



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL CASE NO. 19 OF 2014

REPUBLIC----- PROSECUTOR

VERSUS

FESTO OBWANA-----1ST ACCUSED

SIMON JOHN IMORIA-----2ND ACCUSED

JUDGMENT

1. On the morning of 22nd July 2014 Leunita Ateleng (The Deceased) was found dead. Festo Obwana (1st Accused) and Simon John Imoria (2nd Accused) face the charge of murdering the Deceased between the night of 21st and 22nd of July 2014. The two face the charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

2. Kevin Wasike Omasete (PW1) was aged eleven (11) yeas on 2nd December 2014 when he testified. He was affirmed before giving his evidence. It was his testimony that the Deceased was his grandmother. That in the evening of 21st July 2014, the witness was at her home. He was there with his brother Bramwel and Aunt by the name Jael (PW2). As they took their dinner, two visitors came and were received by the Deceased. The two had a conversation with the Deceased and PW1 retired to sleep when they were still talking. It was also his evidence that sometime in the night, at about 4.00 a.m., he heard someone call out the name “Boi” but he did not wake up and continued to sleep.

3. The next morning Bramwel went to school as PW1 went to the house of his grandmother to get some soap. But she did not respond when he called her out. She was in bed. When he uncovered her head, he found that the Deceased’s mouth was agape. The Deceased was unable to speak. The witness then told Jael about what he had seen. Although the witness did not know the two people who had visited the home of the Deceased prior to the day of the visit, he was able to recognize them in Court

4. Jael Omanyala (PW2) was with PW1 and Bramwel and the Deceased taking supper when two men visited the house of the Deceased. The Deceased told them that the two were her relatives and called her Auntie. Under cross-examination PW2 told Court that the Deceased and her two visitors drank an alcoholic drink changaa. On instructions of the Deceased, she prepared a bed for them. Answering a question in cross examination, that would be in a separate room from where the Deceased slept. It was her further evidence that the house of the Deceased had two rooms. And that the two Accused persons slept with Kevin (PW1) and his brother Bramwel in the sitting room. After doing so, at about 9.40p.m. the witness retired to her house to sleep. Her house is separate from that of the Deceased. In the morning, at about 6.00 a.m., PW1 called her and told her about the Deceased. The witness saw the Deceased who was already dead and whose neck was twisted. The witness then informed her brother Shadrack (PW3) about the death. She too was able to recognize the Accused persons as they sat in the dock.

5. On a fateful morning, PW2 in tears, came running, to the home of Shadrack Murunga (PW3) and informed him that the Deceased had died. After receiving the news, PW3 visited the house of the Deceased and indeed found her cold and dead. Her head was facing to one side. The witness then telephoned the Village Elder and informed him of what had happened.

6. PW3 also told the Court that on 20th July 2014, the Deceased had come to his home and informed him about a quarrel between her son Dennis Omanyala with one Arnold Okatuyi. That Arnold was not happy when the Deceased tried to reconcile them and accused the Deceased of favoring Denis. That the two exchanged bitter and abusive words and Arnold threatened the Deceased that one week would not pass before “she faces up with her nose”. It was the testimony of this witness that indeed after the death of the Deceased Arnold was arrested.

7. Dennis Omanyala (PW7) told Court that on 22nd July 2014 (perhaps it as earlier date!), he found the Deceased quarrelling with her brother -in-law called Arnold. That Arnold went to his house and returned back holding a fimbo and threatened the Deceased “you shall cry tears that shall not stop or your nose will face up”

8. Zacharia Oleket (PW4) was at the material time the Senior Chief of Angurai location. On the morning of 22nd July 2014 at about 7.30 a.m., he received a call from the Village Elder of Kakurikit location who informed him about the death of the Deceased. In turn the witness informed a Police Officer by the name Kusimba (PW9). The Police Officer together with PW4 visited the scene at about 8.00 a.m. where they found a crowd of people. On entering the house of the Deceased, they found the Deceased in one of the rooms with her head facing sideways. It was the testimony of PW4 that a girl by the name Everlyne who was within the crowd told him about two strangers who had visited the house of the Deceased. It was also his testimony that some members of the public were pointing an accusing finger at Arnold and had threatened to rough him up. So as to save Arnold from the wrath of the crowd, he and Sgt. Kusimba decided to arrest Arnold.

9. Later, PW4 tracked down the two Accused persons using a Boda Boda operator by the name Etyang and another person by the name Leonard Emojong (PW6).

10. On the morning of 22nd July 2014, Valentine Emukulie (PW5) was at home when he heard some screams. He visited the home of Jael who told him that the Deceased had died and that two men had slept in the Deceased house and left in the morning. PW5 in the company of Leonard Emojong (PW6) decided to trace the two and on reaching Kakurikit Primary School, they were told by a Boda Boda operator that he had seen two strangers who were asking about where they could get some alcohol. Using this tip, PW5 and PW6 visited some homes which were well known for selling alcohol. At a third house, the owner told them that some two strangers had taken alcohol there and left towards the road to Malaba. PW5 and PW6 followed that road and at a place called Akelet they found the two strangers. PW5 asked the two to accompany him back and using a Boda Boda they travelled to the office of the District Officer.

11. Everlyne Agesa (PW8) is one of the people who identified the body of the Deceased to Dr. Angira Stephen (PW11) who conducted a Post Mortem examination on the body of the Deceased on 23rd July 2014. On the external appearance, the Doctor noted that at the neck there was bruise extending from the Nape of the neck towards the angle of the jaw of the left side with dimension of 5cm x 1 cm. He also saw two bruises on the right of 2 x 2 cm and 2 x 1 cm with a nail marking. On examination of the genital area, the Doctor noticed a dry white discharge forming a track along the left thigh. The Doctor formed the opinion that the cause of death was Asphyxia (suffocation) secondary to strangulation.

12. John Kusimba (PW9) is the Police Officer who visited the scene alongside the Senior Chief (PW4). He gave evidence that supported the evidence of PW4. In addition, the witness received the two Accused persons who had been arrested by members of public. He re-arrested them and handed them over to Malaba Police. In answer to a question in cross-examination, he told Court that he had arrested Arnold because of some rumours about his involvement, and in an answer to a question posed by the Court, he told Court that he handed Arnold to the Police at Malaba.

13. Cpl. Sabastian Murima (PW10) investigated the circumstances surrounding the death of the Deceased. He visited the scene and saw the Deceased lying dead in her house. He noticed that the Deceased had bruises on her neck. He recovered the body of the Deceased. Later he visited Angurai AP camp where the Accused persons were being held. He re-arrested them and escorted them to Malaba Police Station. The Investigating Officer also interrogated the Accused Persons. In cross-examination he told Court that Arnold Akolong Juma was the 3rd suspect. That the Deceased was his sister. And that the two were involved in a land dispute.

14. On 26th of June 2015, this Court ruled that the Prosecution had led sufficient evidence to require the Accused persons to make their Defence. In an unsworn statement Festo Obwana (1st Accused) denied the charges. He told Court that he visited the house of the Deceased on 21st July 2014 and while there, drunk alcohol together with Simon Imoria (the 2nd Accused), Jael (PW2) and Omocha. That although PW1 was also present, he did not drink. That he got drunk and Jael offered them a place to sleep. That he and the 2nd Accused slept in the same room with the children. While PW2 slept with the Deceased. In the morning, he and 2nd Accused left in search for more alcohol at a neighbours. They left the neighbour's at 10.00a.m. and on the way to Kakalet, a Boda Boda hooted behind them and stopped them. That the driver of the Boda Boda told them that the Chief had sent for them. That the Boda Boda operator also told them that someone had been killed. The witness told Court that they agreed to accompany the Boda Boda operator to the Chiefs camp where they were arrested and later transferred to Malaba Police Station. The witness told court that he frequently took alcohol at the home of the Deceased and had no grudge against her.

15. The 2nd Accused gave evidence that substantially supported the evidence of his co-accused. He was more specific on the time that the two left the home of the Deceased on 22nd July 2014. That it was at 8.00 a.m. The Accused was also more specific that he and the 1st Accused had been stopped at Kakalet by PW5 and PW6 and the two asked them where they had a drink on the previous night. The 2nd Accused person also told Court that he was a frequent customer of the Deceased who is his relative and that he had nothing against her.

16. At the close of hearing, Mr. Owiti State Counsel submitted that there was sufficient circumstantial evidence for this Court to return a conviction. That it was proved that both Accused persons spent the night in the Deceased's house and left at between 3.00 a.m. and 4.00 a.m. without informing anyone. That this was suspicious, Counsel then submitted

“Apart from admitting that they had spent the material night in the house of the deceased, and despite the fact that the prosecution had by raising circumstances pointing exclusively to the two accused persons, established the statutory rebuttable presumption against the two accused persons as regards the deceased's death, were culpable as provided under Sections 111(1) and 119 of the Evidence Act, CAP 63 Laws of Kenya, none of the two accused persons attempted to discharge the rebuttable burden to explain either how the deceased died or met her death.”

This Court was then urged to be persuaded by the Decision in **Republic vs Michael Miriuki Munyiri** (2014) eKLR

17. On the part of the Defence, Mr. Okutta argued that the Prosecution was working on circumstantial evidence which at best established only a suspicion. He further submitted that Sections 111(1) and 119 of the Evidence Act were not applicable.

18. The evidence of PW1 is that on the evening of 21st July 2014, the two Accused persons visited the home of the Deceased. And as he went to sleep, he left the two speaking to the Deceased. In the course of the night at about 4.00 a.m. the witness heard someone call out Boi but the witness did not wake up.

19. When the witness woke up on the following morning, he called out the Deceased but she did not

respond. On uncovering her, the mouth of the Deceased was agape. This was unusual and so PW1 informed Jael (PW2) about it. PW2 in turn informed grandmother Nafula. Together they completely removed the blanket covering the Deceased and it was then that they realized that the Deceased was dead.

20. When the two Accused persons came to the home of the Deceased, PW2 was at that home with the Deceased, Bramwel and PW1. The Deceased welcomed the two to an alcoholic drink and told the witness that the two were her relatives. On instruction of the Deceased, PW2 prepared a bed for the two to sleep and she retired to sleep at about 9.30 p.m. This was in a separate house. She explained that the house of the Deceased had two rooms. A bed room and a sitting room and that on that night the 2 Accused persons slept with Bramwel and PW1 in the sitting room, while the Deceased slept in the bedroom. On the events of the morning of 22nd July 2014, the witness told Court that PW1 informed her about the state of the Deceased at about 6.00 a.m.

21. In their Defence both Accused Persons admit to sleeping at the house of the Deceased but in a room which they shared with PW1 and another child called Emocho. Emocho is probably Bramwel. And the Evidence of the 1st Accused was that PW2 slept with the Deceased.

22. PW2 herself said that she slept in a house separate from that which the Deceased slept on the fateful night. On this aspect I believe the evidence of PW2 because the 2nd Accused who also testified said nothing about where Jael slept or that she slept in the same room as deceased. In my view it was critical enough that if indeed Jael slept in the same room with the Deceased then even the 2nd Accused would have raised this in his Defence.

23. So what time did the two visitors leave the house of the Deceased? The State submitted that the two Accused persons left at between 3.00a.m. and 4.00a.m. in the morning. But this Court is unable to find any evidence that would support that proposition. When PW1 woke up that morning, he did not find either of the Accused persons. But PW1 did not tell the Court what time this was. There is however evidence by PW2 that at about 6.00 a.m. she was informed by PW1 about the condition of the Deceased. That PW2 is, in all likelihood being truthful about the time she spoke to PW1, find corroboration in the evidence of PW5.

24. On that morning, PW5 heard screams from the home of Deceased. When he visited that home, he found the Deceased already dead. He then, after speaking to PW2, left to trace the Accused persons. That effort took him toward Kakurikit School. He was at the school by 7.30 a.m. an indication that he had spoken to PW2 about the Death of the Deceased earlier. This Court finds as a fact that PW2 must have learnt about the Death of the Deceased from PW1 earlier than 7.30 a.m. and accepts her testimony that this was at 6.00a.m. And in the absence of evidence as to the exact time that PW1 woke up to find the two Accused persons gone, this Court holds that this was by at least 6.00 a.m. On the side of the Defence, only the 2nd Accused gave the time of exit. It was his evidence they left at 8.00a.m. I am however inclined to accept the version of the Prosecution that they had left by 6.00a.m. as there is strong evidence to support that version. See my analysis of the evidence of PW1, PW2 and PW5 on this aspect.

25. There is Medical evidence by PW11 that the Deceased person died of Asphyxia secondary to strangulation. In essence that her death was not natural. Indeed the Doctor found bruises on the body of the Deceased. One of which was a bruise extending from the Nape towards the angle of the jaw on the left side. The Nape is the back of the neck.

26. As correctly submitted by the Prosecution, the Deceased had on the evening of 21st July 2015 welcomed both Accused persons to the comfort of her home. From the evidence of both the Prosecution and Defence, the reception was warm. There is also evidence, as just pointed out, that sometime between when the Deceased welcomed her two visitors and 6.00a.m, she had met an unnatural death. A death that had been expertly opined to have been caused by strangulation. There is also evidence that by at least 6.00 a.m. both Accused persons had left the Deceased's house without informing any of the occupants of the Deceased house about their exit. While it may not have been strange for them to leave at 6.00a.m., it may be unusual for them to have left without bidding goodbye to the people who had hosted them.

27. These are circumstances that invited an explanation from the Accused persons as there was no evidence that any other person was connected to the Death of the Deceased, leave alone the mere suspicion on one Arnold. The duty to offer a reasonable explanation was placed on the Accused persons by Section 111 of the Evidence Act which reads;

(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 guilty of the accused person in respect of that offence.

(2) Nothing in this section shall-

a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or

c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

Section 119 of the Act is also relevant, it 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.

28. So what explanation, if any, did the Accused Persons offer? The 1st Accused merely said that they left the house of the Deceased on the morning of 22nd July 2014 to look for alcohol in the neighborhood. As for the 2nd Accused, he stated;

“In the morning of 8.00 a.m. we left the home of Leunita and went to Leunita’s neighbour for another drink”

No explanation was offered by either of the Accused persons as to why they would leave the house without bidding goodbye to Leunita or the other occupants of the house. Or were they too drunk to realize that they needed to have the usual courtesy of bidding their host goodbye? This they did not say. Neither was it said by either of the Accused persons that no one was in the house when they left.

29. In the absence of a reasonable explanation on this matter, I find that the two Accused persons, either alone, or with another or others, were connected to the injury that caused the death of the Deceased person. On the aspect of malice aforethought, there is no evidence that the Death of the Deceased was deliberate or planned. The Medical evidence was that the cause of death was suffocation caused by strangulation. There was no evidence however that the strangulation was so vicious that it must have been intended to cause grievous harm or death. From the nature of the injury it cannot be said, with certainty, that whoever inflicted it intended either to cause grievous harm or to kill the old lady. For this reason

therefore I am inclined to find that both Accused persons committed the lesser offence of manslaughter. The upshot, I do hereby find Festo Obwana and Simon John Imoria guilty of the Offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

Dated, signed and delivered at Busia this 2nd day of December 2015

F. TUIYOTT

J U D G E

In the Presence of :-

Oile - C/Assistant

Owiti - for State

Okutta - for the Accused persons