



IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 2 OF 2014

BETWEEN

REPUBLIC PROSECUTOR

AND

MAROA STEPHEN MASANCHU ACCUSED

JUDGMENT

1. On the morning of 11th January 2014 at Rodi Kopany in Homa Bay District within Homa Bay County, **BEATRICE ATIENO ANYACH** (“the deceased”) was found dead in her house. Her body had several cut wounds on the abdomen and groin. After investigations, **MAROA STEPHEN MASANCHU**(“the accused”) was arrested and on 21stJanuary 2014, this court was informed that the accused had murdered the deceased on the night of 10th – 11th January 2014 contrary to **Section 203** as read with **Section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The accused pleaded not guilty and the prosecution marshalled 10 witnesses to prove its case. The accused elected to make an unsworn statement.
2. The deceased’s children, Samuel Owuora Anyach (PW 1) and Steve Opiyo Anyach (PW 3), both testified that they knew the accused as he had married their mother after their father’s death. The accused and the deceased were living together at the deceased’s homestead while the deceased owned and ran a hotel at Rodi Kopany where the accused worked as a cook.
3. Joyce Auma (PW 5) testified that she used to work at the deceased’s hotel at Rodi where she served customers while the accused, whom she knew as Steve, was working there as a cook. She recalled that on 10th January 2014, after working the whole day, she left the accused and the deceased at the hotel at about 6.30pm after being paid her wages.
4. A cashier at Friends Pub at Rodi, Joseph Ouma Ogolla (PW 6), testified that he knew both the accused and the deceased as regular customers who would normally pass by the bar for a drink after they had closed their business. He recalled that on 10th January 2014 at about 8.00 pm, they both came into the bar and asked for sodas to mix with the alcoholic drinks they had carried. They remained there until about 10.30pm when he closed the bar. After he closed down the bar, they all left together. He saw the jovial couple walk into another bar while he went home. He never saw them again on that night.
5. Steve Opiyo Anyach (PW 3) recalled that on 10th January 2014, he came back from school at about 5.00pm. He found the deceased at home. She made dinner then left for the hotel. She came back with the accused and they had dinner together. At about 9.00 pm the deceased left with the accused while he and his brother went to sleep in their house.

6. On the morning of 11th January 2014, PW 3 testified that his sister came to tell him that their mother was not responding when she knocked on her door and that she could not open the door. He went to the house but he was also unable to open the door. When he looked through the window, he could see blood. He immediately sent for his brother Samuel Owuora Anyach (PW1). PW 1 arrived and found neighbours, who had responded to his sister's alarm, surrounding his mother's house.
7. PW 3 explained that since the house had been locked from the inside, he decided to enter the house through the gap between the wall and the iron sheet roof. He entered into the bedroom and found his mother lying down covered with a bed sheet. He noted that the deceased had stab wounds on the chest and abdomen with her intestines protruding. Her right hand had also been cut. He also noticed that items in the house were scattered and there was blood all over the walls towards the bedroom, on the floor and on the bed. He also saw a steel knife under the bed. He found a *jembe* which he used to break the padlock from the inside.
8. After PW 3 broke the door, PW 1 entered the house wherein he observed that furniture and household items were scattered around. He also saw his mother lying on the floor covered with a white bed sheet. When the bed sheet was removed, she was naked. She had been stabbed on the stomach and near the breast and her intestines were protruding.
9. The deceased's brother, Evans Omondi Amala (PW 2), recalled that he received a call on the morning of 11th January 2014 informing him that his sister had been killed. He quickly rushed to her home at Rodi where he found that the door to the deceased's house had been opened. On entering the house he saw blood on the floor and the deceased who had been stabbed in the abdomen.
10. Both PW 1 and PW 3 testified that they noticed that their mother's red and black Tecno phone which she always carried with her was missing. PW 1 decided to call his mother's phone. The person who received the call did not identify himself but said he was at Tausi Hotel at Rodi. PW 1 immediately went to report the incident at the Rodi Administration Police Post.
11. Administration Police Inspector Richard Wesonga (PW 10), who was stationed at Rodi AP Post, recalled that on 11th January 2014 at 7.00am, he was informed by his deputy about the occurrence of a murder in the area. He proceeded to the scene, which was about 200 metres away from the AP Camp, with other officers. They found people had gathered there and when he went to the house, he saw a body of a female on the floor covered with a bed sheet. He immediately called Police officers from Homa Bay.
12. Among the officers who arrived were Corporal Paul Mureithi (PW 10), the investigating officer, and Corporal Shem Ondiek Mogaka (PW 9). PW 9, a gazetted Scenes of Crime Officer came and took photographs of the scene. He noted that the deceased was lying inside the house at the door step of the bedroom. She was lying naked in a pool of blood and had 2 stab wounds on the stomach with her intestines protruding. When they conducted a search they recovered a knife which was found under the bed. PW 9 took several photographs of the body and the rooms from different views and produced the same in evidence.
13. PW 10 testified that he suspected that the blood stained knife they recovered was the murder weapon. He interrogated the deceased's relatives who were at the scene, including PW 1, PW 2 and PW 3. They informed him that the deceased had been living with the accused in the same house but separate from that of the children within same the homestead. They told him that the accused had not been seen that morning but was with the deceased the previous night. PW 10 arranged for the deceased's body to be taken to Homa Bay District Hospital Mortuary for the autopsy.
14. Dr Francis Ochieng (PW 4) conducted the post-mortem on the deceased's body on 13th January 2014 after Fredrick Ochieng Ombogo and PW 1 identified it. The significant finding was that

- there was an abdominal laceration on the left upper quadrant and a V-shaped laceration on the groin where the intestines had prolapsed through the cuts. On internal examination, the significant finding was in the digestive system where there were multiple perforations on the small and large intestines with blood in the abdominal cavity. PW 4 concluded that the cause of death was severe bleeding due to abdominal wounds caused by a stab.
15. After the deceased's remains were taken to the mortuary, the investigation turned to locating the accused who was now a suspect. PW 2 testified that he called the deceased's telephone number and the person who picked the call identified himself as the accused. He said that he was in Tanzania and that he was angry when he found the deceased with another man in the house. He further stated that he was going to sell cows and that he would send Kshs. 35,000/= for the funeral. PW 2 dialled the deceased's number again on 12th January 2014 and spoke with the accused about the funeral and he promised to send money. They spoke again on 13th January 2014 and he once again promised to send money for the funeral. On 14th January 2014, PW 2 spoke to the accused who promised that he would send money after selling cows. He said he was in Tanzania at the Border.
 16. Corporal Zablon Mwita (PW 8), a CID Officer based at Homa Bay Police Division Offices, testified that on 14th January 2014 at about 2.00 p.m., he was called by his superiors and briefed about the murder of the deceased. The deceased's family members including PW 1 and PW 2 were called into the meeting. He was informed that the accused was at large and was probably in the Kuria area. He was also informed that the accused was still communicating using the deceased's phone. Since he was experienced in mobile phone tracking and because he was familiar with the area, he was instructed to trace the accused with the assistance of the members of the deceased's family who would identify him.
 17. PW 8, PW 1 and PW 2 arrived at the CID Offices at Kehancha Police Station on 15th January 2014 and began to trace the accused who was using the deceased's phone number 0705***986. His movements were tracked from Kegonga as he was moving towards Kehancha town. While PW 2 was communicating with the accused, he could hear music and ladies laughing in the background, leading him to conclude that the accused was in a bar. They therefore started moving from bar to bar until they reached Rafiki Bar where they found the accused in the company of some ladies drinking. He was identified by PW 1 and PW 2, arrested and taken to Kehancha Police Station.
 18. PW 8 testified that he searched the accused at Kehancha Police Station. He found an identity card belonging to the deceased in the name of Beatrice Atieno Dole in his wallet. He also recovered a black and red Tecno mobile phone and the sim card. The accused was using the deceased's line number 0705*** 986. He also recovered the accused's own identity card. The accused was then transferred from Kehancha to the Homa Bay Police Station.
 19. After the accused had been arrested, he was taken to Homa Bay District Hospital on 17th January 2014. PW 4 examined him to determine whether he was mentally fit to stand trial. PW 4 noted that the accused had no stains or tears on his clothing, was well kempt and oriented in his surroundings. The accused had good long and short term memory and PW 4 concluded that he was fit to stand trial. PW 4 also found that the accused had cuts on both palms of his hands. His right hand had two cuts; one on the palm and another on the middle finger. The left hand had cuts on the thumb and middle finger. The approximate age of the injuries was one week. PW 4 opined that the injuries were probably inflicted by a sharp object. He testified that the accused had not sought medical treatment in a health facility and had treated himself with over the counter drugs.
 20. On 24th January 2014, PW 10 organised for the following items to be delivered at the Government Chemist Laboratories in Nairobi. Item A - a blood sample in vacutainer marked "A" indicated as blood of the deceased Beatrice Atieno Anyach. Item "B" – blood sample in a vacutainer marked "D" indicated as that of the accused Marwa Stephen Masanchu. Item C – a knife with a metallic

handle wrapped in a newspaper marked “C”. The instructions on the exhibit memo accompanying the items were to determine the presence and source of blood stains. Anne Wangechi Nderitu (PW 7), a Government Analyst, conducted a DNA analysis of the blood and concluded that the DNA profiles generated from the blood stains obtained from the knife (item “C”) matched the blood of the deceased (item “A”). She testified that the probability of the DNA being that of the deceased was very high and that it was that of the the deceased. She testified that the accused’s blood sample was not reflected on the knife and that there was no other blood on the knife other than that of the deceased.

21. After the close of the prosecution case, the accused elected to make an unsworn statement. He denied that he murdered the deceased. He stated that he comes from Kegonga Sub-location in Kuria and that he used to work near Pre-Mara Hotel at Kehancha in Kuria. He stated that he was shocked that he was arrested for a murder case which he was not aware of.

22. In order to establish the offence of murder under the provisions of **Section 203** and **204** of the **Penal Code**, the prosecution must prove beyond reasonable doubt the following ingredients;

- a. Proof of the fact and the cause of death of the deceased.
- b. That deceased’s death was a direct consequence of the accused’s unlawful act or omission.
- c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **Section 206** of the **Penal Code**.

23. As regards the first ingredient, the fact and cause of death, it is not in doubt that the deceased was found dead in her house on the morning of 21st January 2014. The prosecution’s witnesses: PW 1, PW 2 and PW 3 all observed that she had cuts all over the body and most notably that the cuts in the abdomen and groin resulted in her intestines protruding from the resultant wounds. This was also evident in the photographs taken and produced in evidence by PW 9. These injuries are consistent with the findings of PW 4 who concluded that the cause of death was severe bleeding due to abdominal wounds caused by a stabbing with a sharp object. I therefore find and hold that the deceased died as a result of stab wounds inflicted on various parts of the body by a sharp object. I further find that the knife recovered in the deceased’s house is the instrument that was used to inflict the injuries as the blood found on it was determined by DNA tests conducted by PW 10 to be that of the deceased.

24. The next issue is whether the accused is the person who inflicted the deadly injuries on the deceased. In this respect, it is important to recall that the prosecution’s case against the accused is based on circumstantial evidence. The long established principle concerning circumstantial evidence was laid down by the Court of Appeal for Eastern Africa in **Kipkering Arap Koske & Another v Rex, [1949] EACA 135** where it was stated that:-

That in order to justify, on the 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 hypothesis than that of guilt and the burden of proving facts which justify the drawing of the inference from the facts to the conclusion (sic) of any other reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused

25. In this instance, the prosecution’s case was the accused and the deceased were in a relationship, that the accused was the last person seen with the deceased prior to her death, that the accused was found with the deceased’s personal possessions including her Tecno cell phone so soon after her death and that the deceased’s conduct, in light of their relationship, was inconsistent with his innocence.

26. The accused was not a stranger to the deceased. The deceased’s closest family members testified to the fact that the accused and the deceased had a close relationship and were living together in the deceased’s house. They were also working together at the deceased’s hotel at Rodi. On the night before her death, PW 1 testified that she had been at home as usual after work where she had

been with the accused and PW 5. When she went to the bar, PW 6 testified that she left with the accused after having drinks. It is on the next morning that she was found dead and the accused, who lived and worked with her, was nowhere to be found.

27. The accused was traced as he was using the deceased's phone identified by PW 1 and PW 3. PW 8 arrested the accused and found him in possession of the red and black Tecno phone and the deceased's Identity card. He could not provide any reasonable explanation as to why he had the deceased's personal items in his possession when he was arrested so soon after the deceased's death.

28. As a person who had a close relationship with the deceased, why did he disappear with the deceased's personal items after the deceased's death? He ran away from Rodi and was arrested in Kehancha, Migori County. His conduct of disappearing was inconsistent with innocence. Counsel for the accused submitted that it was reasonable to conclude that the accused being a member of the Kuria tribe and a leverator could have run away to avoid mob justice given that he was cooperative and did not hide his identity. In my view, the evidence does not support this possibility as the accused could easily have reported the matter to the police at the first opportunity either at Rodi or in Kehancha.

29. There was a suggestion that a third party could have committed the act but the entire evidence does not support this. The deceased was found in her house and the door was locked from the inside hence it could only have been locked by someone who was familiar with the house. All these facts when pieced together leave no other explanation other than that the accused committed that act that led to the deceased's death. I therefore find and hold that it is the accused who killed the deceased.

30. Has the prosecution proved that the act of killing the deceased was with malice aforethought? Malice aforethought is defined in **Section 206** of the **Penal Code** as follows;

Malice aforethought shall be deemed to be established by 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.*

31. It is clear that the multiple stab wounds demonstrate malice aforethought as do the number of injuries inflicted in areas of the body where grievous harm or death could have resulted. These injuries could only have been intended to cause the death of or to do grievous harm to the deceased. I therefore find that the prosecution proved malice aforethought within the meaning of **Section 206(a)** of the **Penal Code**.

32. I therefore find the accused **MAROA STEPHEN MASANCHU** guilty of the murder of **BEATRICE ATIENO ANYACH** and I convict him accordingly.

DATED and DELIVERED at HOMA BAY this 6th day of April 2016.

D.S. MAJANJA

JUDGE

Mr Okoth instructed by G. S. Okoth and Company Advocates for the Accused.

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