



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL CASE NO. 43 OF 2012**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ROSE AUMA ONYANGO ..... ACCUSED**

**JUDGMENT**

1. On 28<sup>th</sup> December 2012, this court was informed that **ROSE AUMA ONYANGO** (“the accused”) had murdered **MAURICE ODUOR GANDA** (“the deceased”) on 24<sup>th</sup> December 2012 at Ringiti Island of Mbita District contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. She pleaded not guilty to the charge and the trial ensued. The prosecution called a total of 5 witnesses.
2. The deceased was found dead in the accused’s house early in the morning on 24<sup>th</sup> December 2012. Dr Ayoma Ojwang’, PW 3, who was at the time the Medical Superintendent at the Homa Bay District Hospital, carried out the post-mortem on the body of the deceased on 8<sup>th</sup> January 2013. He observed that the deceased had a deep penetrating wound on the anterior chest wall on the interspace between the 2<sup>nd</sup> and 3<sup>rd</sup> ribs on the left side. He did not see an exit wound or fracture. The internal examination revealed massive bleeding and clot formation on mediastinum and the left chest cavity. In his opinion the cause of death was severe bleeding within the chest cavity due to a stab wound inflicted by a sharp object.
3. The question and issue of determination in this case is who caused the death of the deceased and whether it was caused by malice aforethought. The prosecution evidence was as follows.
4. PW 1, Ezra Ojwang Kauma, a business and resident of Ringiti Island testified that on the night of 24<sup>th</sup> December 2012 he was in his house sleeping. His house was next to that of the accused. At about 1 am, he was awoken by rainfall. While awake, he heard the accused shout, “*get out! get out! I want to lock the door.*” He heard these words four times. He did not get out of his house and in the morning he went out and found several people outside the accused’s house. When he entered the house, he saw a lot of blood at the door and when he went inside he saw the body of a person he did not recognise.
5. On the same night Emily Achieng, PW 2, a resident of Ringiti Island and a neighbour to the accused testified that she went to bed early and during the night she heard a bang and utensils fall on the floor. Since it was raining, she did not hear any other noise so she fell asleep. When she woke up the next day she found a group of people standing outside the accused’s door and saying that the accused had killed the deceased whom she knew as a fisherman. By the time she went to

the house, it was locked and the accused had been taken to the Police Station.

6. PW 4, PC David Njagi, a police officer stationed at the Ringiti Island Patrol Base, recalled that on 24<sup>th</sup> December 2012, he was on duty when the accused came to the Base at about 2.00 a.m. and introduced herself. She reported that the deceased, her ex-boyfriend, came to the bar where she was working. He appeared drunk and as he did not have any money, he was turned away. The accused told him that she went home to sleep. While she was in the house, she heard footsteps and a person, whom she recognised as the deceased, calling her. He told her he wanted to spend time with her and threatened that if she did not open the door he would force himself in. He then broke into the house. The accused explained to PW 4 that the deceased was holding a knife and that she tried to push him but in the process he stabbed himself and fell.
7. After the accused made the report, PW 4 called his superiors and then proceeded to her house which was about 200 m from the Base with Corporal Ruto, PW 5. When they entered the accused's house, they found the deceased was facing up and there was a kitchen knife without a handle bedside the body and the scene had a lot of blood. He observed blood oozing from the chest near the collar bone. The officers secured the scene, arrested the accused and caused the body to be taken to Homa Bay District Hospital Mortuary.
8. PC, Michael Kipleting Ruto, PW 5, confirmed that he was called by PW 4 and they proceeded to the accused's house together. He observed the deceased's body lying face up and that there was a wound on the left collar bone and a knife without a handle on the floor next to the body. He produced the knife in evidence.
9. When the accused was put on her defence and she elected to remain silent. Both counsel for the prosecution and defence made submissions. Mr Nyauke, counsel for the accused, submitted that the prosecution failed to prove that the charge against the accused beyond reasonable doubt. He pointed out that the circumstantial evidence does not in any way point to the complicity of the accused. Counsel further submitted that the police failed to gather and produce material evidence to support the charge. He contended that the police ought to have produced the photographs that were taken at the scene, items of clothing that were blood stained and furniture in the house.
10. Ms Ongeti, counsel for the State, submitted that there was evidence that the accused committed the murder and the fact that the deceased was found in her house, the evidential burden shifted to her to explain what happened. She urged that court to find that she is the only person who could have murdered the accused.
11. The accused was within her right to remain silent under **Article 50(2)(i)** of the Constitution and **section 306** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. She assumes no burden to prove her innocence, and any defence or explanation put forward by the accused person either in her testimony or that emerges through the evidence is only to be considered on a balance of probability. The standard of proof placed on the prosecution is to prove the guilt of the accused person beyond reasonable doubt (see ***Republic v Gachanja [2001] KLR 428***).
12. **The prosecution did not present any direct evidence implicating the accused as the person who killed the deceased hence the case against the accused is based on circumstantial evidence.** The case of ***R v Kipkering Arap Koske & Another [1949] 16 EACA 123*** laid down the test to be applied when the court relies entirely on circumstantial evidence to found a conviction. The East Africa Court of Appeal held that in a case depending exclusively upon circumstantial evidence, the court must be satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of guilt before entering a conviction.
13. From the testimony of the prosecution witnesses, the deceased's body was found in the accused's house. On the material night, PW 1 heard the accused chasing someone away from her house. He recognised the voice as that of the accused. On voice recognition, the Court of Appeal in ***Karani v***

**Republic [1985] KLR 290** held that, “Identification by voice nearly always amounts to identification by recognition. Yet here as in any other case care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions favouring safe identification.” Were the conditions favourable to safe and positive identification? PW 1 testified that he had known the accused a period of 3 years as she was working in the nearby bar within the Island. PW 1 and the accused were neighbours and according to PW 5, the house which they lived was a temporary one made from iron sheets with two rooms on either side of the accused’s room. PW 1 testified that he heard the accused say the words four times. In light of this testimony, I am satisfied that PW 1 knew the accused and recognised her voice on that night. Furthermore, there was no reason for PW 1 lie about what he heard. I therefore find his testimony on the fact that he heard the accused on the material night credible. That there was some form of struggle or fight in the accused house is further corroborated by the testimony of PW 2 who heard a thud when utensils fell in the accused’s house. The two were neighbours and their houses separated by corrugated iron sheets.

14. In addition to the testimony of PW 1 and PW 2, PW 4 testified that on the morning of 24<sup>th</sup> December 2013, the accused went to the Police Base and reported that the deceased had come to her house and threatened her and that there was an altercation and in the process the accused stabbed himself. The totality of the prosecution evidence is that the deceased and the accused were in the same house when he died. It is in these circumstances that the accused is called upon to furnish an explanation as to what happened.

15. The law is clear that the burden of proof always rests on the prosecution to prove the case against the accused beyond any reasonable doubt. The accused has no duty or burden to establish her own innocence but there are instances when the law places a duty on the accused to explain certain facts particularly those peculiarly within her own knowledge. **Section 111(1)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which casts the burden of proof on the accused provides as follows:-

***111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:***

***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:***

***Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.***

16. Where the accused fails to offer any reasonable explanation as to how the deceased’s body came to be found in her house, the court is entitled to presume certain facts under **section 119** of the **Evidence Act** which provides:-

***The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.***

17. The accused told PW 4 that the deceased came into her house, tried to push her and in the process stabbed himself. The position of the stab wound as described by PW 3 is inconsistent with the deceased stabbing himself. It is also unlikely that the deceased would have collapsed facing up if he had stabbed himself. The evidence points to the fact that the deceased came into the accused’s house at the late hour and started making unwarranted advances and the accused repulsed him. In

the process she stabbed him with the knife on the left side of the chest. If the accused's version is correct, the deceased would have been holding a knife in such a manner with the blade facing him. Taking into account the testimony of PW 1, PW 2 and PW 4 and in the absence of any plausible explanation, I find that the accused is the person who caused the death of the deceased. From the evidence, there is no possibility that any other person could have caused the death of the deceased.

18.As regards the issue of malice aforethought, the facts suggest that the accused acted in self-defence. In the case of **Anthony Njue Njeru v Republic NRB CA Criminal Appeal 77 of 2006 [2006]eKLR**, the Court of Appeal dealing with the issue of self-defence stated as follows: -

*A killing of a person can only be justified and excusable where the Accused's action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the Accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.*

19.I find that there is evidence from the testimony of PW 1, PW 2 and PW 4 that the deceased came in accused's house at night, made unwanted advances which resulted in an altercation between him and the deceased. The accused was entitled to defend herself from an intruder in her house. As to whether the force used was excessive, the evidence is that there was one deep stab inflicted on the deceased. PW 1 stated he heard that the accused shout to the deceased to get out of her house at least four times. It is probable that despite the accused's attempt to tell him to go away, the deceased persisted in making advances whereupon the accused inflicted the blow that turned out to be fatal. In the circumstances I hold that the force used was not unreasonable in the circumstances.

20.Having evaluated the entire evidence, I therefore acquit the accused **ROSE ANYANGO**. She is set free unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY this 12<sup>th</sup> day of February 2015**

**D.S. MAJANJA**

**JUDGE**

Mr Nyauke 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.