



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**HCCRC NO. 4 OF 2015**

**(CORAM: J. A. MAKAU - J.)**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**KENNEDY ODONGO ODERO.....ACCUSED**

**J U D G M E N T**

1. The accused **KENNEDY ODONGO ODERO** was 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 11<sup>th</sup> day of May 2012 at Omia Malo sub-location in Rarieda Sub-County within Siaya County within Nyanza Province, jointly with another not before court murdered one **SOPHIA ACHOLA OBONGO**.

2. The Prosecution called seven (7) witnesses. Most of the witnesses were relatives and neighbours to the accused. The deceased, Sophia Achola Obongo was grandmother to the accused. PW1, Pamela Anyango Odhiambo, granddaughter to the deceased was on 1<sup>st</sup> February 2012 at her place of business at Asembo when she heard people passing by saying Sophia Achola Obongo had been raped. She proceeded to the deceased's home and found her sitting outside her house surrounded by many people. She also found the accused Kennedy Odongo there. She testified the deceased was unable to talk but noted her clothes were soiled with faeces and blood. She talked to the deceased who did not respond and then she talked to the accused who told her Jeremiah is the one who had raped the deceased. That PW1, the Assistant Chief and the accused took the deceased to Aboudha Hospital from where she was referred to Madiany Hospital; where she was treated and referred to Kisumu District Hospital from where she passed on after 1 week. PW2, Fredrick Odhiambo Omino, the Assistant Chief of Omia Diere sub-location testified that on 1<sup>st</sup> February 2012 at 9.00am, he received a call informing him of an incident in which the deceased was suspected to have been raped by Kennedy Odongo Odero, the grandson of the deceased. PW2 went to the scene of the incident whereby he found the deceased lying on the ground while the accused was surrounded by members of public. PW2 stated the deceased told him she had been raped by the accused and PW2 asked the accused whether he did it and he denied it. PW2 arranged for the deceased to be taken to the hospital and took the suspect with the deceased's clothes to Aram Police Station. PW2 noted the deceased was bleeding.

3. PW3, Mary Aluoch Mangoha, daughter in-law to the deceased herein, stated that on 15<sup>th</sup> February 2012 at Kisumu District Hospital, she identified the body of Sophia Achola Obongo in company of police officer from Aram Police Station to the doctor for postmortem examination.

4. PW4, Collins Omondi Ouma, a Clinical Officer Incharge of Madiany South County Hospital, produced

a P3 form of one Sophia Achola Obongo (deceased) aged 87 years who died on 1<sup>st</sup> February 2012 which had been filled by Caleb Kadima. The P3 form exhibit P1 classified the injury as harm. It reveals the deceased had tenderness around the neck on palpation and that bruises were noted on both labia majora and minora indicating possible penetration. That the clinical officer noted some faecolith material on the genitalia and on posterior border.

5. PW5, Dr. Patrick Omondi Choga, who gave evidence on behalf of Dr. Masawa, produced postmortem report on the body of Sophia Achola Obongo which was identified to the doctor on 15<sup>th</sup> February 2015 by PC Henry Munene, Mary Aluoch (PW3) and Milcah Awuor Otieno. PW5 produced postmortem report as exhibit P2. The postmortem report P2 showed that on vaginal examination, there were multiple bruises and minor tear at 12.00 o'clock position of the vulva, with marked paleness on the vaginal mucosa and the conjunctiva as well as the severe wasting generally. The doctor opined the cause of the death was severe anaemia with severe sepsis due to sexual assault.

6. PW6, No. 90899 PC Sammy Kimanzi, told court on 1<sup>st</sup> February 2012, the Assistant Chief (PW2) in company of members of public together with the accused reported at Aram Police Station. That PW2 handed over the accused and a lady who he realized was a complainant, who reported to him that on 31<sup>st</sup> January 2012 she was raped by the accused, her grandson. That he recorded the report in OB and issued her with a P3 form referring her to Madiany Hospital and placed the accused person in cells. PW6 identified the person he received by pointing the accused at the dock.

7. PW7, No. 219173, C.I. Francis Ngugi, the Investigating Officer, testified that on 1<sup>st</sup> February 2012, the accused was escorted to Aram Police Station on allegation of having raped his grandmother and he was charged with an offence of incest contrary to **Section 20(1) of the Sexual Offences Act** at Bondo Law Courts as the complainant was undergoing treatment at Madiany Hospital but her condition deteriorated leading to her being transferred to Kisumu East District Hospital. That on 11<sup>th</sup> February 2012, she passed on. PW7 then took over the file and charged the accused with murder on 29<sup>th</sup> May 2012 after withdrawing the case at Bondo Law Courts under **Section 87A of the Criminal Procedure Code**, following the postmortem report which stated the deceased died as a result of rape.

8. The accused upon being put on his defence, he denied the offence and gave a defence of alibi. The accused stated the deceased was his grandmother. He stated he knows the charge he is facing stating that he denied that on 11<sup>th</sup> May 2012 he killed the deceased as stated in the charge herein stating that by 11<sup>th</sup> May 2012 he was at Kodiaga G.K. Prison. He denied that he raped or murdered the deceased. He further stated on 11<sup>th</sup> February 2012 he did not murder the deceased nor did he do so on 1<sup>st</sup> February 2012. He stated on 1<sup>st</sup> February 2012, he was at home at Asembo and that Sophia Achola Obongo was living in the same compound with the accused. That on 1<sup>st</sup> February 2012 he slept at his father's house whereas the deceased slept at her house at a distance of between 15-20 metres. That he did not see his grandmother as he was not at home the whole day and that at 9.00pm he left the market where he was watching news at Ndaraokat to go to sleep. That on 2<sup>nd</sup> February 2012, when he woke up, he found people gathered at the house of his grandmother. That on going there he was asked whether he had raped his grandmother and he denied having done so. The mob then started beating him demanding the truth. He was then taken to police at Aram Police Station.

9. The accused is facing a charge of murder and as such the burden 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: -

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

10. The prosecution in a murder case must 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: -

**“206. Malice aforethought shall be deemed to be established by Malice aforethought. evidence proving any 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 bodily harm is caused or not, or by a wish that it may not be caused;**

**c. an intent 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.”**

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

**1. Death of the deceased and cause of death.**

**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 malice aforethought.**

**12. Whether the prosecution proved the death of the deceased and the cause of her death?** A postmortem was carried out on the body of the deceased on 15<sup>th</sup> February 2012 in the presence of PW3 Mary Aluoch Magoha, PC Henry Munene and Milcah Awuor Otieno. The doctor’s postmortem report exhibit P2 produced by PW5 Dr. Patrick Omondi Choga, on behalf of Dr. Masawa corroborated the evidence of PW3, who told the court that she identified the deceased body for the doctor at Kisumu East Hospital for the postmortem purposes. That death of the deceased is not in dispute. The doctor opined the cause of the death was as per exhibit P2 due to severe anaemia with severe sepsis due to sexual assault. I therefore find and hold that prosecution proved the death of the deceased and the cause of the death.

**13. Who caused the deceased’s death?** The accused denied having committed the offence. In this case, there is no eye witness or anyone claiming to have witnessed the commission of the offence. The only evidence is that of PW1 and PW2. PW1 claimed the accused told her the deceased was raped by Jeremiah, whereas PW2 stated the deceased told him she was raped by the accused. PW6 also stated that the deceased told him she was raped by the accused. I have very carefully considered the evidence of PW1, PW2 and PW6. PW1 was at the scene where she found so many people surrounding the accused under arrested and no other witness was called to corroborate her evidence; that they heard the accused mentioning one Jeremiah as the person who raped the deceased. PW2 was there and he never mentioned hearing the accused mentioning Jeremiah as the person who raped the deceased and even if such statement was made, which I doubt, the same cannot be taken as a confession and cannot be used as basis of conviction as it was allegedly made to a person who is not supposed to get confession (**see Section 25A of the Evidence Act**).

PW1 stated when she went to the scene she tried to talk to the deceased but she did not respond. PW2 testified the deceased made a dying declaration to him to the effect that she was raped by the accused. However, on asking the accused, he denied. On cross-examination and on being shown his statement, PW2 admitted what he told the court is not contained in his statement to the police and when he arrived at the scene, the deceased was in unconscious situation and that in his statement he did not mention the deceased telling him who had raped her. From the evidence of PW1 and PW2, there are unreconciled contradictions and inconsistencies which dent the prosecution case. I observed the demeanor of PW1 and PW2 and both of them struck me as incredible witnesses. I find that the deceased could not talk at that time, the two went to the scene. PW1 and PW2 while at the scene, at no time did the deceased mention

her assailant to anyone, leave alone mentioning her grandson Kennedy Odongo Odero as the person who had raped her.

14. PW6 and PW7 contradicted one another when PW6 stated that the deceased was taken to the police station by PW2 and was able to name the accused as her assailant. PW6 did not tell the court the truth as PW2 stated the accused was taken to the hospital and she did not go to Aram Police Station as stated by PW6. PW7 was categorical that the deceased did not make report to the police station as she was taken straight to the hospital. I therefore find the purported dying declaration made by the deceased to PW2 and PW6 to be non-existent as the deceased as per evidence of PW1 could not talk and also as per PW2 she was in unconscious situation. I find that the deceased never met PW6 at the police station. I therefore find no basis of existence of the alleged dying declaration, I find that the deceased never made a dying declaration as she could not talk as per evidence of PW1 and PW2 and as per evidence of PW7 and PW2 as she never went to a police station and met PW6.

15. From the evidence on record, it is not clear who raped the deceased. There is no material evidence linking the accused with the rape of the deceased. The accused used to stay in the same homestead with the deceased and at the material night he was at home. That his house is 15-20metres away from that of the deceased. He stated he does not know who committed the offence. In this case, no forensic test were produced to connect the accused with the offence of sexual assault resulting to the deceased's death. I therefore, find that the sexual assault was committed by unknown person as there is no evidence connecting the appellant with the sexual assault of the deceased. I find the prosecution failed to prove who caused the deceased's death but proved what caused her death only which I find insufficient to link the accused with this offence.

**16. Whether the accused had malice aforethought?** The accused told the court he used to take care of his aged grandmother jointly with his brother and all used to stay in the same compound. That they lived in good terms. That on the material time, he saw the deceased during the lunch time. That he returned home from watching news and slept at 9.00pm. That before this incident there was no bad blood between the accused and his grandmother. There is therefore no evidence that the accused had planned to kill his grandmother or committed any ill act against her. For the above reasons, I find that there is no evidence that the accused killed his grandmother. Malice aforethought is therefore not proved.

17. The upshot is that I find the prosecution has failed to prove the charge of murder against the accused person beyond any reasonable doubt. In the circumstances, I give the accused the benefit of doubt and acquit him of the charge of murder accordingly. I direct the accused be set at liberty forthwith unless otherwise lawfully held.

**DATED AND SIGNED AT SIAYA THIS 9TH DAY OF MARCH 2017.**

**J.A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 9TH DAY OF MARCH 2017.**

**In the presence of:**

**Mr. R. Otieno:** for the Accused

**Mr. E. Ombati:** for State

**Court Assistants:**

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

**J.A. MAKAU**

**JUDGE**