



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE NO. 72 OF 2011

BETWEEN

REPUBLIC.....PROSECUTION

AND

R O O.....1ST ACCUSED

D O O.....2ND ACCUSED

G O O.....3RD ACCUSED

JUDGMENT

1. The accused, **R O O**, **D O O** and **G O O**, are charged with the murder of **O O** (“the deceased”) contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that they jointly murdered the deceased on 3rd December, 2011 at [particulars withheld] Sub-location, Siaya County. After the accused pleaded not guilty, the matter was heard in part by Chemitei J., and I completed it after complying with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.

The prosecution case was that the deceased was poisoned by his relatives after being found having sexual intercourse with CO (PW 1) who was also their relative. PW 1 told the court that the deceased was her lover. She recalled that on the night of 3rd December 2011 she went to the deceased’s house where she and the deceased had sexual intercourse. During that night, the accused in the company of others came to the house and frogmarched them to her father’s house. Since nothing could be done that night, they were told to go back home. She learnt on the following day that the deceased had died after she had gone for treatment at Mutumbu Dispensary.

2. The deceased’s father, **S O W** (PW 2) recalled that on the night of 3rd December 2011, he was at a funeral before he went home. The 3rd accused, who was residing with him, woke him up and told that PW 1 had gone to the deceased’s house. He told the 3rd accused to report the matter to the village elder. PW 2 was told that the matter had been sorted out that night. When he went to check on the deceased that morning, he found him already dead. He reported this to the village elder, Fredrick Oduor Amamo (PW 3), who then called the police. Police officers collected the body from the house where they also found battery acid. They took the body to Yala District Hospital mortuary where Dr Muturi conducted the post-mortem on 5th December 2011. PW 2 confirmed that he identified the body before the post-mortem was done. Wilson Oduor Oyamo (PW 4) also testified that he identified the deceased’s body prior to the post-mortem.

3. PW 3 recalled that on the night of 3rd December 2011, PW 2 sent the 3rd accused to him with a request that he talk to PW 1 and the deceased. Together with PW 2, he went to the deceased's house where he met the deceased and PW 1. He told them to cease their relationship as they were relatives. On the next day, PW 2 called and told him that deceased had died.

4. The final prosecution witness, PC Christopher Onyango (PW 5), informed the court that the original investigating officer, Inspector Samson Kanyi had passed away. As defence counsel did not object, he produced the post-mortem form dated 5th December 2011 prepared by Dr C. K. Muturi. He also produced a medical report (P3 form) prepared by a Clinical Officer, C. Sadiki, who examined PW 1 on 4th December 2011.

5. After the close of the prosecution case, I am required to determine whether there is sufficient evidence to put the accused on his defence. At a minimum, the prosecution is required to produce sufficient evidence which, if unchallenged by the accused, would lead to their conviction.

6. According to Dr Muturi, the deceased's body had abrasions and bruises on both upper limbs and the left and right forearm were swollen. He further reported that there was bilateral adhesion of both lungs to the rib cage. After viewing the stomach, he concluded that the cause of death was ingestion of a corrosive substance. Thereafter he forwarded the stomach contents, part of the liver and kidney for a toxicological examination and part of the right lung and kidney for a histological examination. The results of these examination were not produced before the court.

7. It is clear from the post-mortem report that the deceased died from ingesting a corrosive substance. The prosecution did not call evidence to show how the deceased was poisoned and nothing arose from the testimony of PW 1, PW 2 and PW 3 implicating the accused in the act of poisoning the deceased by placing them at the place and time he is said to have died. There is grave suspicion that the accused wanted to harm the deceased because he was having sexual intercourse with their relative. The evidence led by the prosecution is clearly insufficient to establish a prima facie case against the accused. I refuse to put them on their defence.

8. I hereby enter a verdict of not guilty against all the accused under **section 306(1)** of the ***Criminal Procedure Code***. They are acquitted and set free unless otherwise lawfully held. The sureties are also discharged.

DATED and DELIVERED at KISUMU this 8th day of March 2017.

D.S. MAJANJA

JUDGE

Mr Bagada, Advocate for the accused.

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