon/object such as a knife.

The degree of injury was a clear indication that the person or persons responsible thereof acted with malice aforethought and without any shred of mercy.

[11] What therefore remained as the sole and basic issue for determination was whether the two accused or any one of them was responsible for unlawfully assaulting the deceased and causing her death.

It would appear that the assailants had the double motive of not only robbing the deceased but also killing her either before, during or after the act of robbery.

None of the prosecution witnesses was at the scene at the material time to witness the offence as it occurred. Therefore, none of them presented direct evidence against the two accused.

[12] However, there was an attempt by this prosecution to link the two accused to the offence on the strength of circumstantial evidence in relation to possession of the probable murder weapon (i.e. **P. Exhibit3 – knife**) and a pair of sandals (PW2), but that evidence could not stand in terms of reliability and credibility. It was of the weakest kind as there was no proof that the two items were ever in possession of the accused or any one of them and the evidence in respect thereof was insufficient.

[13] The same position would apply with regard to the items found in possession of the two accused. It was not proved that they belonged to the deceased or that they were purchased with money stolen from the deceased.

By far, the only sustainable evidence against the accused and in particular, the second accused, was the statement of admission and/or confession made before a judicial officer by the second accused (i.e. **P. exhibit 8**).

Although she disowned the statement during trial, there was nothing cogent or credible to show that it was not voluntarily recorded and/or was obtained by threats or inducement.

[14] There was also nothing to show that the judicial officer (PW9) failed to adhere to the legal requirement prescribed in **section 25A (1)** of the **Evidence Act** which provides that:-

“A confession or any admission of a fact lending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of police, and a third party of the person's choice.”

This court must and hereby finds that the confession and/or admission (**P. Exhibit 8**) by the second accused was properly and lawfully obtained for admissibility as evidence against her and/or any other person.

[15] It would therefore follow that the confession and/or admission by the second accused amounts to credible proof that she was involved in the murder of the deceased by way of a criminal transaction aimed at an innocent and humble business woman. Her indication that she was forced to commit the offence by one **“Mariko”** does not add up.

The existence of that person was not established and that name could most likely than not, have been picked as a **“red- herring”** to cover the

second offender who was most probably the first accused as he had been with his girlfriend (second accused) from the 7th October 2015 upto the time they were both arrested either on the 9th October 2015 or 10th October 2015.

[16] Ultimately, this court makes a finding that the two accused are the persons who assaulted, robbed and fatally injured the deceased. They are hereby found guilty as charged and are convicted accordingly.

J.R. KARANJAH

JUDGE

04.12.2018

[Delivered and signed this 4th day of **December, 2018**].