



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 41 OF 2014

PROSECUTOR REPUBLIC

VERSUS

MICHAEL ODHIAMBO ACHIENG ACCUSED

JUDGMENT

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code the particulars being that on 16th May 2014 at Kagwa Sub-location, West Uyoma Location in Rarieda District within Siaya County he murdered **Consolata Auma Akumu**.

He pleaded not guilty to the charge. In the ensuing trial the prosecution called 9 witnesses. The accused also testified on oath but did not call any witnesses.

Briefly the prosecution's case is that the accused and the deceased were man and wife and lived at Kamariga Beach. On the material day information reached Nahashon Ouma Opany (PW1), the Beach Chairman that there was trouble at the house of the accused person. He went there only to find the accused's wife, now deceased, lying on the ground outside. She had allegedly been carried outside by PW1's informant (Lucas Omondi PW5) when, he found her lying in bed comatose. They tried to resuscitate her. Soon word spread to the couple's kin and more people including Samuel Onyango the area Assistant Chief (PW2), George Omondi (PW3), and Jackline Adhiambo Ochieng (PW4) proceeded to the scene. When all efforts to resuscitate her failed they took her to Bondo District Hospital where she was pronounced dead.

Lucas Omondi Ndemba (PW5) who together with one Martin Ochieng were first to go to the scene stated that they found the deceased lying in bed inside the house. The accused was crying and when he (PW5) enquired what had happened the accused said she had just fell down.

According to Doctor Joan Aleyo Afulo (PW6) she performed the Postmortem about 5 days following the death of the deceased. Her findings were a suture on the neck region where the preservation was being administered; a mark at the back, a heavy clot in the atlas of the first vertebrae which was also crushed on the inside. She also had heavy clots superior venacover. The major veins covering was crushed and there were signs of bleeding in th parietal region of the head. The spinal cord too had a depression. She opined that the cause of death was coniation of the spinal cord leading to the respiratory and circulatory, depression of the spinal cord as well as the absence of breathing.

The witnesses other than PW5 stated that they had been informed that the accused had admittedly slapped his wife causing her to fall on the bed. The witnesses stated that the couple often fought. The accused was subsequently charged with this offence.

On his part the accused stated that he married the deceased in 2010 and they were blessed with three children. On the material day his wife left the house at around 8AM to get fish, while he was sleeping. When he woke up at 8.30AM when he took the baby to her he found her airing the fingerlings. They agreed she would go to clean the house afterwards. From there he went and borrowed an iron box to iron his clothes but upon returning to the house found her lying on the bed. He called her but she did not respond. He called their neighbours who found she had difficulty in breathing. They took her to hospital but she was pronounced dead. The Assistant Chief arrested him. He denied that he slapped the deceased and contended that he only admitted to slapping her because the Assistant Chief pressured him. He contended that he had never fought with his wife. He stated that she was breathing when he found her and that she was still alive when they took her to hospital.

To prove murder it must be proved beyond reasonable doubt that the death of the deceased was occasioned by an unlawful act or omission of the accused person. It must also be proved that the accused caused that death with malice aforethought. If malice aforethought is not established then the offence is reduced to manslaughter unless of course there is a defence like self defence. Section 206 states:-

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

(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 harm is caused or not, or by a wish that it may not be caused;

(c) an intend to commit a felony;

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

It would be an unlawful act for a man to beat up his wife and occasion her injuries which causes her death. In this case therefore this Court is enjoined to determined firstly, whether it is the accused person who caused the injuries that caused the death of the deceased, and secondly whether he did so of malice aforethought.

Having heard the testimonies of the prosecution witnesses and that of the accused person my finding is that the charge against the accused person has not been proved beyond reasonable doubt. None of the prosecution witnesses saw the accused person commit this crime. There is therefore no direct evidence to connect him to the crime. Indeed most of what the witnesses narrated to this Court is based on hearsay – what they heard from other people who were themselves called to give evidence. It is alleged that the accused himself admitted to slapping his wife. This however does not amount to a confession that would give rise to a conviction. He has in his testimony stated that the only reason he said he slapped the deceased was because he was pressurized by the Assistant Chief. Moreover in the doctors opinion a slap perse could not have caused the injuries sustained by the deceased and which led to her death. In the doctor's own words death could have occurred only if the perpetrator was a giant which the accused person is not.

The case against the accused person is not supported by evidence whether direct or circumstantial. By and large it is based on suspicion – that since he is the one who was with the deceased then he must know what killed her. There is however evidence from the accused and which was not rebutted that he at one point left her in the house and went to borrow an iron box. The doctor stated that there was strangulation. One would then ask why no forensic investigation was carried out to link the accused to the strangulation. The evidence adduced in this case is very weak and cannot sustain a charge of murder and I accordingly find the accused not guilty and acquit him.

Signed, dated and delivered at Kisumu this 24th day of January 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Muia for the state

Mr. Onsongo for the accused

Accused absent

C/A Serah Sidera