



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 74 OF 2013

BETWEEN

REPUBLIC PROSECUTOR

AND

KENNEDY OTIENO ONYANGO ACCUSED

JUDGMENT

1. The prosecution case is that in the afternoon of 8th December 2013 at Bware village, Kakelo Location of Homa Bay County, **KENNEDY OTIENO ONYANGO** (“the accused”) engaged in a quarrel with his grandmother, **MAGDALENE ONUNDA ODAGO** (“the deceased”). The accused left and when he came back at night, a quarrel once again ensued whereupon the accused assaulted the deceased with an electric cable and a panga. She was found dead the next morning and the accused was charged with her murder contrary to **Section 203** and **204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. He denied the charge.
2. The accused’s father, who was a son to the deceased, had died some time ago and the accused was now staying with the deceased in her two roomed house. The accused’s cousin, Zachary Otieno (PW 6), was also staying in the same house. They slept in the sitting room while the deceased slept in the bedroom. On 8th December 2012, the accused and the deceased had an argument over water. According to PW 6, he and the accused had fetched water and put it in the deceased’s home. Later on the deceased told the accused that he had been drinking water laced with her urine and this triggered an argument between the accused and deceased. According to the deceased’s daughter-in-law and mother to PW 6, Monica Awuor Ogalo (PW 1), the accused left home that afternoon after the argument.
3. PW 6 recalled that the accused came home at about 9.00pm and knocked on the door. PW 6 opened the door for the accused even though the deceased instructed him not to open it. The deceased, who was still in her room, started scolding the accused about his lateness, his drinking and *bhang*’ smoking habits. The accused retorted that it is the deceased who killed his parents and further arguments ensued. PW 6 testified that such quarrels between them were normal so he was not bothered.
4. When the deceased came out of the room, the accused pulled her and started beating her with an electric wire on the head and back. He also used a panga to slap her. PW 6 stated that he could not intervene since he feared being beaten and also because the accused threatened him with the panga. The beating continued for some time and after the accused stopped beating her, PW 6 took the deceased to her bedroom to sleep. He and the accused went back to sleep in the sitting room.

5. PW 6 recalled that when he went to wake the deceased up in the morning, he found her under the bed. She was not responding so he went to call the accused who was already in the shamba. PW 1 told PW 6 that the deceased had died and she went to tell the neighbours who came and raised alarm. PW 6 testified that the accused went into the house, undressed the deceased and dressed her in a yellow dress.
6. Monica Awuor Ogalo (PW 1) testified that she saw the accused leave the home that afternoon, then later heard him arguing with the deceased at about 9.00pm. She stated that they were abusing each other. She did not intervene in the quarrel so she went off to bed. PW 1 recalled that while she was doing her morning chores the following day, she saw the accused leaving going to the neighbour, Mama Akinyi's, home. A while later, a child came to inform her that Mama Akinyi wanted to see her. She went to Mama Akinyi's home and found the accused. Mama Akinyi told her that the accused had informed her that the deceased was not breathing and that she should go and confirm what was happening. They all proceeded to the deceased's house and found the deceased lying on the papyrus mat, facing up and dressed. PW 6 noted an injury above the ear. She concluded that the deceased was dead and she went to inform her brother-in-law who told her to go and report to the Assistant Chief who in turn called the police.
7. Chief Inspector Moses Wafula Wanyama (PW 3), who was serving as the Commanding Officer, Oyugis Police Station, testified that at about noon on 9th December 2013, the Assistant Chief of Kakelo Dudi Sub-location, Jakton Ogwen, called him and informed him of a murder at Bware Village. He proceeded to the scene and found the accused had been arrested by members of the public. He entered the house where he found the deceased lying on a mat. He observed bruises on the face around both eyes and a bruise at the centre of the chest. He also noted that the deceased was wearing very clean clothes. The accused told him that he found the deceased dead and decided to change her into clean clothes. He looked for the clothes she had been wearing but they could not be found.
8. PW 3 interrogated PW 1 and PW 6 at the homestead. PW 1 told him that the accused informed her about the deceased's death at about 7.00am while PW 6 told him that on the previous day, the accused and the deceased quarreled over the fact that the deceased told him that she had urinated in his bathing water. PW 6 narrated to him how the accused assaulted the deceased with the panga and electrical cable. PW 3 further recalled that members of the public began searching for the panga and the electric cable. They recovered a blood stained panga hidden in the farm but since the deceased did not have any cut wounds, PW 3 concluded that the panga could not have been used to assault the deceased. He did not recover the electric cord.
9. PW 3 arrested the accused and took the deceased's body to Rachuonyo District Hospital. He handed the matter over to Corporal Thomas Mbuvi (PW 4) for investigations. PW 4 confirmed that PW 3 handed him the file concerning the murder of the deceased. Witness statements had been taken and he concluded that the accused had used an electrical cable to whip the deceased on the night of 7th – 8th December 2013 in the presence of PW6. He also concluded that the motive was that the deceased urinated in a basin of water which the deceased had fetched and intended to bathe with. He organized for the post mortem to be done by Dr Ogola on 20th December 2013. He also took the accused for an age and mental assessment on 5th December 2014 by Dr. Kevin Osuri (PW 5) of Homa Bay District Hospital. PW 5 confirmed he was an adult and was mentally fit to stand trial.
10. Dr Peter Ogola (PW 2) conducted a postmortem on the deceased's body on 20th December 2013 at Rachuonyo District Hospital after the body was identified by PW 1 and Seraphine Atieno. He noted that the deceased was an elderly woman in her 70's. PW 2 observed that the deceased had multiple bruises on the head and face and bruise swelling on the anterior chest wall, approximately 10cm in diameter. He conducted an internal examination and found that there was a collection of blood below the scalp and a 6cm long lineal fracture on the left side of the head. PW 2 certified the cause of death was due to head injury resulting from a skull fracture caused by blunt force

trauma.

11. The accused elected to give sworn testimony when called upon to make his defence. He stated that he was 24 years old and had dropped out of school. He admitted that he smoked *bhang* and took alcohol which was even sold within the homestead. He stated that he had a good relationship with the deceased. He recalled that on 8th December 2013, he saw the deceased at 4.00pm as she went to visit a neighbour. She returned at about 6.00pm and went to her house as he left to go out and drink. He could not recall when he came back home or that he assaulted his grandmother.
12. The accused further testified that since the deceased was blind, he would take her out every morning. He recalled that on the morning of 9th December 2013, he went to wake her up as usual but found her under the bed. When he called her but she did not respond, he decided to go and inform the neighbour that the deceased was dead. The neighbour thereafter informed PW 1. The accused then went to inform the Chief who did not believe him as he told him he was always drunk. When he came back, he found people accusing him of killing his grandmother. He was arrested by the Assistant Chief and later charged.
13. In order to prove murder the prosecution must establish three key ingredients: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and, third, that the accused committed the unlawful act with *malice aforethought*.
14. I find that the prosecution established the first and second elements of the offence of murder. There is no doubt that the deceased died on the night of 8th – 9th December 2013. She was found dead by PW 1, PW 6 and the accused on the morning of 9th December 2013. According to the postmortem conducted by PW 2, she died from a fracture of the skull resulting from an injury that was inflicted by blunt force. PW 6 gave direct testimony of the manner in which the accused slapped the deceased with a panga and whipped her with an electric cable. The assault happened in his presence. She was found dead in the morning having sustained injuries inflicted by the accused. In light of the evidence, I find and hold that the deceased died and that she died as a result of the head injury inflicted on her.
15. I also have no reason to doubt that the accused is the one who assaulted the deceased and caused her death. The testimony of PW 6 is decisive in this respect. It is credible and consistent. PW 6 narrated to PW 3 what happened that night at the first opportunity. No other person could have committed the act as evidence is clear that PW 6, the accused and the deceased were the only people present in that house when the assault took place. That assault was preceded by arguments between the accused and the deceased which were heard by PW 1.
16. The final issue for consideration is whether the deceased assaulted the deceased with malice aforethought. The accused testified that he had been drinking alcohol and smoking bhang and that he could not recall whether or not he assaulted the deceased. His counsel, Mr Osoro, submitted that the court should take this into account. Ms Ongeti, learned Counsel for the prosecution, responded that **Section 13** of the *Penal Code* which deals with intoxication excludes any defence based on intoxication as the accused knew what he was doing at the material time.
17. The issue of intoxication is dealt with in **Section 13** of the *Penal Code* as follows;
 13. (1) *Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.*
 - (2) *Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—*

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs. [Emphasis mine]

18. It is therefore clear that while intoxication is not in itself a defence, it may be taken into account in determining whether the accused had a specific intent to cause death or grievous harm. In the case of **Manyara v R [1955] 22 EACA 502**, the court noted that;

It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing the defence rests on him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this on the accused.

19. In determining whether the accused was intoxicated to the extent that the intent was negated, the court must have regard to all the facts. In **Richard Kamindu Ndungu v Republic NRB CA Criminal Appeal No. 194 of 2004 [2012] eKLR** the Court of Appeal gave such consideration as follows;

[20] It was not disputed that the appellant had taken some alcohol. By section 13(4) of the Penal Code, intoxication is a factor to be taken into account in determining in this case whether the appellant had formed an intention to kill. The alcohol may not have been so excessive as to interfere with the appellant’s mental faculties. Nonetheless, the alcohol appears to have been enough to produce in the appellant some element of aggression. We come to the conclusion that although the deceased died as a result of the appellant’s action, the appellant did not have the intention to kill her. We find that the superior court erred in convicting the appellant of the offence of murder when no malice aforethought was established.

20. In this case, there is testimony from both PW 1 and PW 6 who knew the accused very well. They knew that he used to take alcohol and smoke bhang’. PW 6 recalled that in fact, the accused and the deceased used to quarrel often and even on the material day, the accused and the deceased quarreled over what can only be described as an undignified act by a woman of the deceased’s age. Whether he could not recall the act he had done as a result of the intoxication or whether he was responding to abuses hurled at him by the deceased, I conclude that the accused lacked the necessary intent to commit murder. His conduct in the morning also supports the conclusion I have come to. Once he learnt that his grandmother had died, he reported the death to the neighbor. Moreover, his act of dressing the deceased was probably an act of remorse.

21. Consequently, I find the accused **KENNEDY OTIENO ONYANGO** guilty of manslaughter contrary to **section 202(1)** as read with **section 205** of the **Penal Code** for the unlawful killing of **MAGDALENE ONUNDA ODAGO** and I convict him accordingly.

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.