



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 3 OF 2014

BETWEEN

REPUBLIC PROSECUTOR

AND

WILLIAM OTIENO OBALA alias ODHARE ACCUSED

JUDGMENT

1. On the night of 21st April 2012 at about 8.30 p.m., **ELIZABETH AOKO OYOO** (“the deceased”) was in her sitting room having supper with her daughter when they heard a knock. Three people entered and two started cutting the deceased and while one stood at the door. The deceased was injured and taken to Rangwe District Hospital wherefrom she was referred to Homa Bay District Hospital but she succumbed to the injuries on 24th April 2012. The accused, **WILLIAM OTIENO OBALA** alias **ODHARE**, was later charged with her murder contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)** which occurred on 21st April 2012 at Koyolo Sub-location, Kotieno Location, Rangwe Division within Homa Bay County. He pleaded not guilty and the prosecution called 7 witnesses before the accused was put on his defence.

2. The deceased’s daughter, Margaret Auma Ajwang (PW 4), recalled that on 21st April 2012, she gone to visit the deceased. She found the deceased had already eaten so she prepared supper for herself. At about 8.30pm, before she could sit down to eat, she heard some footsteps outside and then a knock on the door. PW 4 and the deceased were seated on opposite sides of the table in the middle of the house with a paraffin tin lamp illuminating the room on the table. Two people came in. She recognised one of them as the accused whom she knew as Odhare. The two people went straight for the deceased and the accused started cutting her with a panga. They cut the deceased on the head, arms and face while they cut her on the wrist as she was trying to shield the deceased. PW 4 testified that when she stood up, the table and the lamp fell and the lamp went off. She started screaming calling the neighbour. The assailants ran off.

3. As PW 4 screamed neighbours began to come to the homestead. She went to call Elizabeth Ouma Ajwang (PW1) who was village elder and the deceased’s grand-daughter. On the material night PW 1 was at home when she heard PW 4 calling for help claiming that her mother had been killed. PW 1 went out and saw PW 4’s left hand had been cut at the wrist. She asked her who had cut the deceased and she responded that it was Odhare. She knew Odhare as a neighbour to the deceased. She also noted that other family members had come in response to the alarm raised including Charles Otieno Lusi (PW 5). When PW 4 entered the deceased’s house she found her lying down and bleeding profusely from with cuts wounds all over her head. She inquired from the deceased what happened. The deceased told her that she had been cut by Odhare.

4. On the material night Charles Otieno Lusi (PW 5) was at home when he was awoken up by PW 4 screaming. He went out and found she was with other villagers. He had torch and could see PW 4 bleeding on her arm which had been cut. He proceeded to the deceased's home and found her on the floor where she was bleeding profusely though she was still alive. Together with other villagers they first took her to a dispensary at Nyokal but since there was no one to treat her they took her to Rangwe District Hospital. While at the hospital, PW 5 asked the deceased who assaulted her and she responded that there were many people but she mentioned that Odhare was one of them. PW 5 testified he went to make a report at Rangwe Police Station in the morning. In the meantime, the deceased was transferred to Homa Bay District Hospital for further treatment where she remained until she died on 24th April 2012.

5. The investigating officer, Sgt John Nganga (PW 6), recalled that on 22nd April 2012 at around 11.30am, PW5 came to report that a neighbour had been attacked on the previous night at about 8.30pm. He explained that the deceased and her daughter, PW 4, had been attacked by some assailants and that they had identified William Okoth Obala alias Odhare as the assailant. PW 5 further informed him that the deceased had a dispute with the accused over a shamba and that he used to threaten her and she would report to him. He was further informed that the deceased had been taken for treatment to Homa Bay District Hospital. PW 6 was later informed that he deceased had died on the night of 24th April 2012. After receiving the report of the deceased's death, PW 6 went to the accused's home but found that the village youths had destroyed the accused's home and chased away his wife and children. He went to the deceased's homestead but since 4 days elapsed since the incident, there was nothing remarkable. At the time the accused was not in the village and could not be found. PW 6 organised for a post-mortem to be done by Dr Ojwang at Homa Bay District Hospital.

6. PW 6 testified that on 23rd January 2014, the accused came to the police station. He wanted to report that he was being chased by deceased's relatives. Since PW 6 knew the accused as a result of previous interaction, he arrested him and caused him to be charged with murder.

7. The post-mortem on the deceased's body was done by Dr Ayoma Ojwang on 29th April 2012 at Homa Bay District Hospital after it had been identified by PW 2 and PW 5. As Dr Ojwang had passed away by the time this case came up for trial, the post-mortem form was produced by Dr Francis Ochieng (PW 3) under **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. He confirmed that he had worked under Dr Ojwang and was familiar with his handwriting and signature. According to the post-mortem form, Dr Ojwang observed that the deceased was about 90 years old and that her body had 8 multiple linear cut wounds on the head and other multiple cuts on the limbs although there were no fractures of the long bones. Internal examination revealed for 4 linear skull fractures at the back, front and on both sides which resulted in bleeding into the brain substance. Dr Ojwang certified that death was caused by a head injury. PW 3 opined that the likely object used to inflict the injury was a sharp object. PW 3 also examined the accused to ascertain his mental status and confirmed that he was mentally fit to stand trial.

8. When the accused was put on his defence, he elected to give sworn testimony. He denied murdering the deceased who was his step mother as she had been levirated by his father. He stated they were neighbours and their respective homes were separated by a fence. The accused testified that he used to work at Capital Fish Industries in Homa Bay town and would normally go on duty from 6.00pm and return home in the morning at 6.00am. When cross-examined he stated the he would normally go home at the end of the month after collecting his salary. He stated that after the company he was working for closed, he remained in Homa Bay where he was fishing to earn a living.

9. The accused testified that he had gone back home before his arrest but found that his house had been burnt and his wife and children chased away. He stated that he went to report to the police at Rangwe three times but they did not take any action. He was told that the police did not have a vehicle to the area so he left his contacts so that the police could contact him. The accused stated that he did not run away from home as he was in Homa Bay at his place of work. After his house was burnt down and threats were made to his life, he could not go home.

10. In order to secure a conviction for the offence of murder under **section 203** of the *Penal Code*, the prosecution must prove beyond reasonable doubt (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.

11. The prosecution proved the fact and cause of death. PW 1, PW 2 and PW 4 all confirmed that the deceased had been assaulted and had serious head injuries. She was taken to Homa Bay District Hospital succumbed to those injuries on 24th April 2012. The injuries described by the witnesses were confirmed by the post-mortem performed by Dr Ojwang. I therefore find and hold that the deceased died and that she died as a result of head injuries inflicted by sharp object.

12. As regards the second issue of who committed the unlawful act that led to the deceased's death, the key evidence against the accused is the direct testimony of PW 1 and PW 4 in which they identified the accused. Our courts have taken the position that evidence of visual identification particularly in difficult circumstances should always be approached with great care and circumspection. Such evidence must be watertight before a court can return a conviction (see *Abdalla Bin Wendo & Another v R* [1953] 20 EACA166, *Wamunga v Republic* [1989] KLR 42 and *Maitanyi v Republic* [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (See *R v Turnbull* [1967] 3 ALL ER 549). This requirement is, however, relaxed when dealing with the case of recognition because, "*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.*" (see *Anjononi & Others v Republic* [1980] KLR 59).

13. At the time of the incident, PW 4 and the deceased were seated in a small room which was illuminated by a tin lamp on a table. PW 4 was able to see the accused when he came in and she immediately recognised him as Odhare. Odhare was not a stranger either to PW 4 or the deceased. Apart from the testimony of PW 1 and PW 4 who knew the deceased very well, PW 2, a grandson to the deceased, testified that the accused was a neighbour to the deceased and as they owned the neighbouring plots. On his part, the accused confirmed that he referred to the deceased as his step mother. I find that the conditions for positive identification were clearly satisfied. The small room which was illuminated by the tin lamp, the close encounter between the deceased, PW 4 and the accused within the confined space coupled with recognition of the accused leave no doubt that the accused was clearly identified as the assailant.

14. The prosecution case is also buttressed by the statements made by the deceased identifying the accused as her assailant. When PW 1 and PW 5 asked her for the identity of the assailant, she mentioned that she was attacked by Odhare and other people she did not know. The statement made by the deceased to PW 1 and PW 5 falls within the definition of a dying declaration and is admissible under the provisions of **section 33(a)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. Such a statement must however be received with the necessary caution and circumspection although it is not a requirement of law that it must be corroborated to support the conviction (see *Choge v Republic* [1985] KLR 1 and *Pius Jasunga s/o Akumu v R* [1954] 21 EACA 331). As I have found, the accused was clearly seen and recognised by the deceased and PW 1. The deceased made the statement to identifying the accused to two separate people at two separate times hence I find her declaration credible.

15. In his defence the accused put forth an alibi. He stated that he was working in Homa Bay when the incident took place. It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. In *Karanja v Republic* [1983] KLR 501, the Court of Appeal held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

16. The accused did not suggest in cross-examination of the witnesses, who knew him very well, that he

was working in Homa Bay particularly doing night duties on the night of the incident. If the witnesses knew he was working and residing at Homa Bay at the time, PW 6 would have gone to look for him when he went missing. Nothing of this sort was suggested to him in cross-examination. Having examined the alibi alongside the other prosecution evidence, I find that it is an afterthought and consequently I reject it.

17. The issue of the accused's motive emerged in the prosecution evidence. It was common ground that the accused and deceased were neighbours. PW 2 testified that they had a land dispute regarding the boundary which was settled at some point by the Land Department. On his part PW 5, narrated how the deceased had received threats from the deceased prior to her death. He testified that on 7th April 2012, he had gone to plough the deceased's shamba, when the deceased told her that the accused had threatened her regarding the shamba hence they could not plough the entire shamba. He thought because of her old age she was delusional but on 14th April 2012, the deceased came to inform him that she had been threatened by the accused whereupon, he advised her to go and report the matter to Rangwe Police Station. He did not know whether she went to report but because of threats, he went to sleep there on or about 16th April 2012. The deceased told him that the accused had threatened kill her if she did not leave the shamba. Although the accused asserted that he had a good relationship with the deceased, the testimony of PW 2 and PW 5 was compelling enough to show that indeed the accused and the deceased had a fractured relationship as a result of a land dispute which resulted in the accused issuing threats. Although motive is not an ingredient in proving murder, it may provide a pointer to the culpability of the accused. The Court of Appeal dealt with the issue of motive in **Choge v Republic [1985] KLR 1** as follows:

Under section 9(3) of the Penal Code, the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.

18. In my view, the accused's claim that he had no grudge against the deceased is undermined by the fact that after the deceased's death, he disappeared from the village for a period of two years. His disappearance is inconsistent with his innocence particularly in light of the close relationship he claims to have had with the deceased.

19. All in all I find that the deceased and PW 4 recognised the accused as one of the assailants on the material night. His defence lacks any merit when view alongside the prosecution evidence. In other words the evidence implicating him watertight. I therefore find and hold that the accused was not only among the people who attacked the deceased but he also struck her with the panga resulting in her death.

20. It is clear that cuts on the deceased head demonstrate malice aforethought. These injuries could only have been intended to cause the death of or 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**.

21. For the reasons I have outlined, I find the accused **WILLIAM OTIENO OBALA alias ODHARE** guilty of the murder of **ELIZABETH OYOO** and I convict him accordingly.

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

D.S. MAJANJA

JUDGE

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

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