



IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 18 OF 2012

(FORMERLY KISII HCCR CASES NO. 68, 70 & 81 OF 2012)

BETWEEN

REPUBLIC PROSECUTOR

AND

LEWIS ASMAN SALMIN alias MUSA 1ST ACCUSED

VICTOR OMONDI OTIENO alias BOSS 2ND ACCUSED

WYCLIFF ODIWUOR NYABWA alias ONGIDI 3RD ACCUSED

FREDRICK OMONDI ODHIAMBO alias ISSA 4TH ACCUSED

SAMSON OGUTU ONYANGO alias JAOTE 5TH ACCUSED

JOASH ONGADI OSOO 6TH ACCUSED

RULING

1. The accused persons, **LEWIS ASMAN SALMIN alias MUSA (A1), VICTOR OMONDI OTIENO alias BOSS (A2), WYCLIFF ODIWUOR NYABWA alias ONGIDI (A3), FREDRICK OMONDI ODHIAMBO alias ISSA (A4), SAMSON OGUTU ONYANGO alias JAOTE (A5)** and **JOASH ONGADI OSOO (A6)** are charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information are that on 21st April 2012 at Kamser Village in Rachuonyo North District within Homa Bay County they jointly murdered **ZAINABU ATIENO ABUBAKAR** (“the deceased”).
2. After the accused pleaded not guilty, the trial commenced before Maina J. I took over conduct of the trial in accordance with the provisions of **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* after the learned judge was transferred. After hearing 10 prosecution witnesses I am now called upon to decide whether the prosecution has established a *prima facie* case to put the accused on their defence.
3. On 22nd April 2012, the deceased’s body was found in a bush at a local centre popularly known as Youth Market. The deceased’s husband, Abubakar Salim Mumbo (PW 1) testified that he was called at about 2 pm and informed of her death. He proceeded there and found her along a path leading to his home. She was naked from the breasts, her skirt had been pulled up and her head

covered in a sack. At that point people had gathered at the scene. PW 1 went and reported to matter to the police and the District Criminal Investigation Officer (DCIO), Ayub Bakari (PW 10) commenced investigations. PW 10 organised for the body to be taken to Simbiri Health Centre where Dr Peter Ogola (PW 7) performed the post-mortem on the deceased's body on 23rd April 2012.

4. The significant observations recorded by PW 7 were that blood was oozing from the mouth and nostrils. He also noted bleeding on the conjunctiva and on the covering of the mouth and that the eye and mouth membranes had bluish discolouration. He certified the cause of death as hypoxia which is the lack of oxygen caused by suffocation due to smothering. He explained that the deceased's airwaves were blocked by the sack which had been tied several times around her neck.
5. After establishing the cause of death, the investigation turned to who could have strangled the deceased and dumped her body in the bush by the roadside. PW 1 testified that the deceased used to sell wares at the local market and she would go there in the afternoon. On the morning of 21st April 2012, he left the deceased at home as he went to Kendu Bay on his own business. When he returned home at 9.00pm, he did not find her. The children told him that she had not returned. When he tried to call her, she was not picking her call. She did not return that night and had not returned by 11.00 pm on the next day when he went on his business and returned.
6. Rukia Akinyi Abubakar (PW 7), the deceased's daughter, also testified that the deceased left home for the market on 21st April 2012 at about 4.00 pm. Although she would normally return at 8.00pm, she did not return on that night. Lilian Adhiambo Olale (PW 8), recalled that while she was in her shop at Youth Center when the deceased, whom she knew, came at about 7.40 pm and purchased ½ kg of sugar and left.
7. The deceased's body was later found on the next day triggering an intense search of who could have murdered her on that night. PW 1 recalled that there was a dispute between A1 who was his half-brother. He testified that on 12th April 2012, A1 came and cut a mango tree next to his house. When the deceased asked why he was doing this, A1 told her that something bad would happen to her. PW 1 reported the matter to the Chief.
8. Daniel Obuya (PW 3), a watchman and neighbour to the deceased, stated that he met A1 going towards his home on 21st April 2012 at about 6.30pm. They spoke briefly. He saw A1 on the next day at about 10.00 am as he was sitting on his verandah. A1 requested him to tell one Tobias to collect his money from one Washington. He later learnt that the deceased's body had been found at about 1.00pm.
9. The evidence against the other accused emerged from Charles Obonyo Ajencho (PW 2) and Samuel Obuya Ndire (PW 4). On 16th April 2012 at about 11.00 pm, PW 4 had visited PW 1 and was being escorted to his home when they met a group of 5 people sitting on a stone, armed with pangas taking bhang'. PW 2 had a torch which he flashed at their faces and was able to identify A2, A3 and A5. PW 4 identified A2, A4 and A5. Although he reached home that night, he was so afraid that he slept in a tree. On 18th April 2012, PW 4 reported to the Chief that he had seen some people who looked suspicious. When he learnt that the deceased's had been murdered on 22nd April 2012, he went to the scene which was about 1 kilometre where he had been threatened by the 5 people. PW 2 was also informed that the deceased had been found dead and he went saw the body.
10. PW 10, the investigating officer, recalled that he received a report of the murder of the deceased on 22nd April 2012 from PW 1 while he was at Kosele Police Station. He testified that he took statements from relatives and members of the public. Corporal Gordon Aran (PW 6) of Bodi Administration Police Pose in Kombewa, Seme, Kisumu County testified that on 19th May 2012 he arrested A6 when he came to report that he was from Rachuonyo North and that he had received from his mother informing him that her life was in danger as some people been had been

- arrested over a murder at Kamser. He handed over the A6 to PW 10. Zachariah Oyieko Onyango (PW 9), the Assistant Chief of Karabondi sub-location testified that on 26th April 2010, while he was in his office at Apida, he was informed by members of the public that a mob was about to kill a member of the public on suspicion of murder of the deceased. He went and pleaded with the mob and was able to rescue A5 whom he took to Kendu Bay Police Station.
11. PW 10 testified that the other accused were arrested after they were identified by PW 1. PW 10 stated that there were no eyewitnesses to the murder of the deceased. He stated that he recovered a mobile phone from A2 which PW 1 and PW 7 verified belonged to the deceased. After completing investigation, he caused the accused to be charged.
 12. What amounts to a *prima facie* case has been set out in several cases among them **Ramanlal Trambaklal Bhatt v R [1957]EA 332**, **Wibiro alias Musa v R [1960]EA 184** and **Anthony Njue Njeru v Republic NRB CA Crim. App. No. 77 of 2006 [2006]eKLR**). It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
 13. From the evidence that I have outlined it is clear that the deceased was last seen at about 8.00pm at Youth Centre on 21st August 2012 and her body discovered at about 11.00 pm on 22nd August 2012. None of the prosecution witnesses led any evidence placing the accused persons near or close to the scene on the material night when she is said to have been strangled. The incident described by PW 2 and PW 4 occurred on 18th April 2012 about a kilometre away from the place the deceased was found hence it was too remote in time and space to implicate any of the accused identified in the murder of the deceased.
 14. A1 was the key suspect in the murder. The witnesses admit that the relationship between him and PW 1 were strained and that he issued threats to the deceased but these threats do not place him at the scene of the incident. PW 3, who saw him on the evening of 21st and on the morning of 22nd April 2012, admitted that it was not unusual for the A1 to pass by his home. In any case, he lived in the same compound with the deceased. Even if he had bad intentions against the deceased, there was no evidence placing him at the scene of the incident.
 15. I am afraid that all the evidence is insufficient to put the accused on their defence. What came out of the witnesses particularly PW 2, PW 4, PW 9 and PW 10 is that the accused were generally perceived as bad people and that they were suspected of murdering the deceased because of their criminal antecedents. Such antecedents and suspicions do not constitute proof. Even if all the accused remained silent, the prosecution case would still fail.
 16. Under section 306(1) of the **Criminal Procedure Code (Chapter 75 of Laws of Kenya)**, I am required to enter a verdict of Not Guilty which I hereby do against **LEWIS ASMAN SALMIN alias MUSA (A1)**, **WYCLIFF ODIWUOR NYABWA alias ONGIDI (A3)**, **FREDRICK OMONDI ODHIAMBO alias ISSA (A4)**, **SAMSON OGUTU ONYANGO alias JAOTE (A5)** and **JOASH ONGADI OSOO (A6)**. The accused are all acquitted and if they are in custody, they are set free unless otherwise lawfully held and their sureties herein are also discharged forthwith.
 17. However as against the 2nd accused, **VICTOR OMONDI OTIENO alias BOSS (A2)**, I find that there is a case to answer and I put him on his defence. He is therefore called upon to make his defence. He is informed of his right to remain silent, to give an unsworn statement in which case he shall not be cross examined, to give sworn testimony in which case he shall be cross examined. He may also elect to make an address through his advocate. The 2nd accused is also informed of his right to call any witnesses.

DATED and DELIVERED at HOMA BAY this 4th day of September 2015

D.S. MAJANJA

JUDGE

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

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