



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT SIAYA

HCCRC NO. 21 OF 2015

(CORAM: J.A. MAKAU – J.)

REPUBLIC.....PROSECUTION

VS

GEORGE ODHIAMBO WERA.....ACCUSED

JUDGEMENT

1. **GEORGE ODHIAMBO WERA** is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal code**. The particulars of the charge are that on the 30th day of September 2014 at Central Sakwa location, Bondo District within Siaya County murdered one **SUSAN AWINO**.

2. The Prosecution called seven witnesses in support of the charge. The facts of the presentation case are that the deceased had attended a funeral on 29th September 2014 at Nyangoma and after funeral, she spent a night at her sister's home one Everline Akoth Juma. That the following day, the accused went for her from her sister's home. That they left and a few metres from the home of the deceased's sister's house, her sister witnessed the accused assault the deceased and on enquiry from the accused why he was assaulting her sister, he slapped her. PW2 Paul Tabu who met the two as he was coming from the shamba, witnessed the accused assault the deceased and intervened but he was also assaulted and left the two. That at around 3 - 4 pm screams were heard from the accused home and PW2 went to check but returned with bad news that Susan Awino was dead. The deceased body was taken to Owens mortuary and the accused was subsequently arrested and charged with this offence.

3. PW1, Everlyne Akoth Juma, sister to the deceased and sister in-law to the accused told this court that on 29th September 2014, the deceased went to the call her at 6.30pm to attend a funeral of their neighbour. That they went and returned at 9.30pm and stayed at her home until 1.00am; when PW1 persuaded the deceased to spend the night at her place, because the deceased's home was far. That the following day they saw her husband George Odhiambo Wera come for the deceased. That after breakfast, the two left and at a distance of about 15 metres, PW1 saw the accused slap the deceased, provoking her to proceed and find out why the accused was beating the deceased. The accused then slapped PW1, forcing her to return to her house. That the two left for their home. PW1 witnessed Paul Tabu (PW2) who was coming from the shamba separating the deceased and her husband. That at around 3 - 4pm, she heard screams from the direction of her sister's home and PW2, Paul Tabu, went to check what was happening. He later returned and informed her that the deceased was dead. PW1 then went to Owens mortuary to view her sister's body and noted that the body was swollen with scratch marks at the

face, on both cheeks.

4. During cross-examination, PW1 told the court that she saw the accused slap her sister and then she saw the body of the deceased at Owen's mortuary three to four days after the incident. PW1 stated that she recorded her statement before she had gone to the mortuary to see her sister's body.

5. PW2, Paul Tabu, testified that on 30th September 2014, while PW1 and Chilos were coming from ploughing they found Odhiambo Wera at the house of Chilos with his wife; Nyamitiro and Donald Juangre. That after meeting them, he went to the toilet and on returning he saw the accused and his wife leaving. Then as they were going, PW2 saw the accused push his wife who fell down, he kicked and slapped her. This occurred when PW2 was about 10 metres away from them as he was coming from the opposite direction. PW1 rushed to separate them but Odhiambo chased her away. PW2 went and told the accused he had beaten the deceased enough and he should stop. The accused then questioned PW2 whether he is angry can he be separated from beating his wife? PW2 told the accused to leave the deceased alone and proceed to solve the matter at his home, at that time the deceased told PW2 that her husband had injured her legs and asked PW2 to help her walk, that PW2 helped the deceased walk. That as PW2 was helping the deceased walk, the accused picked a hard dry stick which was of about 1 metre long, and the accused spanked PW2 from the back forcing him to leave the deceased behind, and he returned to the home of Chilo. PW2 left the accused beating the deceased as they proceeded to their home. PW2 noted that the accused was beating the deceased with the stick which he had picked from a dry tree. That at 1.00 pm, PW2 and others heard people screaming from the home of Odhiambo, the accused; while he was still at Chilos' home; that is about 1 kilometre away. PW2 went to check what was happening and found that Nyamitiro, the wife of the accused was covered with a sheet, uncovered the body and found that Nyamitiro was dead. He noted the body had burns on the head, with right ear cut and he then left for Chilo's home. He informed PW1 that her sister Nyamitiro was dead. PW2 identified George Odhiambo Wera as his neighbour and stated he had known him for a long time. He pointed at the accused person in the dock and said that he saw him with the deceased on the material day.

6. On cross-examination, PW2 told court that Ochilo is his friend and they were together on the material date. PW2 said that he is a Ugandan but has been staying at his home at Nyangoma since 1988. He stated that he is from Pathola tribe in Uganda but he is a Luo. PW2 stated he witnessed the incident as it occurred and at the material time he was in Kenya.

7. PW3, Mathew Juma Omollo, testified that on a 29th September 2014 he was informed of funeral at the home of Odhiambo Wera by Omondi Omok. PW3 stated Odhiambo is known to him as he is married to his wife's sister one Susan Odhiambo. PW3 stated he had met the accused on the previous day.

8. PW4, Julius Nyerere Ogam, Chief of Central Sakwa location who has been a chief for the last 22 years stated that he could recall on 30th September 2014 at 8.00pm, he received information from Inspector at Chief's office Nyangoma Division of murder of a person by her husband within his location. PW4, the Inspector and others proceeded to Nyangoma centre, at the home of George Odhiambo Wera, where they found him with his father at around 8 - 9 pm, and found the deceased's body had been taken away to Owen's Mortuary, Bondo. They arrested the accused and called OCS Bondo Police Station, took the accused to APs Camp at Kapolo from where OCS Bondo Police Station; collected the accused. PW4 stated he knows the accused as his subject and identified him in the dock.

9. PW5, No. 90088551 Inspector John Otieno Otunga, attached to Nyangoma D.O's Office stated that on 30th September 2014, he received a call that one George Onyango Onyango thus the said George Odhiambo Wera had killed his wife by the name Susan Awino. PW5 called Area Chief, PW4 Julius Nyerere and both agreed to meet at Nyangoma centre. That PW5 took his officers and proceeded to the home of George Odhiambo Wera. That they found him at his home with his children. That they searched for the murder weapon but got none as the scene had been interfered with. The accused told them the body was at Owen's Mortuary. They arrested him, took him to Nyangoma APs Camp and called OCS Bondo Police Station, who went and picked the accused. PW5 identified the person he arrested as George Odhiambo Wera who he had not known before and identified him as the accused in the dock.

10. PW6, Dr. Bob Awino, performed postmortem on the body of the deceased. He produced the report as exhibit P1. The doctor found the deceased had sustained multiple bruises on the back, face, abdomen, lower limbs, had swollen face, mainly left side; blood oozing from nostrils, ears; temporal (left) scalp area swollen; left face, left upper chest, abdomen with blisters from burns, may be due to hot water. On the head, he noted massive periosteal (sub) hematoma more on the left head, linger fracture and depressed left temporal skull and blood oozing through the sites. The doctor was of the opinion that the cause of death was massive intracranial haemorrhage from fractured skull secondary to blunt object trauma.

11. PW7, No. 65885 PC David Barno, the Investigating Officer jointly with C.I Simon Kirui, testified that on 30th September 2014 in company of C.I Simon Kirui at around 9.40 am they proceeded to Owen's Hospital Mortuary in Bondo town after receiving information that someone had been murdered and taken to the said mortuary. That at the mortuary they enquired from the mortuary attendant who informed them the body of the deceased; one Susan Awino had been taken there by one George Odhiambo Wera, who was suspected to have murdered the deceased. PW7 and C.I Kirui gave instructions that the body should not be interfered with as it was now a police matter pending investigations. PW7 and C.I Kirui proceeded to Kopoto AP Camp, where they found John Otunge (PW5) who informed them he had arrested George Odhiambo Wera, who they picked and took him to Bondo Police Station. That on 2nd October 2014 PW4 in company of the deceased relatives witnessed postmortem of the body of the deceased being conducted by Dr. Bob Owino at Bondo Sub-District Hospital Mortuary. PW7 later recorded witnesses statements and charged the accused with this offence.

12. During cross-examination PW7 testified that from the evidence gathered the place of death of the deceased was at her matrimonial home. PW7 stated that he did personally visit the deceased's home. He stated he did not get the particulars of the person who told him it was the accused who took the deceased to the mortuary.

13. When the accused was called upon to defend himself, he stated as follows: - That he knew Susan Awino Odhiambo, the deceased as his wife; who died on 29th October 2014; adding he is not sure as to the date of the death. That on date before her death, she left home and went to her sister's home and she was to return on the same day, but she did not return. That the following day, the accused went to his wife's sister's home, one Judith Akoth Juma at around 9.30 am and found his wife seated on a couch. That there were other people at the home of Judith Akoth Juma. That after they took a meal, the accused and his wife left for their homestead and on arrival at their home the accused proceeded to his shamba returning at 6.00 pm, where he did not find his wife at home. That at 8.00 pm, he enquired from his father Washington Wera Ogondo (DW2) of his wife's whereabouts who told him that when he left the deceased also left. That at 9.30 pm, the Area Chief Julius Nyerere (PW4) in company of three police officers from Bondo Police Station arrested him and escorted him to Bondo Police Station. He was not told the reasons for his arrest and later he was charged with this offence. The accused denied that he slapped the deceased as stated by PW1. He denied also what PW2 told the court, that he saw the accused push, kick and slap the deceased. He denied killing his wife and taking her body to the mortuary, adding that he does not know how his wife met her death, as by the time of her death, he had been arrested.

14. During cross-examination, DW1 testified that he stated the name of his wife's sister is Everlyne Juma and that they were close with her. He stated his family and that of Juma were in good terms. He stated the prosecution witnesses lied when they stated what they saw. DW1 stated on 30th September 2014, he did not go searching for his wife. He stated when he left the home of his sister-in-law with his wife, he was supporting her as she was drunk, and was walking in a zig-zag manner. DW1 stated he knows PW2 and he has no grudge with him. On re-examination, DW1 stated when he left with his wife for his sister in-law; it was on 29th October 2014 and his wife was drunk.

15. DW2, Washington Wera Ogonda, father of the accused and father-in-law to the deceased in his evidence he stated that on 29th September 2014 at 9.30 am, the accused left home on a bicycle alone. That Susan Awino also left her home after 30-40 minutes. That the accused returned home at around 6.00pm. That at around 9.00 pm, DW2 saw the Area Chief (PW5) in company of police officers, who informed him they wanted to arrest the accused, claiming that he had killed his wife and that her body

was lying at Owen's Hospital mortuary. They arrested the accused and left with him for Bondo Police Station.

16. During cross-examination, DW2 testified that he saw the deceased Susan Akoth and George Odhiambo Wera return home on 29th September 2014 and that they were walking well and that Susan was not walking in a zig-zag manner. He stated when Susan left, on 29th September 2014 for her sister's home, he did not talk to her. He stated that when George was arrested he was told the reason for his arrest.

17. In this case, the accused faces a charge of murder. **Section 203 of 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.”

18. Malice aforethought is a very important ingredient for the offence of murder. In a murder case, the Prosecution is required to prove facts which establish malice aforethought. **Section 206 of the Penal Code** sets down the facts which constitute malice aforethought 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;

c. 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”.

19. To prove a charge of murder, the Prosecution has a duty to establish the following ingredients.

1. The death of the deceased and the cause.

2. That the accused caused the death through an unlawful act or omission.

3. That the accused possessed an intention to cause harm/kill/ or had malice aforethought.

20. **Whether Prosecution proved the death of the deceased and its cause?** A postmortem was carried out on the body of the deceased by Dr. Bob Awino (PW6) on 2nd October 2014 in presence of PW7. PW7 stated in the course of his investigation, he found the body of the deceased at Owen's Hospital while in the company of C.I Kirui. PW1 testified that she saw the deceased's body at Owen's hospital mortuary. The accused do not deny the deceased died. The doctor's evidence did corroborate evidence of PW1 and PW7, who saw the deceased body at the mortuary. The evidence on the cause of death as per postmortem exhibit P1, is that the deceased died as a result of massive intracranial haemorrhage from fractured skull due to blunt object trauma. I therefore find the Prosecution proved the death of the deceased and its cause.

21. **The next issue for consideration is who caused the death of the deceased?** Accused denied having caused the death of the deceased. In this case, there is no direct evidence but the prosecution case is purely circumstantial. In the case of **Elizabeth Gatiri Gachanja and 7 other vs Republic Criminal**

Appeal No. 51 of 2004; the Court of Appeal sitting at Nairobi set out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of the guilt of accused person. In that case, it was held: -

a. “.....There had been no eye witnesses to the death of the deceased. In such a case the test to be applied was clear. In order to draw inference of guilt from circumstantial evidence, the facts of the case must have been incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, the burden of proving facts which justify the drawing of this inference is always on the prosecution and never on the accused.

b. It was necessary for the court to be sure that there were no other co-existing circumstances which could have weakened or destroyed the inference of guilt.

c. In law, there was no set number of witnesses required to prove a fact. Even the evidence of one witness could have formed the basis for a conviction as long as the court had found the evidence credible. Where such evidence was on the identification of a person who claimed that he was not properly identified, then the court had to examine such evidence with the greatest care.....”

22. In the case of **James Mwangi Vs Republic (1983) KLR 522**, still on circumstantial evidence, the Court of Appeal held: -

“In a case depending exclusively in circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.....”

23. In the instant case, both PW1 and PW2 testified they saw the accused on 30th September 2014 in the morning hours come for Susan Awino, from the home of her sister Everlyne Akoth Juma. PW1 stated that on 30th September 2014, the accused came to her home at around 8.00 am for his wife Susan Awino and after leaving her home at a distance of 15 metres, PW1 saw the accused slap his wife and on going to check what was wrong the accused, also slapped PW1. PW2 saw the accused push his wife down, kick and slap her from a distance of 10 metres. That when PW1 went to separate them, the accused chased her away. PW2 told the accused he had beaten his wife enough and he should stop it, but instead he asked PW2 whether when he is angry whether he could be separated from attacking his wife. The deceased told PW2 that her husband had already injured her leg and she asked PW2 to support her, so when PW2 intervened, the accused picked a dry hard stick of about 1 metre long and spanked PW2 who was assisting the deceased. PW2 left them, leaving the accused beating the deceased as they proceeded to their home using the dry stick. That at around 1.00 pm, PW2 heard people screaming from the home of the accused. PW2 went there and found the body of the deceased covered with a sheet. He checked and found Susan Awino was dead.

24. There is no reason that has been advanced before me to make me doubt the evidence of PW1 and PW2 that they saw, observed, heard and talked to the accused in broad daylight. They had good recollection of the events of the fateful material time. The accused and the deceased were well known to PW1 and PW2 and they recognized him as he attacked the deceased. The two were neighbours to the deceased and the accused and it was only the accused who was lastly seen with the deceased while alive. PW1 and PW2 left the accused with the deceased, continuing to beat her. That her death occurred at the deceased's home few hours after PW2 left the accused beating his wife as they were proceeding to their home.

25. The chain of evidence from the time the accused was seen with the deceased to the time, that she was found dead at her home where the accused was taking her, from the home of PW1, was not broken and in

absence of any other reasonable explanation as to how the deceased met her death, the finger points to the accused person, who was seen by PW1 and PW2 beating the deceased and who told PW2, the accused had seriously injured her and no other person as the perpetrator of the murder. I have warned myself on relying on the circumstantial evidence in absence of other evidence, that I must be satisfied that even without any other evidence the circumstantial evidence and the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt and that the court before drawing an inference of the accused's guilt from circumstantial evidence be sure that there are no other co-existing circumstances which would weaken or destroy the inference. I am satisfied in this case that even without any other evidence, the circumstantial evidence is that the accused was the last person seen with the deceased and seen assaulting the deceased and chasing PW1 and PW2 who came to her rescue and when he told PW2 when a man is angry he cannot be stopped from attacking his wife, was enough to point a finger at the accused to the exclusion of any other person coupled with the fact that the deceased was found dead within the accused compound a few hours after PW1 and PW2 saw the accused beating the deceased during broad day time.

26. In his defence, the accused and his witness were evasive in that none of them opted to give evidence touching on the incident of the material date of the murder, thus 30th September 2014. DW1, the accused stated the deceased died on 29th October 2014; thus a month after the death of the deceased as per evidence of PW1, PW2, PW3, PW4, PW5, PW6 and PW7. His evidence was based on events of 29th October 2014 when the deceased was already dead, all what the accused stated happened and the deceased did was not relevant to the charge the accused was facing. I find the prosecution proved that the accused caused the death of the deceased. The accused did not comment on the evidence added by PW1, PW2, PW3, PW4, PW5, PW6 and PW7 as to what happened and on the death of the deceased. DW2 evidence, father to the accused is based on the events of 29th September 2014. His evidence contradicts evidence of DW1. It was inconsistent to the evidence of DW1. The contradictions and inconsistencies of the defence witness makes the accused defence unbelievable. I find the accused and his witness deliberately avoided to state actually what happened on the actual date of murder thus 30th September 2014. I find the accused defence to be an afterthought and a mere denial. PW1 and PW2 placed the accused at the scene of crime and witnessed him assaulting the deceased. I find the prosecution proved that the accused caused the death of the deceased.

27. **I now turn to the issue as to whether the accused had malice aforethought?** PW1 told the court that the accused came for his wife who had spent the night at her home. That when they were leaving, PW1 saw the accused slap the deceased; she rushed to enquire what was happening and why the accused was slapping her sister, she was slapped too and chased away. PW2 similarly went to separate the deceased and helped support her to walk but the accused took a dry hard stick of 1 metre in length and beat PW2 who left the accused beating his wife as they walked to their matrimonial home. The accused acts of chasing PW1 and PW2 points to the facts that he had intention to kill the deceased. The accused slapped the deceased's sister PW1, and beat PW2 who went to help the deceased so as to remain with no one in the vicinity in order to have the opportunity to cause grievous harm or cause death to the deceased. The accused by using 1 metre long dry hard stick and beating the deceased without caring where he hit her especially on the head and all over the body was a further proof of malice aforethought as clearly demonstrated from postmortem exhibit P1. I find therefore from that evidence that the accused had planned to commit the offence. For the above reasons, I will find that the accused murdered the deceased and that malice aforethought is proved.

28. The upshot is that I find the accused guilty of murder of **SUSAN AWINO**. Accordingly the accused is convicted of murder contrary to **Section 203** as read with **Section 204 of Penal Code (Chapter 63) Laws of Kenya**.

DATED AT SIAYA THIS 2ND DAY OF FEBRUARY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 2ND DAY FEBRUARY, 2017.

In the presence of:

Mr. Kowino, Advocate: for the Accused

M/S Odumba: State Counsel for State

Accused: Present

Court Assistants:

1. Patience Beryl Ochieng

2. Leonidah Atika

3. Sarah Ooro

J.A. MAKAU

JUDGE