



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRC NO. 59 OF 2015

(CORAM: J.A. MAKAU – J.)

REPUBLICPROSECUTION

VS

SAMUEL OTIENO OPIYO..... ACCUSED

JUDGMENT

1. The accused **SAMUEL OTIENO OPIYO** is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya**. The particulars of the charge are that on the 2nd day of July 2015 at Gula village in Ugunja Sub-County within Siaya County murdered one **MERRAB AWUOR MASAWA**.

2. This case commenced at Kisumu High Court before Chemitei J. and was transferred to this court by E.W. Maina J. This court took over the matter and proceeded to hearing of the same. Prosecution was led by M/S M. Odumba, Learned State Counsel, and the defence by Mr. B.F. Odhiambo, Learned Defence Counsel.

3. The prosecution called seven (7) witnesses; most of the witnesses were relatives of the deceased. PW1 Mary Achieng Onyango, told the court that on 2nd July 2015 between 7.00am-8.00am, she was preparing to have a bath when she heard screams **“wooi, Achieng come and rescue me”**. The words were being uttered in *Dholuo* language. PW1 rushed to where the screams were coming from outside her compound. When PW1 went outside she saw her grandmother **MERRAB MASAWA** bending, she rushed towards her and found her front part covered with blood. She asked her what had happened to her and she told her she had been injured by her employee, without giving the name of the employee. PW1 rushed and called her husband Walter Onyango; her step-mother in-law Claris Ogutu and a neighbor Christabel Omondi. When all came PW1 stated her grandmother was carried in a wheelbarrow after they had put cushions inside it and proceeded towards the hospital. On the way they met a motor vehicle to which they transferred her in but she passed on, on being put inside the vehicle. They then decided to go to Sigomere Police Station. PW1 stated when she heard the screams she was 50 metres away from the house of the deceased and on observing the deceased she stated she noted the deceased had a stab wound on the right side of her neck. On cross-examination, PW1 stated the incident occurred at around 7.30 am stating further she does not have an employee and that she used to see the accused at the home of the deceased but she did not know how long the accused had served in that home. She stated the accused was an employee at the home of the deceased. PW1 stated she came to know of the accused name on the date of the incident. In re-examination, PW1 stated the accused was the only employee at the deceased’s home.

4. PW2, Christabel Ojuang Omondi, told court that on 2nd July 2015 at around 7.30–8.00am, she was at

home when her daughter in-law Mary Achieng Onyango (PW1) called her telling her that Mama Merrab Awuor Masawa had been beaten by her own employee. PW2 rushed to the deceased's home and at the gate to her home, she found Merrab Awuor Masawa lying on the ground with blood covering her body and being unconscious. PW2 noted the blood was coming from the deceased's neck. They looked for a wheelbarrow to take her to hospital. PW2 found at the scene Claris Ogutu, Mary Ouma, Mary Achieng and Walter Apolo Onyango. That as they were taking her to the hospital in a wheelbarrow they met a motor vehicle in which they transferred her but unfortunately she died. They proceeded to Sigomere Police Station and made a report. The body of the deceased was then taken to Sigomere Mission Hospital mortuary. During cross-examination, PW2 stated she was at her home and did not hear her scream and stated PW1 called her. PW2 stated she has a male employee. PW2 stated she did not find the person who caused the injury nor did she see, the murder weapon at the scene.

5. PW3, Adonija E. Odhiambo testified that on 2nd July 2015 at around 8.55 am he was travelling to Kisumu when he received a call from his sister in-law Christabel Omondi (PW2) informing him that his mother, the deceased herein, had been hurt by the shamba boy. The report was that his mother had been hurt by her shamba boy because he is the one who had employed him. PW3 was told his mother was in critical condition and that they were taking her to the hospital, after twenty minutes. PW2 called PW3 again and informed him his mother had passed on. PW3 turned from going to Kisumu, and at Sidindi, he picked Robert a cousin to Samwel, who was then PW3's shamba boy. They proceeded to Sigomere Police Station where they found the body of the deceased in a motor vehicle. PW3 observed the deceased's body was covered with blood and had two stab wounds on both sides of the neck. They took her body to Sega Mission Hospital. On 8th July 2015, PW3 went to police and recorded statement and proceeded to Sega Mission Hospital mortuary to identify the deceased body in company of his sister Joan Okumu for postmortem report and on 10th July 2015 picked the deceased's body for burial. PW3 testified that he knew Samwel Otieno for two weeks as he had engaged him as his employee and was a person known to him. PW3 identified him in court by pointing at him and he confirmed that he was his shamba boy. On cross-examination PW3 stated that his employee was working at PW3's mother's compound for 2 weeks. PW3 stated he never got any complaint against the accused but he used to see him everyday every evening. He also used to see his late mother every day. He stated he could not know the employee's motive for killing his mother. He stated while he was at Sigomere Police Station on 2nd July 2015, the accused was brought to the station by police officers with weapons which were a slasher and panga.

6. PW4, No. 233961 C.I. Peter Maina testified that on 2nd July 2015 while at the office he received a reported case of murder by members of public who had the body of the deceased with them at Sigomere Police Station in motor vehicle reg.no. KAQ 130X. He arranged for the body to be transferred to Sega Mission Hospital mortuary report booked in OB (Occurrence Book) that the deceased had been stabbed by a shamba boy and as she was being taken to the hospital she passed on hence the members of public decided to report to the police. PW4 proceeded to the scene of crime at Gula village, within Sigomere location in company of Inspector Nyongesa of Administration Police; PC Samoe Kiprotich and APC Mwangi and on arrival they found a suspect who had been held by members of public outside the deceased's home. PW4 and his group re-arrested the suspect; interrogated him and he led them to the murder weapon, a panga which was in the sitting room of the house that was in his occupation within the compound of the deceased. They proceeded to the house of the deceased and found a pool of blood on the floor in the deceased's bedroom. PW4 and his company took the suspect and suspected murder weapon to Sigomere Police Station and booked the suspect with the offence of murder.

7. PW4 later recorded the suspect's statement, under inquiry. That when he recorded the statement he was the only person with the suspect, he cautioned him, that he has not obliged to say anything in answer to the charge and if he wished to do so, what he would say will be put down in writing and may be given in evidence and the suspected elected to make a statement. That they were communicating in Kiswahili language and PW4 recorded the statements as the suspect was narrating to him what had happened. PW4 recorded the statement in English in which he had informed the suspect and after recording the statement he read it back to him in Kiswahili language; inviting him to make any corrections and he stated he was satisfied with the statement as it was correct. That as the accused had issues with writing he appended his

signature on each and every page of the handwritten statement. The statement was recorded on 2nd July 2015 at about 3.00pm, indicating the place, date and time of recording the statement. PW4, then appended his signature to the statement. The statement recorded at Sigomere Police Station, comprised of 5 pages; one page on charge and cautionary statement and the next four on suspect's statement and all copies were filed and signed by PW4 and the suspect.

8. The accused counsel objected to the production of the statement and as such a trial within trial was ordered. The prosecution called PW4, as TPW1 and the defence called the accused as TDW1. That after trial within trial the court found that the confession was not obtained contrary to Section 25A and 26A of the Evidence Act and ordered the prosecution could produce the statement made under inquiry by the accused to PW4. PW4 read through the statement made under inquiry (MFI-P1) and produced the same as exhibit P1.

PW4 identified the recovered murder weapon a panga as MFI-P2 and produced it as exhibit P2. PW4 stated when he saw the deceased's body, it had two stab wounds on both sides of the neck. PW4 then caused the accused to be taken to hospital for a mental assessment and he got a report showing the accused is over 18 years and mentally fit to plead.

9. During cross-examination PW4 stated that he recorded statement in his own handwriting dated 3rd July 2015, at 9.00am, at Sigomere Police Station and that he signed it. That he recorded statement after charge and caution. PW4 stated he was not the investigating officer. He stated that at the deceased's home there was no other employee other than the accused. That he was led to murder weapon by the accused, which was retrieved from where the accused led them.

10. PW5 No. 93278 PC Samoe Kiprotich Isaiah, the investigating officer in this case told court that on 2nd July 2015 he was at Sigomere Police Station when at 8.30am, he was instructed by OCS, C.I. Peter Maina (PW4) together with him to make a detailed follow up of a reported case of murder after a report had already been made to the police station formally, that the deceased Merrab Awuor Masawa had been murdered by her shamba boy namely Samwel Otieno Opiyo at her home situated at Gula village, within Sigomre sub-location, and the body of the deceased at that particular moment had been brought to Sigomere Police Station in private vehicle as the deceased passed on her way to the hospital. PW5 then in company of OCS, C.I. Maurice (PW4), AP, Inspector F. Nyongesa and APC J. Mwangi all based at Sigomere Police Station proceeded to the scene of the murder at Gula village, barely a kilometre from the station. On arrival they found the accused already restrained and surrounded by members of public, they arrested him and proceeded to the house of the deceased and at the bedroom found a pool of blood. The suspect was interrogated and led them to where he had hidden the murder weapon namely, a *panga*, in his house where he used to occupy, which was a few minutes from the deceased house within the same compound. They recovered the *panga* on top of an old chair; they also picked the likely witnesses and asked them to accompany them to the police station to record statements. The *panga* had been washed and had no blood stains. The deceased body was moved to Sega Mission Hospital mortuary where postmortem was done on 8th July 2015. PW5 told court they were given postmortem report identifying it as MFI-P3. That after investigation and compiling the investigation file, PW5 forwarded the same to State Counsel for perusal and advice. Later, PW5 charged the accused with the offence of murder. PW5 identified the *panga*, he recovered, produced it as exhibit P2 and identified the accused (at the dock) as the person they arrested on 2nd July 2015. During cross-examination, PW5 stated they interrogated the witnesses and found a direct link of the accused and the offence. That he took the *panga* and he handed it over to the OCS (PW4). He stated that they received a report that the deceased before she died, she mentioned the accused as her assailant. He stated the *panga* had no blood stains as it had been washed to conceal the evidence.

11. PW7 Dr. Benard Oguche performed postmortem on the body of the deceased Merrab Awuor Masawa on 8th July 2015 at Sega Mission Hospital Mortuary at 3.40 pm. The doctor found that the deceased had cut wound at the right lateral triangle of the neck; with a deep wound approximately 5cm in length, left maxillary area deep cut wound of approximately 7cm; with dried blood on the lower lungs. On genito-urinary system there was lacerations on the labia minora bilaterally, foul smelling discharge from vagina.

The doctor was of opinion that the cause of death was hypovolemic shock secondary to haemorrhage from deep cut wounds on the right lateral neck region with injuries to neck vasculature. PW7 produced postmortem report as P.Exhibit 3.

12. The accused on being called to defend himself, he opted to give unsworn statements and told the court that he knows the charge he was facing, that he is 19 years old. That he recalls on 2nd July 2015 he was staying at Sigomere at a home as a houseboy. That on the material day, he woke up and went to the shamba to cultivate and as he was on his duty, he saw two people coming towards him one of whom was in AP's uniform, that was around 9.30am. They asked him whether he was the one working at the home of Odhiambo and he answered in affirmative. He was then arrested and taken to Sigomere Police Station. That after 20 minutes he was taken to report desk by the police officers, where he was assaulted without any reason and taken back to cells. That at 2.00 pm he was again taken out of the cells and taken to record a statement. That he was threatened by the police officer that if he wont record statement he would be killed. He then recorded the statement and he was taken back to the cell. That he was then taken to court at Kisumu from where he was later transferred to this court. He stated the charge was never read to him by any court. He prayed the court to discharge him of the offence of murder.

13. This case started at Kisumu before it was transferred to this court for hearing and determination. I have carefully perused the court proceedings and indeed have not come across anywhere where the charge was read to the accused by the court, however, there is no dispute that the accused faces a criminal charge of murder contrary to **Section 203 of Penal Code** as read with **Section 204 of the Penal Code**. The court was obliged to take plea from the accused but due to unexplained circumstances plea was not taken and I believe that was undeliberate omission on the part of the court. The prosecution and defence counsel did not draw attention to this court of the fact that plea had not been taken and all took part in the proceedings. In the case of **Moses Mbanya alias Mbara Mbura V Republic(2016) eKLR**, the Court of Appeal (Nyeri) faced with similar situation stated: -

“.....the court was confronted with similar scenario in the case of one Muraga and another versus Republic (2006) KLR 63 held thus:-

“the irregularities and omissions arising from lack of opportunity to plead did not occasion a failure of justice and whatever irregularities were committed were curable under Section 382 of the Criminal Procedure Code”.....

“We fully adapt this holding as applicable to the appellant's complaint herein. This is because as submitted by the respondent, the appellant participated fully in the trial, cross-examined witnesses and when he took the witness stand to defend himself, he was categorical that he understood the charge that was facing him”.

14. In view of the above, I shall proceed to determine the case the accused is facing notwithstanding the plea was inadvertently not taken by the court; however the case proceed normally without any issue being raised by the prosecution or be the defence throughout the hearing.

15. This is a murder case and the burden of proving lies with the prosecution to prove the charge against the accused person beyond any reasonable doubt. **Section 203 of the Penal Code** defines murder as follows: -

“Any person who of a malice aforethought causes death of another person by unlawful act or omission is guilty of murder.”

16. The prosecution must in a murder case prove that the accused had formed the necessary intention to cause death or grievous harm to the deceased. **Section 206 of the Penal Code** describes circumstances which constitute the same as follows: -

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

a) an intention to cause the death 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, by a wish that it may not be cause;

c) an intent to commit a felony;

d) an intention by the act or omission facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony”.

17. To prove a charge of murder, the prosecution has a duty to establish the following ingredients:

(i) Death of the deceased and cause of the death

(ii) That the accused caused the death through unlawful act or omission

(iii) That the accused possessed an intention to cause harm/kill or and had malice aforethought.

18. **Did the prosecution prove the death of the deceased and cause of the death?** PW6, Dr. Benard Oguche conducted postmortem on the body of the deceased Merrab Awuor Masawa after it was identified to him by Adonija Odhiambo Ezekiel(PW3) and Joan Okumu in the presence of PW5. PW3 stated she was with his sister Joan Okumu. PW1, PW2,PW3, PW4 and PW5 saw the deceased’s body in the private vehicle Registration number KBQ 130X which had taken the body to Sigomere Police Station after the deceased passed on, on her way to the hospital and thereafter the body was taken to Segga Mission Hospital. The doctor’s evidence on death of the deceased did corroborate the evidence of PW1, PW2, PW3, PW4 and PW5. The doctor stated the cause of death was due to hypovolemic shock secondary to haemorrhage from deep cut wounds on the right lateral neck region with injury to neck vasculature. The injuries noted were consistent with the evidence of PW1 and PW4. I therefore find the Prosecution proved the death of the deceased and the cause of her death.

19. **The next issue for consideration is, who caused the death of the deceased?** There is in this case an alleged dying declaration by Merrab Awuor Masawa to PW1 Mary Achieng Onyango, granddaughter to the deceased. PW1 stated Merrab Awuor Masawa informed her that it was her employee who had injured her. PW1 rushed to call other neighbours and relatives who included PW2 who she told that the deceased had informed her she had been beaten by her employee. PW1 included in her statement to the police the dying declaration made to her by the deceased. PW2 found the deceased lying on the ground at her gate unconscious with blood oozing from her neck. PW1 noted the deceased had stab wounds to her neck. When PW2 came to the scene, the deceased could not speak, as she was unconscious then and died as she was being transferred to a private vehicle to be taken to the hospital. I therefore find that the only time that the deceased was able to speak was the time she called PW1 to rescue her and immediately she reached where the deceased was, the deceased made the dying declaration to PW1. I have examined the postmortem report exhibit P1, it shows that Merrab Awuor Masawa suffered two stab wounds to her neck. PW4 stated when he examined the body of the deceased before it was taken to the mortuary; it had two stab wounds to the neck. The injuries noted are consistent with the stab wounds with a sharp edged weapon. Merrab Awuor Masawa is said by PW1 to have implicated her employee of having injured her. PW2 and PW3 testified that the deceased had only one employee; the accused, who had been employed by PW3 and who had taken him to his mother’s compound.

20. In this case, there is other evidence against the accused in the form of confession. PW4 C.I. Peter Maina attached then at Sigomere Police Station told this court that on 2nd July 2015, he recorded a statement under inquiry from the accused after cautioning him and complying with the procedure related to recording statement under inquiry. That the accused made confession before him. The confession was made to PW4, a Chief Inspector of Police, who was then not the investigating officer. The confession

was not caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from any person in authority. The accused in his confession admitted to have cut the deceased twice on the neck with a panga and went to hide the murder weapon. The accused led PW4 and PW5 to where the murder weapon was hidden, P.Exhibit P2. At the close of the prosecution case, the evidence against the accused was the dying declaration to PW1 and the deceased's confession to PW4.

21. Regarding dying declaration, it is trite that such evidence must be received with great caution. The principle that has to be applied was stated in **Republic V Peter Mburu Muthoni 423 HCCR No. 27 of 2004(2005) eKLR**, where Osiemo J, as he then was; referred to Choge V Republic and observed as follows: -

“the general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. 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 declarations as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person. See CHOGE V REPUBLIC (1985) KLR 1”

22. From the evidence adduced by PW1, the statement of Merrab Awuor Masawa implicating the accused of having caused the fatal injuries was made a few minutes before she died. The statement is admissible as a dying declaration because it was just few minutes before the deceased died and was made in extremity when the deceased was at a point of death and the mind was induced by the most powerful consideration to tell the truth. Merrab Awuor Masawa was then 83 years old. The deceased must have known her employee, the accused very well as the accused had worked under her for 2 weeks from the time of his employment and a case of mistaken identity is ruled out. The dying declaration from the deceased Merrab Awuor Masawa, an adult, did not need corroboration before it can be relied upon.

23. The confession to the police officer PW4, was made after the accused was informed of the charge and cautioned accordingly. The confession was made in accordance with the provision of the Evidence Act. That after trial within trial, the court found that the confession was made in accordance with Sections 25A and 26A of the Evidence Act and was therefore admissible. The accused in his confession gave a detailed statement on how he committed the offence. According to PW4 and PW5 he led them to the recovery of the murder weapon which he mentioned in his confession.

24. The accused in his unsworn statement stated that he knows the charge he is facing and that on 2nd July 2015, he was staying in the house of Odhiambo being a shamba boy and on that material day, he went to cultivate and was arrested by AP at 9.30am while cultivating. He was taken to Sigomere Police Station where he was put in cells. He was taken out of the cells and beaten then returned to cells. That at 2.00pm he was removed from cells and told by a police officer at a gun point he was being taken to record statements and if he did not record a statement he would be killed. He then was taken to police officer and recorded his statement and returned to cells. The accused gave unsworn statement which could not be tested at all through cross examination nor did he call any witness. I find his movement statement defence to be an afterthought.

25. I have carefully evaluated and analysed the prosecution evidence and specially the dying declaration by Merrab Awuor Masawa to PW1, evidence of PW2, PW3, PW4 and PW6 and the confession made to PW4 by the accused and the accused unsworn statement, and I have no doubt in my mind that the Prosecution proved that the death of the deceased was caused by the accused who stabbed the deceased twice on the neck using a panga, exhibit P2 which panga he led PW4 and PW5 to where he had hidden it.

26. **Whether accused had malice aforethought?** PW1 told this court she heard screams of “woooi Achieng come and rescue me”, which were being uttered in Dholuo language. She rushed to where the screams were coming from and saw her grandmother Merrab Awuor Masawa bending and covered with blood on her front part. She asked her what had happened and she told her, she had been injured by her employee. PW2 when she came to the scene of incident she found the deceased lying on the ground unconscious. PW1 noted the deceased had stab wound on her neck. The accused in his confession to

PW4 stated as follows:-

“.....that is the point at which I lost my mind and went for the panga which I had left outside her house and I got into her bedroom where she was standing and I cut her twice on the neck and she started screaming heading towards the gate while bleeding profusely.....”

The accused in using a sharp *panga* and cutting the deceased at the neck twice had an intention to cause the death or to do grievous harm to the deceased. He had knowledge that the act of cutting the deceased on the neck would probably cause death of or grievous harm to the deceased. The accused had from the evidence adduced before court planned to commit the offence as after talking to the deceased he went out and got a *panga* which he had left outside the deceased house, returned to her bedroom and cut her twice. I find the accused had intention to kill the deceased and I further find that malice aforethought is therefore proved. I find the accused guilty of murder, I accordingly convict the accused with the murder of Merrab Awuor Masawa contrary to **Section 203 as read with Section 204 of the Penal Code Laws of Kenya.**

DATED AT SIAYA THIS 26TH DAY OF JANUARY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 26TH DAY JANUARY, 2017.

In the presence of:

Mr. Odhiambo B. F. for the Accused

M/S Odumba for State

Accused - Present

C/A: Leonidah Atika

J.A. MAKAU

JUDGE