



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 10 OF 2011

REPUBLIC.....PROSECUTION

VERSUS

LYNN ADHIAMBO OGONDA ALIAS BEATRICE AUMA OGUTA.....ACCUSED

JUDGMENT

The accused **LYNN ADHIAMBO OGONDA alias BEATRICE AUMA OGUTA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were given as follows

“On 17th day of February, 2011 at Castle Hotel in Mombasa County within Coast Province murdered YONG HYUN KIM.”

The accused was arraigned before the High Court in Mombasa on 3rd March, 2011 when she entered a plea of ‘*Not Guilty*’ to the charge. Her trial commenced before me on 22nd June, 2011. The prosecution led by **MR. ONSERIO** learned state counsel called a total of fourteen (14) witnesses in support of their case. **MR. BOSIRE** Advocate represented the accused.

The facts of the case were that the deceased ‘*Yong Hyun Kim*’ a Korean national, was part of the crew of a Korean ship which had been hijacked and held by pirates. The said ship was eventually released by the pirates and docked in Mombasa at Mbaraki Port. **PW 12 KIM JONG KYU** told the court that he is the Managing Director of Mombasa Shipping Agency and is also a Korean national. He told the court that he knew the deceased as an engineer on their ship which had been hijacked. On 12th February, 2011 the ship was released and on 15th February, 2011 it arrived at Mbaraki Port in Mombasa. On 16th February, 2011 **PW12** had drinks and a meal with the deceased and later he booked in the deceased as well as the ship’s captain into the Castle Royal Hotel. **PW12** confirmed that he booked in the two Koreans and signed the registration documents at the hotel. **PW3 NAFISA SAYED** the manager at the Castle Royal Hotel confirms that the two Korean ship crew members were booked into the hotel. They were allocated two rooms. The ship’s captain occupied Room No. 260 whilst the deceased occupied Room No. 300.

PW2 DICKSON OCHIENG told the court that during the material period he was employed as a night watchman at the Castle Royal Hotel. He states that on the night on 16th February, 2011 a Korean man (whom **PW2** referred to as a ‘*mzungu*’ i.e. a white man) came and sat at the hotel bar and had a few drinks. The man beckoned to a lady to join him. **PW2** identifies the lady as the accused. The accused went to the deceased, she later came and told **PW2** that the deceased had agreed to pay her Kshs. 2,000/= for her services for the night. This then identifies the accused as one of those commonly referred to as

'ladies of the night'. **PW10 SHEILA WAITHERA** told the court that at the material time she was working at the Castle Royal Hotel as a Front Desk Officer. On 17th February, 2011 she was working the night shift when one of their Korean guests who occupied room No. 300 sought to know the charges for an extra guest. **PW10** told him that the charge for an extra guest was Kshs. 1,500/=. The lady guest filled out the registration card, and the Korean paid the fee of Kshs. 1,500/=. The two then went upstairs to the bedroom.

At this point the narrative is taken up by **PW4 MARGARET AYOTI** who told the court that on the night of 16th/17th February, 2011 she was on duty as a night guard at the parking area of the Castle Royal Hotel. At about 2.00 a.m. she was seated on the staircase when she saw a man fall from the balcony of Room 300 to the ground. The Korean man was totally naked and as he fell his body hit a metal food trolley which was placed in the parking area. The man hit the concrete ground and his skull split open. **PW2** began to shout for help and shouted that all the hotel doors be closed to prevent the accused from escaping. **PW1 PC ESAU OLALA** was a police officer attached to the Tourist Police Unit who was on duty at the Castle Royal Hotel on the material night. He told the court that at about 2.30 a.m. he heard a loud bang. He rushed to the scene and found the naked body of a Korean man lying on the ground. He checked the body for signs of life but found that the Korean was already dead. **PW1** called the police control room to seek reinforcements. Police came to the scene. The accused was removed from room No. 300 wearing only a bra and a pair of jeans. She was taken to the police station for interrogation. At the close of police investigations the accused was arraigned in court and charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto her defence. She opted to make an unsworn statement in which she denied having thrown the deceased over the balcony. The accused told the court that she had no idea how the deceased fell to the ground. This court is now tasked with the duty of analyzing the evidence on record in order to determine whether the charge of murder has been proved beyond a reasonable doubt as required by law.

The offence of murder is defined by section 203 of the Penal Code as follows

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

This definition establishes three crucial ingredients all of which must be proved beyond a reasonable doubt in order to prove the charge of murder. These are

1. Proof of the fact and cause of death of the deceased
2. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused
3. Proof that said unlawful act or omission was committed with malice aforethought.

Before I delve into an analysis of the evidence I deem it important to first clear up the question of the true identity of the accused. The registration documents at the Castle Royal Hotel give the name of the accused as '*Beatrice Auma Oguta*' holder of Identity Card No. 27788362. Indeed the initial newspaper reports of this incident carried in The Standard Newspaper of 21st February, 2011 name the suspect as '*Beatrice Auma Oguta*'. However **PW5** who testified in court also gives her names as **BEATRICE AUMA OGUTA**. She told the court that she is the genuine holder of that name. Upon seeing the newspaper report and the photograph of the accused **PW5** presented herself to central police station in Mombasa. She identified the lady in the newspaper cutting as her neighbour who is called '*Lyn Adhiambo*'. **PW5** told the court in her evidence that she had once lent the accused her identity card to enable the accused collect money from Mpesa. She suspects that it is at this point that the accused may have taken the opportunity to photocopy the identity card and present it as her own. **PW14 SENIOR SERGEANT BOSCO KISAA** who was the investigating officer told the court that in order to establish the true identity of the accused he took the accused finger-prints for comparison and analysis at the office of the Registrar of Persons in Nairobi. The report from the Registrar of Persons dated 29th March, 2011 was produced as an exhibit **Pexb17**. It showed that the finger-prints of the accused matched those of one

'Lyn Adhiambo Ogonda' the holder of identity card No. 25 365685. The accused did not dispute or challenge this report and indeed during her statement in defence she gave her names as 'Lyn Adhiambo Ogonda'. I therefore find as a fact that the identity of the accused person in this case is 'Lyn Adhiambo Ogonda' and not 'Beatrice Auma Oguta'. The accused was merely using the identity of **PW5** her neighbour as a disguise as she carried out her duties as a twilight girl,

The first point the court must consider is whether the fact and cause of death of the deceased have been satisfactorily proved. There are several prosecution witnesses who were on duty in various capacities on the night of 16th/17th February, 2011. They all testify that an adult Korean man fell naked from the balcony of room 300 and died upon impact with the concrete ground. **PW3** the hotel manager confirms that the occupant of room 300 was a Korean seaman known as 'Yong Kyun Kim'. **PW10** was the front desk officer who did the bookings. She confirms that the deceased occupied room 300. **PW12** the Managing Director of the shipping company confirms that it was he who made the bookings for two of their sailors at the hotel. He states that he booked in the ship's engineer and the ship's captain. The captain occupied room 260 whilst the engineer whose name was 'Yong Kyun Kim' occupied room 300. The hotel registration card **Pexb19** clearly shows that room 300 was assigned to one of the persons booked in by **PW12**. I note that **PW12** who knew the deceased well identified the body to the doctor during the autopsy. I find therefore that there can be no question about the identity of the deceased or the fact of his death.

The cause of death is equally not in any doubt. As stated earlier several prosecution witnesses testified that they saw the naked body of the deceased lying dead in the parking area of the hotel. **PW8 CORPORAL HADDISON MWIGU** a gazetted Scenes of Crime officer told the court that at about 3.40 a.m. he was called to the scene. He arrived and took several photographs all of which have been produced in court as exhibits **Pexb20**. The photographs clearly show the naked body of an adult male of Asian extraction lying on a concrete floor with blood oozing out of the head. Evidence on the cause of death was given by **PW11 DR. NGALI MBUUKO** who conducted the autopsy. He noted the following injuries

-Multiple skull fractures

-Laceration below the right clavicle

-Bruises on the abdomen

Internally the doctor noted the following

- Fracture of ribs
- Fracture of sternum
- Both lungs perforated by the fractured ribs
- Two perforations to the heart caused by the fractured ribs
- Deformed brain

PW11 opined that the cause of death was "*severe blunt traumatic head and chest injuries which were consistent with a fall from a height.*" **PW11** filled and signed the post-mortem report which has been produced in court as an exhibit **Pexb21**. This was expert medical evidence which was neither challenged nor controverted by the defence. I therefore find as a fact that the deceased met his death as a result of falling from the balcony of room 300 at the Castle Royal Hotel.

The next question this court has to consider is what caused the deceased fall from the 3rd floor balcony? Was the accused in any way responsible for this fall to his death? **PW2** told the court that he saw the accused and deceased reach an agreement to spend the night together on 16th February, 2011. **PW12** states the deceased could not speak English well thus he lent the accused his pen (possibly to enable them to communicate in writing). The accused later told **PW2** that the deceased had agreed to pay her Kshs. 2,000/= for the night. Similarly **PW10** confirms that the deceased booked in the accused as an extra guest to his room. **PW10** insisted to deceased that the money for the extra guest must be paid up-front. The

deceased paid the Kshs. 1,500/= required and the two went to the room together. Later the accused came back to ask where she could purchase condoms. From the evidence it is clear that the only other occupant in the room with the deceased was the accused. Indeed in her defence the accused does not deny that she and deceased had an agreement to spend the night together. She further confirms that they agreed on a price of Kshs. 2,000/=. Given that the accused was the only other occupant inside the room with the deceased and given that the deceased is now dead it is only accused who can tell how he came to fall from the balcony. In her defence the accused seems to imply that the deceased may have decided to jump off the balcony in order to end his own life. However I am not persuaded by this defence. If the deceased had intended to end his own life why would he lure a prostitute for the night? Why not just lock himself up inside his room alone and end his life. There is no evidence that the deceased was suffering from any mental or psychological disorder which would have caused him to be suicidal. This theory that the deceased threw himself over the balcony was not put to any of the prosecution witnesses by defence counsel. It has only come up as an afterthought during the accused's defence. **PW12** was one of the last people to see the deceased alive. He said he took the deceased shopping to buy supplies and then they had dinner together. Under cross-examination he stated that deceased did not appear disturbed at all. I reject this defence as a *'see no evil, speak no evil and hear no evil'* strategy by the accused.

PW4 Margaret Ayoti told the court that she was seated on the stair case and from there she saw the accused lift the deceased and throw him off the balcony. In her evidence **PW4** states

“I saw the accused holding the naked man. She was cradling the man like a baby (demonstrates to the court how one would hold or cradle a baby). I saw accused drop the deceased over [the balcony].”

PW2 led the court in its visit to the scene. She showed the court where she was sitting and she pointed out the balcony of room 300 on the third floor from which she alleged she witnessed these events. It must be remembered that this incident occurred at about 2.00a.m. It was in the dead of night and therefore dark. **PW4** admits that the lights in the balcony of room 300 were not on thus the balcony was dark. She claims however that there was sufficient light from the adjacent balcony and from the staircase. It is questionable whether this provided sufficient lighting to enable **PW4** see clearly. She has not described the intensity or strength of the lights. At the same time it must be remembered that **PW4** was sitting on the steps. She had no reason to be gazing upwards at the balcony of room 300. Under cross-examination by defence counsel **PW4** admits that her evidence to the court contradicts her statement to the police. Under cross-examination **PW4** states

“I saw the accused throw the deceased over the balcony. My statement says I saw a lady push someone over the balcony.”

Which was it – was the man thrown over the balcony or pushed. During the course of the trial I had a good look at the accused. She was a young girl who was slender and of slight build. I find it very unlikely that she had the strength to cradle an adult man in her arms and throw him over a balcony. I therefore have trouble accepting the version of events given by **PW4**.

The question remains what events led to the deceased falling over the balcony. **PW12** told the court that after the incident he rushed to the scene. He found the accused at the scene having already been apprehended by police. **PW12** approached accused and asked her what had happened. His evidence is as follows

“I asked accused what happened. She told me that she argued with deceased because he refused to use a condom. She told me she did not want more children as she has two children already. She wanted to use a condom.....”

This aspect of the evidence of **PW12** was not challenged by defence counsel during cross-examination of this witness. **PW14** the investigating officer confirmed that this was the first version of the events given by accused. **PW14** stated

“The other Korean guest told me that deceased had accidentally fallen off the balcony. The other Korean told me that he approached accused and she told him that she and deceased had disagreed over use of a condom. The deceased wanted to make love without a condom but accused resisted this as she already had two children.....”

Once again this version was not challenged during cross-examination. Given that this is what the accused said immediately after the incident before she had a chance to collect herself and tilt her story one way or another, it is more likely to be the truth. As stated earlier I reject the accused’s defence that the deceased ended his own life. The two had agreed on a night of pleasure. A used condom as well as underclothes were recovered in the room and an unused condom on the bed. It may be argued that the deceased may have in some way fallen over the balcony to his death without the intention of the accused. However as stated earlier the court did visit the scene. The balcony was a concrete structure and was about waist-high on an adult of average eight. Even if the deceased merely tripped and fell he would not have fallen over the balcony. He would more likely have fallen on the ground inside the balcony. For the deceased to have fallen over the balcony I find that there has to have been some intervening force which propelled him over the balcony. It is quite likely that the accused may have tried to persuade deceased to use a condom for all their encounters and he declined. This could very well have led to a struggle between them explaining why **PW4** saw two people on the balcony. In the course of such a struggle the deceased may have been pushed/fallen over the balcony. There was clearly some extraneous force which caused the deceased to fall over the balcony. Given that the accused was the only other person in the room at the material time that extraneous force could only have come from her. From the evidence presented before me I am persuaded that in the cause of an argument/struggle over the use of a condom, the accused may have pushed or shoved the deceased causing him to fall over that balcony. Having rejected the notion that the accused carried the deceased and threw him over the balcony and having also rejected the notion that the deceased threw himself over the balcony, the circumstantial evidence clearly points at the accused as the one who caused the deceased to fall over the balcony and onto the ground below. I therefore find that the death of the deceased was the direct result of an act on the part of the accused. As such the *actus reus* of the offence of murder has been proved.

Having said that I find this action on the part of the accused was not premeditated. She did not set out to kill the deceased that night. As stated earlier, the intention of the couple was to engage in consensual sex. The accused expected to be paid Kshs. 2,000/= for her services and then leave. I find that the element of *mens rea* or malice aforethought is missing from this incident. The very fact that the accused made no attempt to flee from the scene after the incident proves this point. She remained in the room and was found there half-dressed when officers opened the room after the deceased had fallen. Section 207 of the Penal Code provides as follows

“When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool is guilty of manslaughter only.”

This in my view is precisely the situation here. The accused and deceased were engaged in a struggle leading to the accidental fall of deceased from the balcony. I believe the accused had no pre-determined intention to kill the deceased. I therefore acquit the accused on the charge of murder and instead substitute a conviction on the offence of manslaughter under section 207 of the Penal Code.

Dated and delivered in Mombasa this 2nd day of September, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Bosire for Accused

Mr. Muriithi for State

Court Clerk Mutisya

M.ODERO

JUDGE

2/9/2014

Mr. Muriithi:

Accused has no previous offence. We treat as a first offender.

Mitigation:

There was no malice or intention to kill the deceased. This was an accident. We will plead that the accused is remorseful for that event and she is apologetic. We urge court to pardon the accused. This is a 2010 matter. Accused has already been in custody for four (4) years. The deceased has learnt her lesson. We submit that she has been sufficiently punished. We ask for court's mercy to enable accused rejoin her former life. We urge court to consider that accused has two children who rely entirely on her. She wishes to reunite with her children. We urge court to pardon accused and release her to be able to provide motherly love to her children. Let her stand not condemned as Jesus never condemned the adulterous woman. We seek a suspended sentence. She is reformed. She needs time to heal. She needs time to reform her life and deserves a second chance. The accused was a model prisoner while in cells. She was not a criminal. We urge court to consider the plight of her children.

M. ODERO

JUDGE

Court:

Mitigation is noted. The offence is serious as it resulted in the loss of a human life. In my view a custodial sentence is called for. The accused is sentenced to serve seven (7) years imprisonment. She has a right to appeal.

M. ODERO

JUDGE

2/9/2014