



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 37 OF 2014

BETWEEN

REPUBLIC PROSECUTOR

AND

ELIJAH OUMA ACCUSED

JUDGMENT

1. **ELIJAH OUMA** (“the accused”) is charged with murder of his wife, **LILIAN AUMA** (“the deceased”) on the night of 3rd and 4th September 2014 at Kakelo Dudi Sub-location, Kakelo Location, Rachuonyo South District, Homa Bay County. He denied the charge. The prosecution called 7 witnesses to prove its case. The accused gave sworn testimony and called one witness.
2. The accused was living with his wife at his late father’s homestead. They had four children together although one of them was dead. The accused’s father, Mzee Ogwocha, passed away leaving behind his widow, the accused’s mother, Wilkister Odero (PW 3), who also lived in the homestead. The accused was employed by one Jeremiah Orodi (DW 2) as a farm hand. He was living at DW 2’s home but would come home frequently as his place of work was not very far.
3. Wilkister Odero (PW 3) recalled that on 3rd September 2014, the accused came home from work at about 4.00pm. Before he left, he passed through her house and asked for Kshs. 10/-. She later had supper with the deceased and her children then went to sleep. At about midnight, she heard the accused shouting “*I want to kill somebody*” as he was coming towards his home. She woke up and went to the accused’s door and called the deceased who responded but did not open the door. She saw the accused kick the door to get into the house. Once the accused entered the house, he started beating the deceased. He continued shouting while the deceased was screaming. The two of them fought and even went outside the house. She went back to her house but as the fighting continued, PW3 ran to the road screaming and calling for help but no one responded to her screams. She remained outside and decided to hide in the bushes. Just before daybreak, she went into the accused’s house and found the deceased lying on the floor covered with a bed sheet. She noted that the deceased had cuts on the arms and head.
4. PW 3 immediately went to inform the Assistant Chief of Kakelo Dudi Sub-location, Jacktone Ogweno (PW 1), what had happened. PW 1 told her that he had already been informed of the incident. Thereafter she went to see DW 2 at his shop at Mikai where she found the accused. Police officers arrived soon thereafter and arrested the accused. She then went back home and found people gathered at the homestead. After a while, PW 1 arrived with police officers. She accompanied the police officers when they took the deceased’s body to Rachuonyo District

Hospital Mortuary. She later attended the post-mortem on 12th September 2014 where she identified the body.

5. The accused's uncle, John Ouma Awino (PW 5), recalled that he heard the accused shouting, "*I am killing you. I am killing you ...*" at about 11.00pm on 3rd September 2014. He also heard PW 3 screaming and shouting. He did not think much of the shouting as it was normal for the accused and deceased to quarrel and then reconcile. He went back to sleep and in the morning as he was going to the *shamba*, he met a child who informed him that the accused had killed his wife. He went to the accused's house and found the deceased lying on the floor. She had several cut wounds all over the body. He then decided to call PW 1 and inform him of what had happened. PW 5 further testified that he saw a *panga* under the accused's bed which he identified as the *panga* produced in court as Exhibit No. 1.
6. The Assistant Chief, Jacktone Ogweno (PW 1), recalled that at about 11.00pm on the night of 3rd September 2014, he received a call from a person in Wasweta village informing him that he could hear screams from Ratandi village. He called PW 5, who was an elder in Ratandi, and was informed that the screams were coming from Mzee Ogwocha's homestead. He asked PW 5 to confirm and after 20 minutes, PW 5 confirmed to him that it was the accused who was beating his wife and that their fighting was not uncommon and that they would reconcile. PW 1 called again after a while and was informed that the screams had subsided.
7. PW 1 further testified that on 4th September 2014 at about 6.00am, PW 5 called and informed him that the accused had killed his wife. PW 5 explained to him that the accused was working at DW 2's home. PW 1 made inquiries to various elders and was told that the accused had gone to work that morning and was at Mikai delivering milk. At about 7.00am, PW 3 arrived and informed him that the accused had killed his wife. He called Ogada, an elder, at Mikai, and told him that the accused was a suspect and that he should raise alarm should he see him so that he could be arrested. Ogada confirmed that the accused had been arrested by members of the public at Mikai. He called the Commanding Officer at Oyugis Police Station and immediately left for Mikai. When he arrived there he found the accused had been arrested by Administration Police Officers from Kosele. He testified that one of the village elders, Hesbon Otieno Mita (PW 2), handed him a *panga* which he had found at DW 2's home.
8. On his way to Oyugis, PW 1 met officers from Oyugis Police Station and directed them to the Ogwocha's homestead. They were shown the accused's house where they found the deceased completely naked lying on the sitting room floor covered in a *leso*. He observed an injury on the neck and hand. The house was in disarray with plastic chairs scattered.
9. PW 1 testified that when he interrogated the accused at Mikai, the accused told him that "*Shetani alinidanganya*" meaning "the devil deceived me" The accused also informed him that he had used a *panga* which he had kept where he was sleeping at DW 2's home. PW 1 recalled that he sent PW 2 to collect the *panga* which was at DW 2's home. PW 2 brought the *panga* and handed it over to him. He identified that *panga* as Exhibit No. 1.
10. Hesbon Otieno Mita (PW 2), a village elder in Kakelo, testified that at about 6.00 am on 4th September 2014, PW 1 called to inform him that the accused had killed his wife and requested him to find out where the accused was. Since he knew the accused was working for DW 2, he proceeded there but on the way, he met a child who informed him that the accused had gone to deliver milk at Mikai. DW 2's wife told him that the accused had come in at about 1.00am and told her he had killed two people and that when he went to see DW 2, he refused to open the door for him since he thought the accused was drunk. The accused returned later, milked the cows as usual and proceeded to deliver the milk at Mikai. PW 2 called PW 1 and informed him of what he had been told by DW 2's wife. PW 1 told him that in fact the accused had already been arrested at Mikai. PW 2 proceeded to Mikai and found the accused under arrest at the Chief's camp. PW 1 was present by the time he arrived.

11. PW 2 further testified that after recording his statement, he went to the Commanding Officer at Oyugis Police Station and found PW1 with the accused. He asked the accused where the *panga* was and the accused told him that the *panga* was at DW 2's home where he used to sleep. He went there and recovered the *panga* which he handed over to PW 1. He identified the *panga* produced as Exhibit No. 1 as the one he recovered.
12. Dr Peter Ogola (PW 4) conducted the post-mortem on the deceased's body on 12th September 2014 at Rachuonyo District Hospital after it had been identified by PW 3. He noted that the deceased had fractures on both bones of the right and left legs and the right lower arm, multiple cut wounds on the head and multiple bruising on the face and trunk. The significant finding on internal examination was a fracture on the left side of the head which resulted in bleeding within the skull. PW 4 further noted that the 2nd spinal bone was dislocated from the 3rd one while the spinal cord was compressed at the neck. PW 4 certified the cause of death as a severe head injury and spinal compression that resulted from fractures and dislocation.
13. The final prosecution witness was the investigating officer, Corporal Joseph Keter (PW 7), who was assigned to take over the investigation of the case after witness statements had been taken by officers at Oyugis Police Station. He revisited the accused's house which had two rooms. He observed blood stains in the house and confirmed that the incident took place in the bedroom. PW 7 recorded a statement from the accused who stated that he found another person in the house. He also interviewed PW 3 who told him that the family had frequent quarrels and confirmed that PW 1 handed over to him a *panga* which he produced as Exhibit No. 1. He organised for a post-mortem to be done and for the accused to be examined by Dr Ochieng who confirmed that he was mentally fit to stand trial. When cross-examined, PW 7 stated that the accused stated that he had found a person by the name Abah Ratemo in his house. He inquired from PW 1 whether he knew such a person in the village. PW 1 denied that he knew such a person.
14. When put on his defence, the accused elected to give sworn testimony. He confirmed that he was employed by DW 2 as a farm hand. He denied that he murdered the deceased. He stated that PW 1 informed him of his wife's death when he came to arrest him when he had gone to deliver milk at Mikai. He also denied knowledge of the *panga* that was produced in court.
15. The accused further testified that after his father died, his mother, PW 3, refused to apportion to him part of the land to build his house leading to disagreement between him and her. He also stated that his elder brother, who was mentally sick, had once chased away his wife. The accused stated that PW5 was one of the elders who had handled the land problem in their family and that he was not telling the truth in court.
16. Jeremiah Owande Orodí (DW 2) testified that he owned a shop at Mikai and that the accused was his employee. He told the court that the accused used to work at his farm taking care of the animals and that he was residing there and would milk the cows early in the morning and deliver milk to Mikai every morning. He recalled that he did not see the accused on the morning of 4th September 2014 when he delivered the milk as he went to till his land. He only saw the accused after he had been arrested and tied up by boda boda riders at Mikai. He asked his wife whether the accused had slept at his workplace and she told him that the accused worked but he left at night.
17. 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**.
18. The fact and cause of death is not in dispute. The witnesses, notably PW 1, PW 3 and PW 5, confirm that the deceased was found dead in her house and they all observed multiple injuries on

the deceased's body. These injuries were confirmed by the post-mortem performed by PW 4. I have no doubt and I find that the deceased suffered multiple injuries inflicted on her and died as a result of a severe head injury and spinal compression.

19. The next issue for consideration is who caused the unlawful act that led to her death. In this case, there is no direct evidence hence the prosecution case was built on circumstantial evidence. It is therefore important to recall the principle that has been restated by our courts on many occasions, that is, that in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Rex v Kipkering Arap Koske & Another [1949] 16 EACA 135* and *Mwangi & Another v Republic [2004] 2 KLR 32*).
20. The testimony of PW 3 is clear that the accused came home on the material night shouting and expressing his intent to kill someone. PW 3 narrated how the accused burst into his house and started fighting with the deceased. In response, she started screaming in order to attract other villagers but none responded. Her testimony on this issue is corroborated by the testimony of PW 5 who heard the accused shouting and expressing his intent to kill someone and also heard PW 3 screaming. The consistency and credibility of the testimony of PW 3 and PW 5 is augmented by the fact that PW 1 received information that there was shouting in Ratandi village and as result requested PW 5 to confirm what was happening. In the wee hours of the morning, PW 3 found the deceased lying dead whereupon she reported the incident immediately to PW 1.
21. It is worth noting that the accused was staying with the deceased in the same house. Although the evidence is that he was also staying at DW 2's home where he worked, the workplace was not too far for him to come home from time to time. In any case, PW 3 testified that he had come home on that day and returned later that night when he assaulted his wife. The testimony of PW 3 places the accused at the locus in quo at the time the felonious act was committed. PW 7 who visited the Ogwocha homestead, stated that there were three houses in the homestead; PW 3's house and kitchen and PW 1's house. Apart from PW 3, the accused and his wife, the only other residents were the accused's young children. This forecloses the possibility that any other person could have caused the death of the deceased between the time he was heard and seen assaulting his wife by PW 3 and the time she was found dead.
22. In considering this evidence, the prosecution had to exclude the possibility that someone else could have killed the deceased. There was a suggestion that the accused found another person in the house with the deceased. According to PW 2, the accused told him that he found a person in the house while PW 7 stated that when he interrogated the accused, he was given the name of one Ratemo but he could not trace such a person. The possibility of a stranger in his house is also negated by the evidence of PW 3 and PW 5 that he came home that night shouting and expressing his clear intent to kill someone. It turned out that the only person killed that night was the deceased. I reject this suggestion for the simple reason that the accused in his sworn defence did not even hint that he found another person in the house.
23. The accused also attacked the credibility of the witnesses by suggesting that he had a dispute with PW 3 because she refused to apportion him his father's land and that PW 5 could have conspired with her. In light of the clear direct and circumstantial evidence I have outlined, there is no possibility that the accused could have been framed. PW 3 gave clear testimony which I heard and her demeanour during the trial was that of a mother pained by the spectre of giving evidence against her son. I also reject any suggestion that she could have concocted such testimony to fix her son.
24. The totality of the evidence against the accused is that he went home on the night of 3rd September 2014, shouting and expressing his intent to kill his wife. He arrived home, started

beating her and left her for dead. He went back to his place of work which was not very far and proceeded to work in the morning as if nothing had happened. He was arrested in the morning after his dastardly act became known. All this evidence pieced together leaves no doubt that the accused killed the deceased.

25. Before I conclude this judgment, I turn to deal with the issue of the *panga* (Exhibit No. 1). PW 1 confirmed that it was PW 2 who recovered the *panga* which, according to the accused, had been used to kill the deceased. PW 2 testified that the accused revealed to him where the *panga* was while they were in the office of the Commanding Officer at Oyugis Police Station. In my view, what the accused is said to have told PW 2 leading to the recovery of the weapon can be regarded as a confession as it amounts to words and conduct from which an inference may reasonably be drawn, under **section 25** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, that the person making it committed an offence. The statement made by the accused, being inculpatory in nature, was made at a police station before the Commanding Officer and can only be admitted if it complies with **section 25A(1)** of the *Evidence Act* which states as follows:

25A(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police and a third party of the persons choice. (Emphasis mine)

26. Since the prosecution did not prove the statement as a confession, I must reject the material evidence that was recovered in consequence of what on its face was an inadmissible confession. But given the circumstances of this case, even if I disregard the evidence of the *panga* as the weapon used in killing the deceased, the evidence I have outlined above is sufficient to sustain a finding that it is the accused who killed the deceased.

27. As regards the issue whether the injuries were inflicted with malice aforethought, it is clear from the evidence of PW 4 that the injuries inflicted on the deceased were so vicious as to cause multiple fractures and a head injury leading to her death. These are the kind of injuries inflicted with, “*an intention to cause the death of or to do grievous harm to any person, whether the person is actually killed or not*” within the meaning of **section 206(a)** of the *Penal Code*. I therefore find that the prosecution proved that the injuries were inflicted with malice aforethought.

28. Having considered all the evidence, I find the accused **ELIJAH OUMA** guilty of the murder of **LILIAN AUMA** and I convict him.

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

D.S. MAJANJA

JUDGE

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

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