



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE NO. 66 OF 2011

BETWEEN

REPUBLIC.....PROSECUTION

AND

WILSON OMINDE WEGO.....ACCUSED

JUDGMENT

1. **WILSON OMINDE WEGO** (“the accused”) was charged with the murder of **BEATRICE ATIENO ODONGO** (“the deceased”) contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars are that on the night of 23rd and 24th day of December 2010 at Olympia Bar in Nyalenda Location, Kisumu East District, within the then Nyanza Province, he together with others not before the court murdered the deceased. The prosecution called 7 witnesses to support its case which was based on circumstantial evidence.

2. A guard at Olympia Bar, George Obwar Odongo (PW1), was on duty at about 9.00pm on 23rd December 2010, when the accused, whom he knew, arrived in the company of a lady. As he wanted a room for the night, PW 1 welcomed them and took them to the bar. While in the bar they met Evelyn Akinyi Odhiambo (PW 4), who ushered them to room number 5. She told the court that at the room the accused gave her Kshs. 300/- to pay for lodging charges. He also sent her to buy cigarettes. She went to the counter to give the money to the bar proprietor, Mary Atieno Odera (PW 2), who told her to go back to the room and get the accused’s identity card so that she could record his personal details. PW 4 went back to the room with her colleague Zena, who knew the accused. The accused told them that he would present his identity card to PW 2 but he did not do so. PW 4 went back to the room and knocked the lodging door again but there was no response as it appeared the accused and deceased were already asleep. The bar closed at around 11:30pm and she went home.

3. On the following morning, PW 4 reported to work as usual and went about her normal routine of cleaning the rooms. She knocked door to room 5 and as there was no response, she decided to open the door. She saw the body of the deceased lying naked on the floor with a panty stuffed in her mouth. PW 4 called PW 2 who came to witness what PW 4 had seen. PW 1 who also came to see the body recalled that it was the lady who came with the accused. PW 2 reported to the matter to the Chief who in turn called the police. The police arrived sooner and took the deceased body to Jaramogi Odinga Oginga Teaching and Referral Hospital (“JOOTRH”) Mortuary.

4. The investigating officer, Nicholas Kipkoech Lang’at (PW7), testified that when he received the call from Olympia Bar, he went to the scene with other police officers, collected the body and recorded statements from the people working at the bar. On 6th January 2011, he received information that a

suspect had been arrested at Nyalenda by a village elder and members of the public. He went to Nyalenda and found PW 4 and Zena who identified the suspect as the person who had been with the deceased on the night she came to Olympia Bar. PW 7 arrested the accused and charged him with murder.

5. The deceased's husband, George Odongo Nyaiwera (PW 5), identified her body before the post-mortem was done by Dr Midigo on 10th January 2010. Dr Kamau (PW 3) produced a post mortem form on behalf of Dr Midigo. The doctor concluded that the cause of death was hypoxia due to strangulation.

6. When put on his defence the accused (DW 1) opted to give a sworn statement and denied any involvement in the deceased's death. He stated that on the material night he was his son at home in Nyalenda and that he did not know the deceased at all.

7. At the close of the defence case, Mr Adiso, counsel for the accused, submitted that the prosecution had not proved the case against the accused beyond reasonable doubt. He argued that the prosecution had failed to produce the lodging receipt which was the only piece of evidence that could have placed the accused at the crime scene on that night. He urged the court to acquit the accused.

8. In a murder trial the prosecution bears the onus of proving the case against the accused beyond reasonable doubt. The prosecution must prove that the deceased died; that the accused before the court is the person who caused that death and that the accused caused that death with malice aforethought.

9. There is no doubt that the deceased was murdered at Olympia Bar. PW 1 and PW 4 are clear that the deceased came into the lodging and was later found dead. The results of the autopsy from the report produced by PW 3 is that the deceased was strangled. The key issue for consideration is whether the accused is the one who strangled her on the material night. The prosecution relied on circumstantial evidence and the general principle applicable, in this respect, was summarised by the East Africa Court of Appeal in **R v Kipkering Arap Koskei and Another [1949] 16 EACA 135** as follows:

In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses other than that of his guilt.

This holding in law was amplified and explained in the case of **Sawe v R [2003] KLR 364** where the Court of Appeal held that circumstantial evidence can be a basis of a conviction only if there is no other co-existing circumstances weakening the chain of circumstances relied on.

10. From the circumstantial evidence I have outlined, can an inference be drawn that the appellant is guilty of the murder of the deceased? Does the circumstantial evidence point unerringly to the appellant, and the appellant alone, as the person who committed the murder? Are there any other co-existing circumstances that would destroy or weaken the inference that the appellant is guilty of the murder of the deceased?

11. The testimony of PW 1 and PW 4 placed the accused at Olympia Bar. PW 1 testified that he knew the accused as he was a customer at Olympia and his neighbour at Nyalenda Estate. PW 1 greeted the accused and deceased at the gate and welcomed them to the bar. He told the court that there was an electric light at the gate with which he could identify the accused. PW 1 interacted with the accused for a while when he escorted him into the bar.

12. The other witness who placed the accused at the bar on that night is PW 4. PW 4 told the court she went to see him in room 5 at least 3 times that night. When she ushered him into the room, when she went back to get his identity accompanied by Zena and when she bought cigarettes to take them back to him. When PW 4 went to get their details one last time she found them asleep and decided not to bother them further.

13. As the accused could not be found after the deceased's death, it is important to establish that the person arrested on 6th January 2017 by members of the public was the person who was seen at Olympia Bar with

the deceased. According to PW 7, the accused was identified by PW 4 and Zena who were at the scene. He told the court that when he arrested the accused, he confirmed that he met the description given to the police by PW 4 and Zena. In cross-examination, PW 4 stated that she only identified the accused because she was informed by Zena. Since PW 4 had already seen the accused at the point of arrest, an identification parade would not have served any purpose. I also note that Zena was not called as a witness but this does not undermine the prosecution case as Zena was with PW 4 at the time she saw the accused and would only confirm what the PW 4 stated. Moreover, apart from the evidence of PW 4, PW 1 is a person who knew the accused and identified him positively. I am therefore satisfied that the prosecution proved beyond reasonable doubt that the accused was with the deceased on the night of 23rd December 2010 when he came to Olympia Bar and was ushered in room 5 with the deceased. PW 4 went to the room at least three times and on the last time she found the room was locked from the inside. I find and hold that the accused was the last person to be seen with the deceased.

14. The question that comes to my mind is what happened to the deceased after she entered the room with the deceased? In this instance, **section 111 (1)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* imposes an evidential burden on the accused, as the last person to be seen alone with the deceased alive, to explain what could have happened. In the absence of failure to offer any plausible explanation, the court may presume certain facts in line with **section 119** of the *Act*. The two sections provide as follows:

111 (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

15. In his defence, the accused denied that that he was at Olympia Bar on the material night. He denied knowing the deceased or even going to the bar with her. I reject this line of defence as the prosecution proved that he was the person seen at the bar by PW 1 and PW 4. After PW 4 went to check on the accused the last time, he did not respond to the knocks, so she left him to sleep. Both PW 2 and PW 4 confirm that the business closed at about 11.30. There is no further evidence that after the bar closed, there was any other person who came into the bar or who would have been seen by PW 1 coming through the only gate.

16. Counsel for the accused pointed to the fact that the receipt for payment was not produced to show that the accused is the person who was booked into room 5 with the deceased on the material night. About this issue, PW 2 stated that she gave the receipt to PW 4 who recorded the name Ominde but she could not produce it as it had been stolen. Although the accused was required to give his identity card details, the testimony of PW 4 is that he deliberately avoided providing his details despite being requested to do so. Why would he be reluctant to provide his identity details? His conduct of deliberately refusing to disclose his identity when requested to do completes the chain of circumstantial evidence and is inconsistent with his innocence and points to a felonious intent.

17. The totality of the prosecution evidence is that the accused arrived at Olympic Bar with the deceased and were ushered into room 5 where they slept. During that night, the accused strangled the deceased and escaped only to be arrested 6th January 2011. The act of strangling is not a harmless act, it is a deliberate

act intended to cause grievous harm if not death. I find and hold that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the **Penal Code**.

18. I therefore find the accused, **WILSON OMINDE WEGO**, guilty of the murder of **BEATRICE ATIENO ODONGO** and I convict him accordingly.

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

D.S. MAJANJA

JUDGE

Mr Adiso, Advocate for the accused.

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