



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 38 OF 2012
(FORMERLY KISII HCCRC NO.64 OF 2011)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

CAROLINE NAWIRE ODERO.....ACCUSED

JUDGMENT

1. On 5th July 2011 at about 9.00pm, **JOSEPH MOSOTA** (“the deceased”) was beaten at a bar and lodging owned by **CAROLINE NAWIRE ODERO** (“the accused”) and situated on Remba Island, Mbita District within Homa Bay County. He died as a result of injuries sustained during the beating. Consequently, this court was informed that the accused had been murdered the deceased contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.

2. The fact and cause of death is not in dispute. Dr Michael Omenge conducted the post-mortem on the deceased’s body on 8th July 2011 at the Homa Bay District Hospital after it had been identified by the deceased’s uncle, Fita Masalu Bugafu (PW 2). Dr Mark Ogundo (PW 7) produced the Post-mortem form prepared by Dr Omenge under the provisions of **Section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. He confirmed that he knew Dr Omenge and was familiar with his handwriting and signature as they worked together at Mbita Sub County Hospital.

3. The main observations recorded by Dr Omenge in the post-mortem form were that the deceased had a 2 cm diameter injury on the left cheek, a depressed skull fracture on the forehead and a swelling on the left part of the skull. He also had a 2cm cut wound on the left leg above the ankle and 2cm deep linear wounds on the back about 5 -15 cm in length which were probably caused by a sharp object. On internal examination, the doctor noted that the depressed skull fracture on the forehead was about 5 cm while the linear fracture on the temporal region was about 10cm in length. He further noted that clotted blood had accumulated on the left side of the head. Dr Omenge concluded that the cause of death was a skull fracture on the temporal region and depressed skull fracture on the left forehead. In cross-examination, PW 7 opined that the deceased sustained injuries caused by sharp and blunt objects, possibly pangas, knives or spears.

4. Kennedy Ochieng Elijah (PW 1), a fisherman at Remba, narrated the events of the night of 5th July 2011. He knew the accused as the owner of the bar where the deceased had been assaulted. He recalled that at about 9.00pm, he was in his house when he heard noise coming from the lodging which was hardly a metre away. He could hear a man crying and when he got out of the house, he found the man, whom he

did not know very well, being beaten. His neighbours had also come out of their houses in response to the alarm. PW 1 testified that one of his neighbours carried a chimney lamp and when they went inside the lodge, they found the man on the ground being beaten on the back and head with sticks by the accused and her brother.

5. PW 1 stated that he asked the assailants why they were beating the man. The accused's brother told him that the man had stolen a mattress. PW 1 also stated that the accused slapped him then picked up a stone and hit him with it. He immediately went to the Police Post on the Island where he met Sergeant Kirui (PW 3) and told him what was happening. He stated that PW 3 instructed two officers to accompany him back to the scene.

6. When PW 1 went back to the scene, he found people had gathered while the man who was being beaten had been removed from the lodge. He did not find the accused and her brother. The police officers took the man to a nearby clinic for treatment whereupon he left for home at about 11.00pm. He learnt that the man had died the next day when he was called by the Commanding Officer at Mbita to record a statement.

7. Inspector Joseph Kirui (PW 3), who was based at Remba Island at the material time, recalled that at about 9.30pm on 5th July 2011, a group of people came to the Police Camp at Remba shouting that Caro, the owner of the bar and lodging, and members of the public had killed someone. He calmed them down and dispatched four officers to the scene. The officers he dispatched were; APC Vincent Odero, APC Erick Ogunde, APC Kenneth Onindo and APC Patrick Muniko. When they reached the scene, they called him back and informed him that they had found a man who had been beaten. He instructed them to take the man to the nearest clinic for treatment. He also went to see the victim at the clinic and while there, he heard the crowd threatening to burn the accused's premises. He immediately dispatched the officers to the accused's premises.

8. PW 3 further testified that he returned to the AP Camp and shortly thereafter, the accused arrived at the Camp and reported that the crowd that had gathered at her establishment wanted to kill her. She informed him that she had found a man stealing a mattress from a room and after raising alarm; people came and threatened to kill her. As she was speaking to PW 3, the crowd gathered at the AP Camp began asking for the accused. Fearing for the accused, PW 3 told her to hide in one of the rooms while informing the mob that the accused was not present. Thereafter, APC Eric Ogunde called and informed PW 3 that the man they had gone to rescue had died. PW 3 called the Beach Management Unit (BMU) Secretary who provided a boat to ferry the accused and the deceased to Mbita. APC Doe (PW 5) and APC Orindo (PW 4), left for Mbita at about 2.00am.

9. APC Orindo Ochieng Kenneth (PW 4) testified that he was present when about 10 people came to the AP Camp to complain that the accused, whom he knew, and her workers had beaten someone. PW3 instructed him and other officers to proceed to the accused's premises where they found many people and the deceased lying face up and bleeding from his mouth with a cut on the head and hand. They took the deceased to a nearby clinic and left him there undergoing treatment. The officers returned to the accused's premises to maintain order as the gathered crowd had started looting the premises but they were overwhelmed. When PW 4 went back to the AP Camp, he found the accused in an officer's house being shielded from the angry mob. After about 20 minutes, the officers were informed that the deceased had passed away at the clinic. They were instructed by PW 3 to collect the deceased's body and proceed to Mbita Police Station with the accused.

10. APC Vincent Doe (PW 5) also recalled that he was on night duty at Remba AP Camp on 5th July 2011 when a group of about 20 people came shouting, "*Caro must go...*" He tried to calm the group down then asked one of them what was happening. PW 1 told him that he had come to report that the accused had beaten the deceased at her bar and lodging. PW 3 instructed him and PW4 to go to the scene to find out what happened. He testified that the scene was at the back door of the premises near the gate and the body was about a metre away from the gate. The deceased had been beaten and was bleeding. They took him to the local clinic for treatment and went back to the bar to maintain order as the crowd was becoming rowdy and had started looting. As they struggled to control the looting, they got word that

the victim had passed away. Since they could not restrain the looting, they went back to the AP Camp where they found the accused. He was also instructed by PW 3 to accompany the accused and deceased's body to Mbita Police Station.

11. The final prosecution witness, Corporal Edwin Nyongesa (PW 6), testified that on 6th July 2011, the accused was brought to Mbita Police Station by AP Officers from Remba. He organised for a post mortem to be performed on 8th July 2011 at Homa Bay District Hospital by Dr Michael Omenge. He was briefed by the officers who had brought the accused that on 6th July 2011 at about 9.00pm, it was alleged that the deceased and three others had gone to look for a room but later on one of them was seen carrying a mattress from the room. A waiter who worked at the accused's bar raised alarm and members of the public and the accused started beating him.

12. Caroline Nawire Odero (DW 1) elected to give sworn testimony in her defence. She confirmed that she was running a bar and a lodge at Remba Island. She recalled that she left work early on the evening 5th July 2011 and went to her home which was next to the bar. At about 8.00pm, she was called by one of her employees and told that a man was being beaten by many people outside the lodge. She left her house and went outside where she found people beating the deceased outside the lodge's gate. She testified that the accused was being beaten in a dark area by a group of people who were shouting that they were killing a thief who had stolen a mattress.

13. The accused testified that she decided to run to the AP Camp to report the matter and to ask for security. While she was at the AP Camp, she heard people shouting, "*Carol must go, Carol must go...*" She also testified that PW 1 had levirated her after her husband had died but she left him when he married other women. She testified further that people used to refer to her as an outsider as she was not Luo.

14. Emmanuel Chome (DW 2), testified that on 5th July 2011, he was the accountant and cashier at the accused's bar and lodging at Remba. He recalled that the accused left the bar early on that day as she was exhausted. At about 8.00 pm, he heard some noise from outside the lodging and when he went to check, he found the deceased being beaten outside the gate on the allegation that he was a thief. He testified that it was dark and there were so many people who he could not see. He told one of his colleagues to call the accused who came to talk to the crowd but they could not listen to her. She decided to go to the police but as she was on her way, the swelling crowd was chanting, "*Carol must go.*" The crowd broke into the lodge and ransacked the place.

15. This is a case where the prosecution relied on the testimony of one witness to prove that the accused assaulted the deceased causing his death. In *Maitanyi v Republic* [1986] KLR 198, the Court of Appeal held that although *the court may prove a fact by the testimony of a single witness, the court ought to test with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.* Even in such cases where the witness recognises the assailant, this does not lessen the need for the court to exercise caution as mistakes may be made where the witness knows the assailant (*Anjononi and Others vs Republic* [1976-1980] KLR 1566).

16. The issue in this case though is not necessarily that of identification per se but whether PW 1's testimony, in light of all the other testimony, is credible enough to support the conviction. The fact that the accused was within the bar on the material night is not in dispute as she confirmed as much in her own testimony. She responded to the alarm that was raised. PW 1 was clear that he saw the accused beat the deceased in presence of his brother and his wife. The fact that he saw her is augmented by what he reported to PW 5 that the accused had assaulted the deceased. However, PW 1's testimony is undermined by what PW 5 stated in cross-examination that the accused and the deceased had been fighting and that PW 1 had tried to separate them. In re-examination, he added that PW 1 told him that the accused and deceased differed over a bill. In my view, the

testimony of PW 5 is critical as was the first officer to be informed of the incident.

17. On the other hand, the deceased's version is that she only went to see what was happening after she had been called by her employees. According to DW 2, the accused found the deceased being beaten outside the lodge and only went to the AP Camp to make a report. PW 3 stated in cross-examination that PW 1 did not come alone to report the incident but that he came as part of the group that was looking for the accused. He stated that he received conflicting information as to who between the accused and her employees killed the deceased. While I understand that it is not necessary to call one or all witnesses to prove a fact, the testimony of the accused's employees would have shed light on what happened on that night. DW 1, though, gave exculpatory testimony. Lastly PW 6 stated that from the information he received the deceased was beaten by a mob when a waiter raised alarm after seeing the deceased and others steal a mattress.

18. What emerges from the evidence is that in the small island of Remba, there was a maelstrom of information implicating the accused but in my view, the prosecution did not exclude the possibility that the accused could just have been implicated merely because she was the owner of the establishment where the deceased met his death. Several unanswered questions emerge from the evidence; Did the accused beat the deceased as stated by PW 1? Did PW 1 witness a fight between the accused and deceased and tried to separate them as contended by PW 5 in cross-examination? Did the accused and deceased differ over a bill or was the deceased beaten because he had stolen a mattress? Did the mob beat the deceased in response to alarm raised by the accused?

19. On the whole therefore, I am not satisfied that the prosecution proved its case beyond reasonable doubt. I accordingly acquit the accused **CAROLINE NAWIRE ODERO** of the murder of **JOSEPH MOSOTA**.

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

D.S. MAJANJA

JUDGE

Mr Osoro instructed by Osoro and Company Advocates for the accused.

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