



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 44 OF 2020

REPUBLIC

PROSECUTOR

VERSUS

ARNEST OMUKUBA OSYOLO

ACCUSED

JUDGEMENT

1. The Accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Chapter 63, Laws of Kenya. The particulars of the offence are that on the 10th day of November 2020, at Muchina Village, Wambulishe Sub-Location, Kisa Central Location, Khwisero Sub-County within Kakamega County, he murdered Philisia Moi Aseka.
2. The prosecution called six witnesses. PW1, Phoebe Aitianjiri, recalled that on 10th November 2020, she was

with Jared Obala, the Accused's son, and that, in the evening at about 6 p.m., as she was making supper, she heard her mother-in-law quarrelling and making noise. On inquiring what the matter was, the mother-in-law told her that Jared had reported to her that he found his father beating the mother. At the time, Jared was in the kitchen and confirmed the grandmother's statement. PW1 left, returned to her residence, and continued with her chores. At approximately 9 p.m., she heard the Accused pass her residence en route to her mother-in-law's house. On his way back, the Accused called her and told her that her co-wife had accomplished her duty and was dead.

3. Thereafter, Ruth Nyakawa came to PW1's home and asked if she had heard what the Accused had said. In the company of Ruth, PW1 went to the Accused's home, where they found the Accused seated on the bed and the body of the deceased lying on the floor. They checked the body and saw that it had blood at the back of the head. She asked the Accused what had happened, and he chased them away, stating he did not wish to talk further. They left, went to their home with the two people with

- whom she was with, sat outside the house, and observed the Accused pass, heading towards Nyangeni's home. Soon thereafter, the Accused returned with Nyangeni and her husband and proceeded to the Accused's residence. PW1 said that she followed them to their home, where Nyangeni said that the body should be put on the bed, but PW1 declined to touch the body. Then Nyangeni cleaned the body and put it on the bed before they started wailing.
4. It was PW1's testimony that Phyllis was the Accused's wife who had been separated from him and had been barely back for three weeks after she came back sick and could not go to the toilet or cook without assistance. She said that the Accused thought that she had HIV because she came back with HIV medicine. According to the witness, the Accused would take care of the deceased while she and Ruth would make their meals.
 5. When cross-examined, she said that the Accused did not tell them what had happened to the deceased, but before that date, he would complain that the deceased had gone out and came back and infected him. However, she did not witness the Accused assault the deceased, although

her house is 15 meters from the Accused's house. The witness stated that they did not report the incident. However, the next day, the Assistant Chief visited their home, accompanied by the Village Elder, and subsequently, the police arrived.

6. PW2 was Ruth Awaka, who said that on 10th November 2020, around 6 p.m., she went to see her mother-in-law, and while there, the Accused came and told her that her colleague was no more. He said she had died. The witness testified that she proceeded with her domestic chores, making tea, and then asked Jared to escort her to see what had happened. They passed by PW1's house, tagged her along, and found the deceased on the floor. They left PW1's house and upon seeing the Accused go to Nyangeni's house, sat outside. There, they observed the Accused return with Nyangeni and her husband. Nyangeni then called them to the Accused's house, where Nyangeni cleaned the body and oiled it before laying it on a mattress, and after that, they started wailing. The clothes that the deceased had on were removed, but according to

- the witness, they were not the clothes that she was shown in court on that day.
7. Cross-examined by Ms. Masakhwe, the witness said that she heard about the deceased's death at about 9 p.m., when the Accused told her about it and that her home is about 150 meters away from the Accused's house. She said they used light from the phone to see what was in the Accused's house and where the body of the deceased was. She testified that she saw an injury on the head and that Ernest told them to leave his house when they asked questions about the deceased. She confirmed that the deceased was sickly.
 8. PW3 was Joseph Anunda, who was a Village Elder at the time of the incident. He recalled that on 10th November 2020, at about 11 p.m., his phone rang. When he picked up the phone, the caller introduced himself as the son of the deceased and told him that he was in Mombasa and wanted to know what had happened in the village concerning his mother's death. The caller requested him to go and find out and update him. He tried to call PW1, who told him to go and see for himself. The next day, he

arrived at approximately 6 a.m. and found the door open, with Jared Obwala seated on a chair inside, with no lights on. He used his torch to flash the house and saw the body of the deceased on the floor, covered with clothes. He asked Jared what had happened, and he replied that his father had assaulted the deceased. He examined the body, and it was bleeding on the head and the hand. He then called the Assistant Chief, who directed him to have the body taken to the mortuary. He further stated that Jared, who was the only one at the home, informed him that the Accused had left at 1 a.m. The Accused returned at 8 a.m. PW3 further testified that when he asked the Accused what had happened, he denied beating the deceased but asserted that the deceased had fallen and injured herself. He advised the Accused to go and report to the police station because the villagers wanted to beat him. When the body was exposed, he saw another injury on the side which was also bleeding. There was also bleeding at the back of the head. The police later came and took the body to the mortuary, while the Accused was taken to the police station. The witness identified a stick

recovered from the bedroom and stated that he had not observed any bloodstain on it. He also said that the police went into the latrine and recovered clothes which were stained with blood. They were the clothes in court, especially the pink piece. He confirmed that the deceased had lived with the Accused intermittently and that she came back about six months before her death.

9. When cross-examined, the witness said that he recorded his statement on the day the body was taken from the scene, when the facts were still fresh in his mind. However, he is unable to read or sign. He did not object to the production of his statement as an exhibit, and the same was produced as DEx1. He reiterated that he was there when the police conducted the search and that when the deceased came back, the Accused reported to him that she had come back and that she was sickly. He further stated that when he went to the house, the body was on the floor in the sitting room, where Jared was, and when he observed the body, he saw injuries which suggested assault. There was an injury to the forehead, which was swollen and bleeding on the cheek and the

right hand. There was a cut wound which was bleeding under the back of the head and on the side, which was like a stab wound. He could not recall the colour of the deceased's clothing because it was dark. However, he could remember that she was wearing a dress. He said that the call was made to him by Diplo, who is the son of the Accused with the deceased. He also said that the Accused and the deceased had lived peacefully because he had never gotten any report of a fight between them.

10. PW4 was Dr Jemima Auma, a Medical Officer based at Vihiga County Hospital, who testified and produced the post-mortem report, which she compiled on 17th November 2020 at Sunak Hospital upon conducting an autopsy on the deceased's body. She said that on examination, she found moderate central-peripheral cyanosis, meaning a blueish tip of the fingers, lips, and tongue, and there was no obvious evidence of chronic illness. She said there were lacerations on the scalp, two deep cut wounds on the anterior aspects of the left wrist, and a deep cut on the anterior aspect of the left leg. There was also noticeable bilateral orbital swelling with bruises

on the same area, no fracture of the neck and the limbs and no evidence of recent medical intervention. Internally, the rib cage and pleura were intact, but there was slight bleeding and no clots around the lungs. On the head, there was a hematoma on the right parietal and a hematoma of the occipital, as well as the left parietal, with a visible scalp fracture on the occipital area. The nervous system had flattened contours of the brain. The Doctor stated that from the examination, she formed the opinion that the death was due to raised intracranial pressure secondary to cerebral oedema following head injury due to blunt force trauma.

11. In cross-examination, she said that it is possible that the trauma to the head could be from a fall. She said that she did not establish past medical history, but examined and found the presence of chronic illness; however, her finding was that the immediate cause of death was the injury to the head. On re-examination, she asserted that even an assault can cause similar injuries. In her view, the injuries were inconsistent with a fall because a fall would not

cause the extensive head injuries, which were more consistent with assault as opposed to a fall.

12. PW5 was a Wycliffe Shiraku Weboka who recollected that on 10th November 2020, he was at home when he heard noises at night coming from his neighbour's house, which is Jared's home. Jared is the son of the Accused. He awoke and went to Jared's home at approximately 6 a.m. On arrival, he found Jared slashing. Upon inquiry, Jared directed him to the house and stated that his mother was sleeping. He entered the house and found the woman lying on a mattress in the sitting room. He noticed that she had injuries. There was a cut to the head, to the face, to the back of the head, and there was also a cut to the left leg. Jared's aunt was present and informed him that the deceased had been killed by the husband. He got out, and shortly thereafter, the Village Elder arrived. They called the police, who arrived at 9 a.m. As the police were observing the body, the Accused arrived. The police asked him to sit down and produce the weapons used to kill the deceased. The Accused denied that he killed the deceased. The witness said that, on searching, the

deceased's clothes were located inside a latrine and that the police asked him to extract the clothes from the latrine. He then used a stick to retrieve the items from the latrine. The witness identified the items as PMFI 2(a) to 2(g). He said that he also retrieved a stick. According to the witness, the clothes had blood stains, and even the stick was blood-stained. He said that he retrieved the items while the Accused was present, and the Accused did not explain how the deceased's clothes ended up in the pit latrine. The Accused claimed that his wife fell, got injured, and died.

13. Cross-examined, PW5 said that he did not witness the Accused assault the deceased, and that the noise he heard was around 7.30 p.m. on a date he cannot recall.
14. PW6 was a police officer and testified that he had taken over the investigations but was unable to trace Jared Osyolo, who was a witness in the case, as he had absconded.
15. In his defence, the Accused chose to give a sworn statement and stated that on the 10th November 2020 at around 9 p.m., he was at home with Felici Moi Aseka, his

wife, who was ill. He said that on that night, he left her and went to the neighbour's for a drink, as they used to live alone. At the time he left, the deceased was asleep, but on arrival, he found that she had gotten out of her original area where she was sleeping. She was now lying face down on a different area of the floor. He went to wake her up but found her unresponsive. He therefore went to call neighbours, namely Phoebe Ayiti, Ruth Nyakoa, and Nyagem. They came, checked on the deceased, and informed him that she was dead. Upon confirmation of her death, they took the body, bathed it, and changed her clothes, all three of them. Then they screamed to alert the neighbours of the death; this was at around 10 p.m. He stated that he slept in the house with the body until morning, then went for a drink at Nyagem's at around 6 a.m. When he went back to the house, he found Phoebe had called the Village Elder and informed him that he had killed his wife and fled. The Village Elder is the one who told him that Phoebe had called him. He returned to his house at 7.30 a.m. to find that the Village Elder had called the Assistant Chief, who was on the way.

The Assistant Chief informed the police, who came and took the deceased's body, and arrested him. He denied killing the deceased and said that she was sickly. He also said that when Phyllis's body was being collected, there was no injury on her.

16. Upon cross-examination, he stated that he had been married to the deceased for 30 years; that they had three children; and that they had been separated for 20 years, after which she returned recently. She stayed with him for 6 months before she died. He said that she came back when she was sickly and could do nothing, as she was paralyzed on one side and therefore needed assistance. He said that he used to take care of her, and on the day of her death, she was sleeping on a mattress on the floor. When he left, she was lying face sideways; upon returning, he found her lying face downwards. According to him, she may have tried to stand and hit the table. He said that he overlooked the injuries on her head, and he did not know how she sustained the injury. According to him, aside from three neighbours, no one else entered the house, which

he had not locked, and found the door shut as he had left it.

17. At the end of the defence case, the parties filed their submissions, which I have duly considered.

Analysis and Determination

18. The first issue for determination is whether the person named as deceased truly died. There was sufficient evidence that was adduced that the woman known as Felici Moi Aseka died. The Accused confirmed that she had died. A post-mortem report was produced by the Doctor who performed an autopsy, and it confirmed the death of the person named.
19. The second issue is whether the death was due to an unlawful cause. According to the Doctor who conducted the post-mortem report, when he examined the deceased, there was no obvious stigma of chronic illness. The Doctor formed the opinion that the cause of death was raised intracranial pressure secondary to cerebral oedema following head injury due to blunt force trauma.
20. It is trite law that every homicide is presumed to be unlawful, except where circumstances make it excusable

or where it was authorized by law. See the case of ***Guzambizi, Wesonga v Republic, [1948] EACA 55.*** Article 26 of the Constitution underscores the sanctity of human life. It provides that no person should be deprived of life intentionally except to the extent authorized by the Constitution or other written law. In the circumstances, any homicide is deemed to be unlawful unless it is established that it was authorized by law, excusable by circumstances, or accidental in nature.

21. From the evidence adduced by the prosecution, there is no doubt that an assault caused the injuries that led to the deceased's demise. Contrary to what the Accused submitted in his defence, the Doctor emphasized that the injuries on the deceased were not consistent with a fall. If the deceased had indeed fallen, she would not have suffered the multiple injuries to the limbs and the multiple injuries to the head. In my view, the nature and extent of the injuries point to an assault rather than a fall. Notably, there were lacerations, deep cut wounds and a fracture on various parts of the body. There is nothing to suggest the

presence of any extenuating circumstances in the instant case to make the cause of death lawful.

22. On the question of whether the Accused has been positively identified as the person who killed the deceased, there was no eyewitness to the assault that led to the fatal injuries. The Accused's son, who allegedly witnessed the Accused assaulting the deceased, did not give evidence. The Accused's mother, to whom the report of the assault was also made, was not called as a witness. Given the scarcity of direct evidence, the prosecution relies on circumstantial evidence.

23. In **Republic v Mohammed & Another [2019] KESC 48(KLR)**, the Supreme Court laid the principles to be observed while dealing with circumstantial evidence as follows:-

“However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court “should proceed with circumspection when drawing firm inferences from circumstantial evidence.”¹¹ The court should also

consider circumstantial evidence in its totality and not in piece-meal.¹² As the Privy Council stated in Teper v. R [1952] AC at p. 489, “Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.”¹¹Teper v R [1952] A.C. 480 PC as [489]¹²S v Reddy & others 1996 (2) SACR 1 (A)

59.To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant¹³, reasonable and not speculative¹⁴, but also, in the words of the Indian Supreme Court, “the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established....”¹⁵ As was stated in the case of Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the “... the inculpatory facts must be incompatible with the innocence of the accused and incapable of

*explanation upon any other reasonable hypothesis than that of his guilt, ...”¹³Jowitt’s Dictionary of English Law, 4th Edition, Vol. 1, P. 418.¹⁴Barker, Ian. Circumstantial evidence in criminal cases [online]. *Bar News: The Journal of the NSW Bar Association* , Winter 2011: 32-39...*

60.As was further stated in the case of Musili v Republic CRA No 30 of 2013 (UR) “ to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt .” The chain must never be broken at any stage.¹⁶ In other words, there “must be no other co-existing circumstances weakening the chain of circumstances relied on ”¹⁷ and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused.¹⁸ “ Suspicion however strong, cannot provide a basis for inferring guilt. ”¹⁹

24. For a conviction to be based solely on circumstantial evidence, the evidence must be incompatible with the

- Accused's innocence and explainable only by his guilt. The court must therefore adopt a cautious approach towards circumstantial evidence as a basis for conviction.
25. The prosecution wants the court to find the Accused guilty based on the hearsay report that he was seen assaulting the deceased. In the absence of any evidence linking the Accused to the assault, there is nothing that points to his culpability. Whatever evidence was adduced is speculative.
 26. Additionally, the conduct of the Accused after the demise of his wife does not point to a person who was guilty of assaulting the deceased. He is the one who called the neighbours and informed them that his wife had died. He remained at the scene while the deceased's body was washed. The next morning, he went out to drink very early in the morning and came back to his house by 9.00 am, where he was arrested as a suspect. What the court gleans from the defence is that the Accused is a habitual drunk who may not have been able to appreciate the cause of his wife's death and assumed that because she was sickly, she had succumbed to her ailment.

27. The Prosecution's evidence failed to establish an unbreakable chain that links the Accused to the assault that led to the death of his wife. There may have been a conspiracy of silence among the Accused's family members that led to the failure to secure evidence from the Accused's mother and son. The result is that the court is left with hearsay evidence alone. In fact, the court cannot resort to the doctrine of last seen as there is no conclusive evidence that the deceased was last seen with the Accused. The Accused stated that he left the deceased and went to drink. He did not lock the house. Under such circumstances, it is hard to tell whether or not a third party entered the house and committed the assault. In my mind, there is suspicion that it is the Accused who killed his wife, but with the dearth of evidence, the suspicion alone is not sufficient to sustain a conviction. The Accused tendered a plausible defence that raised a reasonable doubt in the court's mind.
28. In the end, I find that the Prosecution failed to prove its case to the required standard. The Accused is therefore

acquitted of the charge of murder. He is forthwith set at liberty unless otherwise lawfully held.

Dated, signed, and delivered at Kakamega, this 19th day of January 2026.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Chala for the State/Prosecution

No appearance for Ms. Masakhwe for the Accused

Court Assistant: Polycap