



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Criminal Case 52 of 2009**

**REPUBLIC .....** **PROSECUTOR**

**VERSUS**

**MICHAEL OTIENO ODIPO .....** **ACCUSED**

**JUDGMENT**

1. The accused herein Michael Otieno Odipo was on 17<sup>th</sup> September 2009 arraigned before Muchelule, J. on an information charging him with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It was alleged that on the night of 7<sup>th</sup>/8<sup>th</sup> August 2009 at Genga sub location, Homa Bay District within Nyanza Province he murdered Varol Odhiambo Ogilo. The accused denied committing the offence and the case went to trial.

2. The prosecution called 7 witnesses. From the testimonies of the 7 witnesses, the facts of the case emerge. On the night of 7<sup>th</sup> and 8<sup>th</sup> August 2009 one Benta Adhiambo, PW7 (Benta), who is mother to the deceased left her matrimonial home where she lived with the deceased as she went for night prayers in the neighbourhood. The accused was left in the house with the deceased. When Benta returned from the night prayers at about midnight the accused opened the door for her and she entered the house. On searching for the deceased who was by then aged about 2<sup>1</sup>/<sub>2</sub> years, she found his cold body lying under the bed, after the accused had called her and asked her to assist him remove a sack of maize that had fallen on the deceased. The bag of maize was beside the bed. When Benta checked for the sack of maize which had allegedly fallen on the deceased, she found the sack intact in the place she had left it.

3. After Benta found the deceased's body under the bed, she took the body outside the house and looked at it in the moonlight. She then returned to the house with the body. The accused remained inside the house all this while. Benta screamed and that is when Rose Atieno Adongo, PW1, came to Benta's home. As there was no light in the house, Rose Atieno Adongo (Atieno) went back to her house, lit a lantern and came back with it to Benta's house. With the help of the light from Atieno's lantern, Benta noticed that the deceased's stomach was swelling while the tongue was protruding slightly from the mouth.

4. The next morning on 8<sup>th</sup> August at about 11.00 a.m., the village elder, Gilbert Osonga (Osonga) who testified as PW2 got news of the deceased's death. He went to Benta's home and found the body of the deceased lying on the floor of the house in the sitting room. Osonga enquired from Benta what had happened to the deceased. After Benta informed him that the deceased had died while in the custody of

the accused who had inherited Benta after the death of Benta's husband, Osonga took the accused into custody and escorted him to Rangwe police post. After handing the accused to the police, Osonga went back with police officers who removed the body of the deceased to Homa Bay District Hospital mortuary for preservation and subsequent post mortem.

5. When she was cross-examined, Benta told the court that the church where she went for the crusade and night prayers was about 500 metres away from her house, and that on the night in question the accused escorted her half way to the prayer meeting after the family had had the evening meal. The time was about 9.00 p.m. She could not say whether the accused went to some other place before going back to the house where the deceased and their other child Velima Awuor were sleeping. She admitted that there was a sack of maize near where the deceased was sleeping but that after the accused woke her up to tell her that the sack had fallen on the deceased, the sack of maize was in the same place where she had left it. Benta also told the court that when she and the accused discovered that the deceased had died, they both mourned for him. It was also her case that though she did not personally report the incident to the police, she went to Rangwe police post and recorded her statement.

6. This case was investigated by Number 70935 Corporal Paul Mogesi, PW6, of Rangwe police post, crime branch. He got a report of the death of the deceased on 8<sup>th</sup> August 2009 at about 2.00 p.m. from Osonga who also took the accused to the police station. Cpl. Mogesi visited the scene of crime accompanied by other police officers from Homa Bay police station. He took statements from Benta and other witnesses. After listening to Benta, Cpl. Mogesi dismissed the accused's theory that a bag of maize had fallen on the deceased. The scene of crime was photographed by police constable Salim (not called as a witness) while Corporal Mogesi took statements from witnesses. On completion of investigations the accused was arraigned in court and charged with the present offence.

7. PW3 was John Otieno (Otieno), an uncle to the deceased. Otieno met with the accused on 13<sup>th</sup> August 2009 when the accused informed him of the deceased's death. The accused also informed Otieno that the deceased had died as a result of a sack of maize falling on him. Richard Okong'o Obudho testified as PW4. The deceased was his cousin since their grandfathers were uterine brothers. On the 12<sup>th</sup> August 2009, Richard identified the body of the deceased to Dr. Ayoma Ojwang', PW5, for post mortem on the 12<sup>th</sup> August 2009.

8. According to Dr. Ojwang' there was subcutaneous haematoma around the neck of the deceased; the lungs were extremely pink though there was no sign of congestion nor was there any fracture. In Dr. Ojwang's opinion, the deceased died due to suffocation leading to asphyxia. The doctor also stated that the pink lungs were an indication of lack of oxygen which was caused by suffocation that denied oxygen to the lungs. He also opined that the suffocation could have been caused by strangulation. Dr. Ojwang' produced the post mortem report duly filled and signed by himself on 12<sup>th</sup> August 2009 as **P. Exhibit 1**.

9. During cross examination, Dr. Ojwang testified that an oversupply of sheets and blankets can cause suffocation, though this was most likely to occur in children who were less than one year old.

10. At the close of the prosecution case, the accused was put on his defence. He gave an unsworn statement and called no witnesses. He told the court that he knows nothing about the death of the deceased. He however recollected that on 7<sup>th</sup> August 2009, he woke up as usual and went to work as a mason until 5.00 p.m. At the end of his working day, he bought some items for his family and sent them with someone as he went by a "**Changaa**" drinking place where he remained until about 9.30 p.m. He then walked for about one hour to his home where he arrived at about 10.30 p.m. On arrival at the home, he found Benta in the house but she did not light the lamp as she went to open the door for him. He later learnt the lamp had no paraffin. He then went to bed and slept.

11. At about 1.00 a.m., Benta woke the accused up and asked him why he was sleeping when the deceased was dead. By the time he got out of bed, Benta was already outside. When he later sought to know how the deceased had died, Benta told him that a sack of maize had fallen over the child. Benta refused to answer any other questions from the accused. The accused then screamed and attracted the

attention of Atieno to the home. Atieno brought a lamp. Benta then disappeared from the home for about half an hour. When she came back, she refused to divulge where she had been.

12. On the following day which was 8<sup>th</sup> August 2009, at about 12.00 p.m., Osonga went to Benta's home and asked the accused to accompany him to Rangwe police post. The accused obliged and on arrival thereat, he recorded his statement before being put in cells. He was later transferred to Homa Bay police station where he stayed for 14 days before being arraigned in court. He denied any knowledge of how the deceased died. He added that it is only Benta who can say how the deceased died as she was the one with the deceased throughout the day and night until he got home at about 10.30 p.m. He expressed surprise that Benta who is the prime suspect as far as the deceased's death was concerned turned state witness. It was the accused's contention that the evidence of both Benta and Corporal Migesi was lies.

13. At the close of the defence hearing, Mr. Nyasimi advocate for the accused submitted, as he had done at the no-case to answer stage, that the evidence by the prosecution was so scanty and so shoddy that it did not meet the required standard of proof in criminal cases. He submitted that the circumstantial evidence so far on record could be explained in other ways, and that in the instant case, there were other existing circumstances that would weaken or destroy the inference of guilt on the part of the accused.

14. I have now analyzed the evidence that is on record. From that evidence, the prosecution case is anchored on circumstantial evidence as there is no direct evidence tending to connect the accused with the offence. In the circumstances, there are two issues for determination. One is whether the deceased was murdered and if so whether he was murdered by the accused.

15. Murder is defined as causing the death of another with malice aforethought. Malice aforethought is defined by **section 206** of the **Penal Code** in the following terms:

**“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –**

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- (c) an intent to commit a felony;**
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

16. Thus, malice aforethought is the intention to kill another person by deliberate planning and execution through an unlawful act or omission.

17. In the instant case, there is ample evidence that the deceased actually died. Dr. Ojwang' confirmed this fact through his oral testimony and through the postmortem report which he produced as **P. Exhibit 1**. Richard Okongo Obudho, PW4, also testified to the fact of death of the deceased. Benta also testified that when she came back from night prayers, she found the deceased's body lying cold under the bed. She screamed and Atieno rushed to the home and also confirmed that the deceased had died. Osonga and Corporal Mogesi also confirmed that they saw the deceased's body lying on the floor in the sitting room of Benta's two-roomed house. Dr. Ojwang's findings were that the deceased died from suffocation leading to asphyxia and that there was a probability the deceased had been strangled because of the presence of subcutaneous haematoma around the neck.

18. The more nagging question is whether it is the accused who murdered the deceased or whether it was

Benta who did so as alleged by the accused? The only available evidence against the accused is circumstantial evidence since nobody, including Benta saw him kill the deceased. From the evidence on record, it is clear that there was a hand involved in the death of the deceased since the medical evidence shows that the deceased died from suffocation and possible strangulation. What caused the subcutaneous haematoma around the deceased's neck? In this case, the prosecution had a duty to prove beyond any reasonable doubt that the circumstances surrounding the death of the accused point to no-one else but the accused as the person who killed the deceased. The prosecution is under a duty to rule out any other explanation other than the guilt of the accused. There should be no doubt in the mind of this court as to the guilt of the accused, and such doubt can only be removed by the prosecution placing before this court evidence which discloses the required standard of proof. In the case of **Paul –vs- The Republic [1976-80] 1 KLR 1622**, the Court of Appeal, relying on the case of **Simoni Musoke –vs- R.[1958] EA 715**, referred to an extract from **Teper –vs- R [1952] AC 480, 489** in the following words:-

**“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”**

The Court of Appeal in the **Paul Case** relied on the following extract

from **Taylor on Evidence (12<sup>th</sup> Edn.) pp 66 and 67:-**

**“Admitting that the facts sworn to me are satisfactorily proved, a further and highly difficult duty remains for the jury to perform. They must decide, not whether these facts are consistent with the prisoner’s guilt, but whether they are inconsistent with any other rational conclusion for it is only on this last hypothesis that they can safely convict the accused. The circumstances must be such as produce moral certainty to the exclusion of every reasonable doubt. Moral certainty and absence of reasonable doubt are in truth one and the same thing.”**

19. In the instant case, it is agreed between the accused and Benta that between the time the accused escorted Benta to the prayer fellowship (albeit only halfway), the deceased and his younger sister were left alone in the house in which there was no light. Benta said that she could not tell whether the accused went anywhere else after he departed from her and before they again met in their house only to find that the deceased had died. This gap in the evidence of the prosecution creates some reasonable doubt in my mind as to whether the accused can be said to have been the only adult person who was in the house between the time Benta left for the fellowship and the discovery of the body of the deceased under the bed. There are therefore other co- existing circumstances, namely the possibility of a third party having come into the house and strangled the deceased, which would in my view, weaken or destroy the inference of guilt against the accused.

20. I also think that because of the circumstances under which the deceased died, the investigating officer should have been more innovative, by taking the finger prints of the accused, and comparing the same with any marks that might have been seen around the deceased's neck. Such a procedure would have assisted the prosecution in pinning the accused to the crime and eliminating the existence of any other circumstances which would weaken or destroy the prosecution's case against the accused.

21. The accused's story is that when he came back from his visit to the “**changaa**” den he found Benta and the children in the house, and Benta did not go out after that save for 30 minutes after the family had come face to face with the fact that the deceased had died. It was incumbent upon the prosecution to displace this defence of alibi. I have considered this defence against the evidence of Benta who said that she could not tell whether or not the accused went anywhere else after he left her. It is trite law that it is not for the accused person to prove his alibi rather it is for the prosecution to displace the defence of alibi. The burden of proof always remains with the prosecution throughout the whole case. sSee **Kinyua – vs- Republic [2003] KLR 3001**). In the instant case, there is an inculpatory fact and co-existing circumstance that make the inference of the accused's guilt very weak indeed. This is despite the fact that I do not believe the accused's story.

22. Consequently therefore, though the prosecution proved that the deceased indeed died, and that he died from strangulation/asphyxia, it has not proved beyond any reasonable doubt that it was the accused who killed him with malice aforethought. I therefore, as is expected of the court in circumstances such as these, give the benefit of the doubt to the accused. I therefore find the accused not guilty on the information of murder preferred against him. He is accordingly acquitted under **section 322 (1)** of the **CPC**.

23. Unless he is otherwise lawfully held, he shall be released from prison custody forthwith.

24. Lastly, the delay in delivering this judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9<sup>th</sup> July 2012.

**Dated and delivered at Kisii this 4<sup>th</sup> day of October, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Kaburi for Nyasimi (present) for Accused

Mr. Mutai (present) for State

Mr. Bibu (present) Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**