



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL MURDER NO.26 OF 2009

REPUBLIC PROSECUTOR

VERSUS

DAMARIS AKOTH OKUNYA ACCUSED

RULING

1. The accused person herein, Damaris Akoth Okunya is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on the 23rd day of March 2009 at Muso village Kogelo South Sub location in Rongo District, within Nyanza Province, the accused murdered Jane Akinyi Okunya.
2. The accused was first arraigned before court on 30th April 2009. During the plea on 15th May 2009, the accused denied the charge. The case has been going on since then. The accused has remained in custody since then although she was granted bond on 26th February 2014.
3. From the record the facts of this case are that on the 23rd March 2009, the deceased's body was found in a bush about 30 metres from her house by one Roger Otieno Manje. The said Manje rushed and informed the deceased's husband and co-wife. The body had serious burns similar to the one caused by a hot liquid. The body was removed to Rapcom Hospital mortuary where a postmortem was carried out and results therefrom indicated the cause of death to be strangulation.
4. During the course of investigations, it was established that the accused had 3 cockrels 2 brown and 1 black. The black cockrel had gone missing and the accused strongly suspected the deceased to have stolen the same. The accused, in the company of one Eunice Akoth went to the deceased's house to enquire about the missing cockrel. She was heard threatening that she would take whoever had stolen her cockerel to the witchdoctor. It was the prosecution's case that by uttering threats towards the deceased, because of the missing black cockrel, the accused is the one who caused the deceased's death as she (accused) sought to avenge for her lost cockrel.
5. The prosecution called 4 witnesses. PW2, Richard Agwenye Okunya (Richard) testified that he was son to the deceased. That on 23rd March 2009 at about 6.00 p.m, he returned home from Awendo market where he had gone to sell sisal. On arrival home, he learnt of the death of the deceased whose body was lying in the bush about 5 metres from her house. He also testified that inside his mother's house, he found a roast chicken that was half eaten though he knew as a fact that the deceased did not rear any chicken. Richard also testified that on the morning of the same day, the accused had complained the loss of her chicken and that she had told one Elizabeth Adhiambo (not called as a witness) that whoever had stolen her chicken would meet death.
6. Richard further testified that on the following day, the matter was reported to Awendo police station. PW4, Ambrose Oluoch Otieno, the Assistant Chief of Kogelo sub location confirmed the fact that on 24th March 2009, he was one of the people who reported the death of the deceased to Awendo police station.
7. After the report was made, police from Awendo police station visited the scene. PW4 testified

- further that before the deceased met her death, there had been a dispute between her and the accused herein, who was her co-wife.
8. PW3, Rogers Otieno Owanje testified that on 23rd March 2009 at about 5.30 p.m., he was driving his cattle from the grazing field when he bumped into the body of the deceased. Thereafter he reported the matter to the deceased's husband and also to the accused person herein, both of whom accompanied him to the scene and identified the body as that of the deceased.
 9. The report that was made to Awendo police station was received by Number 65494 Corporal Ongoki Josephat. On receipt of the report, Cpl Ongoki went to the scene accompanied by scenes of crime personnel who took photographs of the scene. Cpl Ongoki drew sketch plans of the area and recorded witness statements. Eventually, Cpl Ongoki arrested and charged the accused with the offence of murder on the ground that the accused had issued threats against the deceased after she (accused) lost her cockrel.
 10. When Cpl Ongoki visited the deceased's house, he recovered a roasted chicken hidden inside a basket which was hanging somewhere in the house.
 11. The body of the deceased was later removed to Rapcom Hospital mortuary in Awendo for postmortem. The accused was also examined by a doctor and found fit to stand trial. Cpl Ongoki produced the two sketch plans of the scene, the seven (7) photographs, the basket in which the roasted chicken was recovered in the deceased's house, the P3 form on the mental status of the accused as **P. Exhibits 1, 2, 3 and 4** respectively.
 12. At the close of the prosecution case, counsel for the accused, Mr. C.A. Okenye, submitted that there was no iota of evidence to connect the accused with the offence of murder, nor was there any evidence to confirm the cause of death of the deceased. Although Mr. Okenye submitted that the investigating officer had not been called to shed light on why the accused had been arrested, the record clearly shows that PW1, Cpl Ongoki Josephat, was the investigating officer. He gave the following reasons for having arrested the accused:-

“I interrogated her [accused] and she denied having killed the deceased. Based on circumstantial evidence, I formed the opinion that she had committed the offence.”

13. The issue that now arises for determination is whether from the evidence so far placed on record, it can be said that the prosecution has established a *prima facie* case against the accused person herein. The Court of Appeal in the case of defined what amounts to a *prima facie* case when it rendered itself in the following words:-
14. So, what is clear from the above words is that not any type of evidence will suffice as establishing a *prima facie* case. For the prosecution to discharge its onus of establishing a *prima facie* case, the prosecution must place such evidence before the court that if the accused says nothing in response to the evidence on record, then the court properly addressing its mind to the evidence before it, can convict. Can that be said of the evidence in this case?
15. I think not. The only evidence before me is evidence of suspicion. The investigating officer testified that after hearing that the accused had allegedly uttered some threats to the deceased on suspicion that the deceased had stolen her black cockrel, and after he (PW1- the investigating officer) found a half eaten roasted chicken hidden in a basket in the deceased's house, he was convinced that the accused had murdered the deceased. The law is clear that suspicion, no matter how strong, unless supported by other cogent evidence, is no evidence at all.
16. It was alleged that the accused had told one Elizabeth Adhiambo that whoever had stolen her cockrel would meet death. The said Elizabeth Adhiambo was never called as a witness, so whatever the accused may have told Elizabeth Adhiambo remains hearsay evidence with no probative value. PW1 stated that the available circumstantial evidence led him into believing that the accused person murdered the deceased.
17. While it is true that circumstantial evidence can be used to squarely connect an accused person to an alleged offence, such evidence must be unbroken, with no chance that there is a co-existing fact that can create doubt in the mind of the court as to the guilt, or as in the instant case, the possible connection between the accused and the alleged offence. See **Karanja -vs- Republic [1982-88] 1 KAR 355.**
18. In the present case, the chain is so broken that the link between the suspicion held by PW1 and the death of the deceased remains ever so remote. In any event, the prosecution failed to adduce

medical evidence to tell the court the cause of the deceased's death; thereby widening the gap in the evidence adduced by the prosecution.

19. In the premises, and for the reasons above stated, I find that it would serve no useful purpose to put the accused person on her defence. The accused is under no duty to prove her innocence. It is the duty of the prosecution to prove every allegation of fact made against the accused person. Having failed to do so, the accused must get the benefit of the doubt.

20. Accordingly, I find that the accused herein has no case to answer and acquit her of the offence of murder under **Section 306 (1)** of the **Criminal Procedure Code**. Unless she is otherwise lawfully held, the accused is to be released from prison custody forthwith.

21. Orders accordingly.

Delivered, dated and signed this 9th day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. C.A. Okenye for Accused

Mr. Majale for State

Mr. Nyangaga - Court Assistant