



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 32 OF 2014

BETWEEN

REPUBLICPROSECUTOR

AND

WYCLIFFE OMONDIACCUSED

JUDGMENT

1. **WYCLIFFE OMONDI** (“the accused”) was charged with the offence of murder contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on 15th April 2014 at Owaga Sub-location, Muhoroni Subcounty within Kisumu County he murdered **ROSELIDA MAJUMA OYAA** (hereinafter “the deceased”). The prosecution marshalled 6 witnesses while the accused gave unsworn testimony. Prior to his transfer, Chemitei J., took the testimony of the first three witnesses and I completed the hearing after complying with the provisions of **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.

2. To prove murder the prosecution must establish three key ingredients beyond reasonable doubt: first, the prosecution must prove the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death and third, that the accused committed the unlawful act with *malice aforethought*.

3. The prosecution case is that the accused hit his grandmother, the deceased, on the head while she was cooking. The fact and cause of death was established by the post-mortem conducted by Dr E. Okello at Jaramogi Odinga Oginga Teaching and Referral Hospital on 22nd April 2014. According to the Post-mortem report produced by Dr Steve Onyango under **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the key observation by Dr Okello is that there was a depression on the back of the head which, on internal examination, revealed a severe skull fracture and scalp haematoma. He concluded that the cause of death was a severe head injury and severe bleeding due to trauma.

4. As to whether the accused caused the unlawful act that led to the deceased’s death, the prosecution called several witnesses who narrated the events of the evening of 15th April 2014. The accused’s cousin, Kenneth Mboya (PW 1) recalled that about 7.30pm, he was at home with the deceased in the kitchen preparing supper. He recalled that the accused came into the kitchen and sat atop some firewood. In a little while, he heard a loud bang and when he turned he saw the accused holding a piece of wood and the deceased bleeding. PW 1’s scream for help caused his mother, Beryln Akinyi Odhiambo (PW 4), to come to the kitchen.

5. PW 4 recalled that she heard PW 1 calling for help saying that the accused was killing his grandmother. She rushed there and found the deceased on the floor with blood oozing from the back of the head while the accused was still standing holding a piece of wood. Grace Akinyi Oyaa (PW 3) also rushed to the kitchen when she heard PW 1 screaming. She found the deceased lying on the floor bleeding from the head and the accused holding the blood-stained piece of wood.

6. The Assistant Chief of Owaga Sub-location, Benson Otieno Abondo (PW 3) heard about the incident and called PW 4 who informed him that the accused had killed the deceased. He immediately went to the homestead and confirmed as much. He rung the Commanding Officer of Koru Police Station, Chief Inspector Zipporah Kilonzo (PW 5), who proceeded to the homestead with other officers. She re-arrested the accused who had been restrained by members of the public. She found the deceased lying in the kitchen with a head injury at the back of the head. She took custody of the piece of wood and arranged for the deceased's body to be taken to the mortuary for the post-mortem.

7. In his unsworn statement, the accused denied killing the deceased. He told the court that on the material day, when he arrived home from the shamba he found the deceased holding a knife with which she threatened to stab him. As he tried to run away, she hit her head on the wall and fell on the sufuria which was on the fire. His aunt arrived suddenly and started accusing him of killing the deceased.

8. The testimony of PW 1, PW 2 and PW 3 established that the deceased was assaulted by the accused. PW 1 was alone with the accused and the deceased in the kitchen when the accused hit the deceased with the piece of wood. PW 1 raised immediately and when PW 2 and PW 3 arrived, the accused was still in the kitchen holding the piece of wood with which he assaulted the deceased on the head. The accused admitted that he was at the scene of the incident and the evidence excludes any possibility that anyone else would have assaulted the deceased other than the accused.

9. I reject the accused's defence that the deceased fell while trying to chase him. The unsworn statement lacks any weight when considered alongside the convincing testimony of PW 1, PW 2 and PW 3. There was no suggestion to the witnesses in cross-examination that the deceased threatened and chased the accused. There is also no evidence to suggest that the witnesses were motivated by a grudge or ill-will against the accused to the extent that they would implicate him in killing the deceased. I therefore find and hold that the accused assaulted the deceased on the head with a piece of wood on the material day.

10. I now turn to the issue of malice aforethought. Having rejected that accused's version of events, I also reject that the accused was provoked or that he acted in self-defence. The truth of the matter is that he hit the deceased with a vicious blow on the head. The severe injury inflicted on the deceased's head points to the fact that the assault was intended to cause grievous injury if not death. The injury was consistent with the unlawful killing of the deceased actuated by malice aforethought within the meaning of **Section 206(a)** of the *Penal Code*.

11. Despite proof of malice aforethought, there was evidence that the deceased could have been insane at the time he committed the felonious act. A successful defence of insanity negates malice aforethought. When the accused was first brought to court for plea, he was referred for a mental examination. Dr Onyango, who examined him on 29th April 2014, reported in his medical report that the accused had an underlying mental illness and was not fit to plead. He was later found fit to plead and the hearing proceeded without incident.

12. The defence of insanity is to be found at **section 12** of the *Penal Code* which states as follows;

12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission, but a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or more of the effects above mentioned in reference to the act or omission.

13. It is a cardinal principle of law that the burden proof of guilt of accused person lies on the prosecution, and that an accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities. To establish the defence of insanity, the court must clearly be satisfied that when the accused committed the act of which he is indicted, when he committed the offence he was;

- (a) suffering from a disease affecting his mind and
- (b) through such disease he was incapable of
 - (i) understanding what he was doing or
 - (ii) of knowing that he ought not to kill the deceased person.

14. To prove these two ingredients, it is necessary to examine the entire evidence. According to the first medical report of Dr Onyango, which I have already alluded to, the accused was found not fit to plead. Dr Wakindu, who examined the accused on 29th January 2015 confirmed that the accused was lucid and was fit to plead. PW 1, PW 2 and PW 4 did not point to any incidents of mental illness although PW 3 testified that the accused smoked bhang. PW 5 told the court that he did not consider the accused normal. On his part, the accused told the court that he only used bhang once before and did not use it when at the time of the incident.

15. The totality of the evidence is that while it is possible that the accused suffered from bouts of insanity from time to time, there is no evidence that at the time of the incident the accused was suffering from any mental incapacity. Those who knew the accused well; PW 1, PW 2, PW 3 and PW 4 did not detect any activity that would indicate mental illness at the time he committed the felonious act.

16. I therefore find the **WYCLIFFE OMONDI** guilty of the murder of **ROSELIDA MAJUMA OYAA** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 20th day of March 2017.

D.S. MAJANJA

JUDGE

Ms Aron, Advocate for the accused.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.