



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL CASE NO. 26 OF 2013**  
**(FORMERLY KISII HCCR NO. 55 OF 2010)**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**TOM MBOYA ONYANGO..... ACCUSED**

**JUDGMENT**

1. According to the information dated 1<sup>st</sup> July 2010, **TOM MBOYA ONYANGO** (“the accused”) is charged with the murder of his wife, **DESLINE AWUOR MBOYA** (“the deceased”) contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the laws of Kenya)* at Kitere Village in Rongo District on the night of 20<sup>th</sup> and 21<sup>st</sup> June 2010. The prosecution called 6 witnesses while the accused gave sworn testimony without calling a witness in his defence.
2. The fact and cause of death is not in dispute. On the morning of 21<sup>st</sup> June 2010 at around 6.00am, the deceased was found dead in her house. She had suffered a head injury. Her body was removed to Rapcom Hospital Mortuary where Dr Emmanuel Oyier (PW 4) conducted the postmortem on 29<sup>th</sup> June 2010 after Patrick Onyango and John Otieno (PW 3) identified it. PW 4 observed that on the occipital part of the head had two cuts which were about 2cm apart. The cuts were about 1cm in length and bone deep. Further examination revealed a depressed skull fracture on the occipital part with intracranial and intracerebral hemorrhage. He certified the cause of death as respiratory arrest due to intracranial and intracerebral hemorrhage as a result of a depressed skull fracture inflicted by a sharp object.
3. The accused’s mother, Cecelia Akumu (PW 1), testified that the accused and deceased were married and were residing in the same homestead with her. She recalled that on 20<sup>th</sup> June 2010, she was with the deceased who complained about chest problems. The deceased took drugs and prepared supper for the family. After supper, the accused and deceased went to sleep. PW 1 further recalled that on 21<sup>st</sup> June 2010 at about 6.00am, the accused came to her house and informed her that he was trying to wake up his wife but she could not respond. She immediately went to the accused’s house, which was about 20m away, and found the deceased lying lifeless on the bed. She immediately called her son Patrick Odiema Onyango (“Patrick”) while the accused was standing outside looking stranded. She also called her nephew Joseph Okoth Onyango (PW 2) and raised alarm causing other people to come to the homestead.
4. PW 2 recalled that on the material morning PW 1 came to his house and informed her that her

daughter in law was dead. He proceeded to the deceased's house and found the deceased, in her bedroom, lying on her bed facing up. He asked Patrick to go and inform the area Chief, Eric Ochieng Mala (PW 5) about the death. The deceased's brother, John Otieno Anyango (PW 3), testified that he was awoken by PW 1 screaming that the deceased had died. He immediately ran to the accused's house which was about 10 metres away from his house. He found the deceased on her bed lying on her back. By that time PW 2 and Patrick had arrived at the scene. As he did not see any injuries, PW 3 suspected that the deceased had probably poisoned herself. As Patrick went to call PW 5, he and PW 2 decided to move the body to the sitting room. As they carried the body, they noticed that the blood was dripping from a head injury at the back of the head. When Patrick came back he was asked to go back and inform PW 5 that the deceased had been injured.

5. Eric Ochieng Mala (PW 5), the Chief of South Kamagambo Location, recalled that he was at home on the morning of 21<sup>st</sup> June 2010. At about 7.00am, Patrick came to inform him that the deceased was suspected to have taken poison. When he asked whether there were any remnants of the poison, Patrick went back to check and returned 10 minutes later and informed him that the deceased had deep cuts at the back of the head. PW 5 called the police at Kamagambo Police Station as he proceeded to the accused's homestead where he found the deceased's body lying in the sitting room. He examined the body and proceeded to the bed room and found a piece of timber next to the bed with blood spots on it. By the time he arrived at the homestead, he found the family members were present including Patrick, PW 1, PW 2 and PW 3. As he suspected that the accused to have killed the deceased, he took him and the piece of wood to Kamagambo Police Station. On the way he asked the accused what happened. The accused told him that he fought with the deceased after a quarrel as she threatened to leave with their four children. After the accused had been arrested, PW 5 went back to the scene with police officers and removed the deceased's body to the mortuary.
6. PC Eliphias Mareke (PW 6) testified that he took over the conduct of the investigation from PC Kennedy Shikuku who had been interdicted. He confirmed that the deceased's murder was reported on 21<sup>st</sup> June 2010. PC Shikuku proceeded to the scene and found the deceased's body on a mat in the sitting room. He noted that she had severe injury on the back of the head and her T-shirt was blood stained. PC Shikuku recorded that there was blood on the mattress and that he found a piece of timber on bed which he suspected to be the murder weapon. He caused the body to be photographed and took it to Rapcom Hospital Mortuary for the postmortem.
7. When called to make his defence, the accused elected to give sworn testimony. He testified that on the night of 20<sup>th</sup> and 21<sup>st</sup> June 2010, he was in the house with the deceased and their 5 month old baby. During the day, he had come back from a trip and found his wife sick. The deceased told her that she was having chest pains and a headache. He planned to take her to hospital the next day. At around 5.00am on 21<sup>st</sup> June 2010, he heard something falling on the bed. When he woke up, he found the deceased struggling as if she was dying. He rushed to inform PW 1 that his wife was dying. When PW 1 came she had stopped struggling. The accused testified that when the deceased fell down, she hit her head on the wall and on the bed. The accused stated that he started crying as he asked people to come and help him. His brother, PW2, came and removed her from the bedroom to the sitting room. Thereafter, PW 5 arrived, arrested him and took him to Kamagambo Police Station on suspicion of killing his wife.
8. The main issue in contention in this case is whether the accused killed the accused and whether he did so with malice aforethought as contemplated by **section 206** of the *Penal Code*. The accused and deceased lived together in the same house and on the material night, the accused admitted that he was with his wife alone when she fell from the bed, was injured and died as a result. The accused's own explanation on oath excludes any possibility that any other person could have been involved in injuring the deceased. Furthermore, since the incident occurred in the house where the accused and the deceased were alone, the accused had a duty to provide a reasonable explanation as to how the deceased died under **section 111** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* as whatever happened in the house was a matter within his knowledge. In *Mkendeshwa v Republic [2002] 1 KLR 461*, the Court of Appeal elucidated the law on this issue as follows;

*In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.*

9. The accused's explanation of what transpired on the material night is that she was sick the previous day and on that night she had a fit hence the injury was accidental. He explained that she hit her head on the wall then on the rail of the bed hence the injuries. I find that that this explanation is inconsistent with the cause of death as explained by PW 4. According to the post mortem report he described the injuries as follows, "2 cuts in length at the occipital part of the head bone deep, 3 cm apart ...." He concluded that the both injuries possibly inflicted by a sharp object. If the deceased had hit the wall, then the injury would have been a blunt injury on the head. In cross-examination, the accused stated that she fell and hit her head on the rail of the head. This explanation is inconsistent with the injuries and does not explain the two separate sharp and bone deep wounds at the back of the head. I therefore reject the accused's explanation to how the injury occurred. I find and hold that the accused struck the deceased twice at the back of the head with a sharp object resulting in her death.
10. PW 6 produced a piece of timber (Exhibit No. 2) with sharp edges as the likely weapon used. PW 4 testified that he recovered the piece from the accused's house and handed it over to the police. This evidence is inconsistent with that of PW 6 who stated that he recovered the piece of timber from the accused's bedroom. I do not find this inconsistency material or exculpatory as it is only the accused who could have committed the felonious act with the piece of timber and if it was not with the piece of timber but another weapon, it is only the accused who could tell whether he used any other weapon to inflict the injuries.
11. I now turn to the issue of whether the injury was inflicted with malice aforethought. Malice aforethought may be inferred from the circumstances. PW 5 recalled that the accused told him that he quarreled with the deceased. There is no evidence of the nature of the quarrel; what the deceased said or did to cause the accused to inflict the injuries. The post-mortem report clearly shows that the cut injuries inflicted at the back of the head were bone deep and must have been inflicted with such force to cause a skull fracture with the resultant intracranial and intracerebral bleeding. Such injuries could only have been inflicted if the deceased had turned away from the accused or if she was lying on the bed facing down. These facts negate any possibility of self-defence or provocation. The accused must have intended to cause the deceased grievous harm which ultimately led to her death. I therefore find and hold that the prosecution proved that the accused killed the deceased with malice aforethought within the meaning of **section 206(a)** of the **Penal Code**.
12. After evaluating all the evidence, I find the accused **TOM MBOYA ONYANGO** guilty of the murder of **DESLINE AWUOR MBOYA** and I convict him accordingly.

**DATED and DELIVERED at HOMA BAY this 10<sup>th</sup> day of February 2016**

**D.S. MAJANJA**

**JUDGE**

Ms Foza instructed by Nyauke and Company Advocates for the accused.

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