



IN THE COURT OF APPEAL  
AT KISUMU

(CORAM: OMOLO, GITHINJI & ONYANGO OTIENO, J.J.A.)

CRIMINAL APPEAL NO. 382 OF 2010

BETWEEN

NAFTALI AULO AYHOO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

*(Appeal from the decision, judgment and findings of the High Court of Kenya at Kisumu, (Karanja, J.)  
dated 21<sup>st</sup> October, 2010*

in

H.C.C.R.C. NO. 11 OF 2008)

\*\*\*\*\*

JUDGMENT OF THE COURT

In an information dated 12<sup>th</sup> March 2008, the appellant, *Naftali Aulo Ayhoo* was arraigned in the superior court at Kisumu, on the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code in that he:-

***“On the 29<sup>th</sup> day of February, 2008 at Kiboswa market in Kisumu District within the Nyanza Province murdered Dorcas Amondi Gila.”***

He denied the charge, but after full hearing in which nine (9) witnesses testified, the learned trial Judge (J.R. Karanja) found him guilty of the offence as charged, convicted him and sentenced him to death. He was not satisfied with that conviction and sentence and hence this appeal premised on five grounds of appeal spelt out in the memorandum of appeal dated 11<sup>th</sup> July 2011 filed by him through Onsongo and Company Advocates. Those grounds are:-

- “1. The superior court failed to appreciate that the essential ingredients of the offence of murder were not established to the required standards.***
- 2. The trial court failed both in law and fact in disregarding the appellant’s defence.***
- 3. The trial court erred both in law and fact in lowering the standard of proof in a criminal trial to below that of beyond reasonable doubt to the prejudice of the appellant.***

4. ***The trial court erred both in law and in fact in disregarding the opinion of the medical doctor (an expert witness) on the possibilities of the cause of death without assigning an explanation and or reason for such a disregard or disagreement.***

5. ***The trial court erred both in law and fact in failing to appreciate that the evidence tendered by the prosecution and on record contained several and material contradictions which raised serious doubts in the case and which contradictions ought to have been resolved 1 (sic) favour of the appellant.”***

The brief facts giving rise to the entire saga was that; the appellant and the deceased were sometimes about two weeks prior to the incident living together. According to Prisca Auma Gila, (PW1) who was sister to the deceased, the two had lived together as husband and wife for five years. Hesbon Onyango Gila (PW4) confirmed that version as to the relationship between the appellant and the deceased. Both Prisca and Hesbon stated in evidence that the two had however separated for sometime before the incident with Prisca saying they had separated for two weeks prior to the incident and Hesbon saying they had separated four three weeks. We do not attach much importance to the period of separation save to note that it could have had a bearing on the motive for the act that is the subject of the case. Be that as it may, the appellant was at the relevant time operating a video shop at Kiboswa market along Kisumu – Kakamega road. Next to his video shop was another video shop owned by Mark Odhiambo Opollo (PW5) but which was operated by Kevin Okoth Opollo (PW2). These two video shops were, according to the appellant, only separated by a wall and were sharing the payment of rent to the same landlord.

On 29<sup>th</sup> February 2008, Prisca and the deceased left Kibos where Prisca was staying for Kiboswa market. Prisca said they went there to purchase vegetables and also to trace a friend of theirs, Maureen Awino (PW3) who had Dorca’s dress and to retrieve the same dress for her. They went to look for Maureen at the video shop belonging to Odhiambo and operated by Kevin both brothers of Maureen. They did not find Maureen in the video shop and decided to wait for her. Other people were also at or near the video shop. As they were still waiting, Prisca went for a short call. On her way, she met the appellant. The appellant told her that he did not want to see her (Prisca) around. The appellant, according to Prisca, had a knife. He went to Odhiambo’s video shop and Prisca saw the deceased running away followed by the appellant who beat her up and she fell down. The appellant picked the deceased up and stabbed her twice with the knife. Members of the public rushed to rescue the deceased who was then bleeding profusely. This was at about 3.00 p.m. Prisca claimed this happened in her presence as she was about 10 to 12 metres away. She was positive, it was the appellant who stabbed the deceased, but she did not know where the appellant went immediately after the incident. Prisca added that there were about three young men at the video shop where she left the deceased as she went for a short call. They had found them there. These three young men were chased away by the appellant. Kevin was at the front door of the video shop, having welcomed deceased and Prisca to the video hall where he left them and closed the rear door of the shop. While at the front door, he saw people running through the corridor at the rear. He went to check and found the deceased lying down bleeding and saying that she had been stabbed by the appellant. Kevin in his evidence quoted the deceased as saying:-

***“Toprank has stabbed with a knife.”***

He knew that the name Toprank was nickname of the appellant. He however did not see the appellant at the scene nor did he see Prisca there. He noted that the deceased had been stabbed on the left side of her neck. According to Kevin, when the deceased and Prisca arrived at the video shop, there were many other customers. Cotran Agumba (PW6) was a matatu conductor and an uncle to the deceased. On 29<sup>th</sup> February 2008 at 4.00 p.m, he got information from one Malanga, that the deceased had been stabbed at Kiboswa. He rushed to the scene but then the deceased was being taken to hospital in Kisumu. She had a stab wound on the neck. Cotran says she called him out and told him.

***“Uncle I have been killed by Toprank.”***

Cotran knew Toprank as nickname for the appellant. Deceased was then rushed to New Nyanza General Hospital (known as Russia hospital) but she passed away while undergoing treatment that day. The

appellant went to Riat Police Post on his own and claimed he had quarreled with his wife and he had hurt her. He was arrested, detained there and the next day ie. 1<sup>st</sup> March 2008, Geoffrey Amuhaia (PW9) who was then Chief Inspector of Police and was the officer in charge of the crime at Kisumu Police Station but who at the time he gave evidence was an Engineer with Ministry of Works, investigated the case and took the appellant from Riat Police Base to the Kisumu Police Station. On 4<sup>th</sup> March 2008, Dr. James Wagude (PW8) performed postmortem on the deceased body. He found that the body had stab wound on the left cervical region of the neck. In his opinion, the cause of death was cardio-respiratory arrest due to severe haemorrhagic shock secondary to a deep stab wound in the neck region due to assault. He prepared postmortem report which was produced at the hearing of the case. After the postmortem was done, Geoffrey charged the appellant with the offence of murder as stated above. We may add here that Hesbon in the meantime went to the house where the two lived and finding that people were stealing properties from the house, took away TV, mattresses and other household goods to their house.

After the prosecution's nine witnesses were heard by the trial court, the appellant was put on his defence as the trial court found a prima facie case had been established. In his sworn defence, the appellant stated that the deceased was his second wife. They lived happily for sometimes but later they separated so that at the time of the incident, they were living separately. His video shop at Kiboswa where he lived was adjacent to another video shop – Star video shop. That Star video shop was similar to his shop, in that the front and backrooms were separated by curtains. Star video shop was being run by a brother of its owner and that man Kevin (PW2) lived there. On 29<sup>th</sup> February 2008, he was at his premises. At about 3.00 p.m. to 4.00 p.m. the deceased, accompanied by her sister and three men who were strangers to him arrived there and stood outside the door opposite that of the back entrance to his video shop. They were whispering and murmuring. He opened his back door to see what the group was doing there. He asked them what they were doing there. At that juncture Prisca ran away and the deceased went to Star video shop. He ordered the three men off the premises and they left and went away. He then went after the deceased inside Star video shop but the door was locked from inside. It was a backdoor. He went to front door and found Kevin who allowed him to go to the backdoor. He went to the backdoor with Kevin and he found the deceased sitting on a bed with her legs apart. Kevin asked her why she entered his shop without his consent, and he (appellant) also asked her about her behavior. An argument ensued between him and deceased resulting into shouts between the two. Deceased became violent and threw utensils at him. The people at the video told him and deceased to leave. As he was going out the deceased violently attacked him throwing kicks at him; grabbed him by the collar and pushed him to the wall and bit him on his left shoulder. He put up resistance but deceased pulled a knife hidden under her waist and attempted to stab him. He blocked the move and in doing so he suffered injury on his left hand. In the process, the deceased fell down and injured herself on the neck with the same knife. She stood up and ran away. He followed her but in vain as she disappeared from the scene. He was bleeding profusely and had to close his business as he went for treatment. He went to his house which was about 1½ kilometers away and thereafter went for first aid. After that he went to Riat Police Post and reported the incident but while he was still there, a report was received at the Post that deceased had died. He was then locked up in the cells and was later charged. In cross examination, he admitted that although he had injured himself while blocking the knife and he was also bit by the deceased on his left shoulder, and that although he was produced before a doctor for his mental status to be checked up, he nonetheless did not tell the doctor that he had any injury and thus no P3 form was filled in respect of those alleged injuries. He denied stabbing the deceased and maintained that the deceased fell down and injured herself with the knife in the course of falling down.

The above, are the facts that the prosecution and the defence canvassed before the trial court. The learned Judge of the superior court, after considering the same in details, rejected the appellant's version, accepted prosecution's facts which he found were overwhelming and thus proved the charge. He stated in part:-

***“It is clear from the foregoing testimonies particularly by Prisca (PW7) (sic), Kevin (PW2) and Cotran (PW6) that, contrary to what the accused stated in his defence regarding the circumstances leading to the death of the deceased, it was actually the accused who was responsible for the death by his unlawful act of assaulting and causing fatal injury to the deceased.*”**

***It is evident that the accused followed the deceased into Kevin's video shop when there was no need for him to do so considering that deceased despite her presence at the scene posed no danger to him. The deceased and her sister (PW1) were their (sic) waiting for Maureen (PW3). The accused followed them into the video shop while expressing his displeasure of seeing them around. He followed them while armed with a knife. Thereafter he chased and caught up with the deceased. The deceased fell down in the process. He picked her up and stabbed her with a knife. All those was seen by the deceased's sister Prisca. Prisca did not appear to this Court to be a person inventing a story to "fix" the accused. There was nothing to suggest that she would have a reason to do so. Her evidence was precise, steadfast and credible enough for this Court to have no doubt in its mind that the deceased was indeed fatally injured by the accused and not by her falling on a knife as is implied by the accused.***

And as to who had the knife prior to the fatal incident, the learned Judge had this to say:-

***"The evidence of Prisca proved that the knife was in possession of the accused from the very start and was never at any time in possession of the deceased."***

In rejecting the appellant's defence he said:-

***"Although the accused attempted to portray himself before this Court as a loving and caring husband who only had a minor scuffle with his estranged wife and in the process she accidentally injured herself, the court did not believe him at all in view of the very strong and credible evidences against him.***

***Other than the evidence of Prisca (PW1), there was that of Kevin (PW2) and Cotran (PW6) which showed that the deceased made dying declarations in which she clearly implicated the accused. Both PW2 and PW6 had previously known the accused by his nickname of "Toprank".***

And on the issue of whether or not the appellant had formed intention to murder the deceased, known in legal corridors as *mens rea*, the learned Judge stated:-

***"The intensive and vicious attack meted against the deceased demonstrated that the accused had the necessary intention to kill the deceased despite the resistance he may have met from the deceased. To say the least, he actually "slaughtered" the deceased. His defence was clearly displaced and was nothing short of an afterthought intended to exculpate himself from his heinous act."***

In his submissions before us challenging the decision of the learned Judge of the superior court, Mr. Onsongo, the learned Counsel for the appellant submitted that no proper case was made out sufficient to warrant conviction of the appellant for any offence at all. If any evidence ever existed, he contended, then it was only such evidence that would at the very best be enough for conviction on the offence of manslaughter but certainly not of murder. His reasons for that submission were that the evidence of the doctor stated that the deceased died of only one stab wound, yet Prisca who alleged to have seen what happened talked of the deceased having been stabbed twice. That, he submitted, was a serious contradiction in evidence that was before the court. Further, he said whereas Prisca said she did see the appellant at the scene of murder at the time of the incident, Kevin was certain he did not see Prisca at the scene. Again, whereas, Prisca said the appellant was at the video shop carrying a knife, Kevin said the appellant did not get to the video shop. He concluded that line of attack by saying there were many contradictions in the sequence of events and it was not established as to whose knife was used as the murder weapon as the relatives of the deceased later carried away the alleged knife to their home where it was recovered. Lastly he submitted that the deceased fell on the knife and that is what caused her death. On his argument in support of his submissions that at the very best, manslaughter was established, Mr. Onsongo contended that there was struggle between the deceased and the appellant and thus the appellant was provoked. Further he submitted that the appellant, in finding his wife the deceased with other men and with her legs apart, the appellant was provoked and thus was unable to form and did not form any intention to kill the deceased. Mr. Kivihya, the learned Senior State Counsel opposed the appeal. In his view, the appellant, in pursuing the deceased with a knife in his hands, must have formed the intention to kill the deceased. Evidence of Kevin strengthened the evidence of Prisca and evidence of

Cotran confirmed that there was a dying declaration in which the deceased clearly stated who had inflicted the fatal wound. In his view, there was no struggle and that explains why the appellant had no injuries worth telling the doctor. In his submissions, the offence was proved beyond reasonable doubt.

This is a first appeal. We are in law enjoined to revisit the evidence afresh, analyse it, evaluate it and reach our own independent conclusion, but always bearing in mind that the trial court had the advantage of seeing the witnesses, hearing them and seeing their demeanour and make allowance for that – see ***Okeno v R (1972) EA 32***. It is not in dispute that the deceased, Dorcas died as a result of the events that took place on 29<sup>th</sup> February 2008 in which the appellant was involved. Doctor Wagude stated in evidence and it was also in the postmortem report that the deceased died as a result of cardio respiratory arrest due to severe haemorrhage shock secondary to a deep stab wound in the neck region due to assault. Whether deceased suffered two stab wounds as Prisca remembered or one stab wound as the doctor saw, one fact remains that she died as a result of one stab wound. We say so because a person may suffer many injuries, but still only one injury may be fatal while others are not fatal. In this case, one stab wound on the left cervical region of the neck was the fatal wound. Prisca, in her evidence, was positive that the appellant stabbed the deceased and she saw it all. No one else stabbed her. Whether he stabbed her twice or not, one wound was fatal.

The next issue is whether it was the appellant who stabbed the deceased as stated by Prisca or whether the deceased fell on her own knife during the struggle. On this, it was only the evidence of Prisca against that of appellant as to what actually happened at the scene although in considering the evidence of the two, other evidence must be considered as well in arriving at the answer as to which version is to be believed. It must also be put in mind that the appellant had no burden of proving who stabbed the deceased. He could as well have kept quiet in his defence and that would not have lessened the burden which was on the prosecution to prove its case beyond reasonable doubt. The appellant merely said that the deceased was making attempts to stab him with a knife but he blocked the move and in doing so suffered injury on his hand and that in the process, the deceased fell down and injured herself on the neck with that knife. He did not state as to whether she stabbed herself with the knife as she fell down or whether the knife first fell down and the deceased fell on to it and its position on the ground as the deceased fell on it. Clearly his story is not probable and certainly not coherent. Prisca on the other hand said that as she left the deceased in the video shop operated by Kevin, going for a short call, she met the appellant who told her that he did not want to see her around. That was outside the video shop. The appellant then went to the video shop with a knife and she saw deceased running away. The appellant followed her and beat her up. The deceased fell down and the appellant picked her up and stabbed her. Prisca and others went to the rescue of the deceased. That knife was later recovered having been taken to the home of the deceased's grandfather but that could be because Hesbon Onyango Gila, deceased's uncle had removed household properties from the appellant's house as he found people stealing things from that house. The record shows that the deceased told Kevin that the appellant whose nick name was Toprank, had stabbed her with a knife. As if that was not enough, the deceased also told Cotran Agumba Gila, her uncle that she had been killed by Toprank. These dying declarations were not challenged in cross examination. They were admitted in evidence. We have considered these dying declarations with the backdrop of the requirements set out by the predecessor to this Court in the cases of ***Ramazani bin M'randu (1934) 1 EACA 107***, ***R vs. Okuku s/o Eloku (1938) 5 EACA 39*** and ***Muvonya bin Msuma (1939) 6 EACA 128***. We think, they strengthen the evidence of Prisca to the effect that it was the appellant who stabbed the deceased and we too reject the appellant's version that the deceased somehow fell down and injured herself with the knife. In any case, we doubt if injury received in such a manner would have been so deep and so severe as was in this case.

The next matter we need to discuss is whether the deceased was the aggressor as the appellant stated in his defence. This includes discussion of whether the appellant was provoked or could have been provoked and thus stabbed the deceased as a result of the provocation. Prisca said she and the deceased set out from Kibos to Kiboswa to buy vegetables and to retrieve deceased's dress from Maureen the sister of both Kevin and Mark. They went to the video shop owned by Maureen's brother Mark and operated by her other brother Kevin. It was thus not out of normal that they went to that video shop for that was where they expected to find Maureen. Maureen Awino (PW3) in her evidence, admitted that deceased was her friend and that she had her clothes. She was not cross examined on that evidence. In short the deceased's

visit to that video shop was properly explained and had no sinister motives. Unfortunately for the deceased, that video shop was adjacent to the appellant's video shop and the appellant saw her there. We do not accept the appellant's allegation that the deceased went and stood outside near his door with Prisca and three men with whom they were whispering and murmuring. All Prisca said is that there were about three people at Mark's shop and those were chased away by the appellant. If those people were together with the deceased and were whispering and murmuring, Prisca would have been cross examined on that aspect. Again, although the appellant said he entered Kevin's video shop through the main door in search of the deceased and were with Kevin to the room where the deceased was sitting with her legs apart and Kevin asked deceased why she entered that room without his consent, Kevin gave completely different story. Kevin in fact heard a knock at the door of his shop and he is the one who opened for the visitors who were deceased and Prisca, his sister's friends. They wanted to see Maureen and went to sit at the video hall as Maureen was not in the shop. Kevin closed the rear door and went to the front door where he collected fees from people intending to see the video films. While there he saw people running through the corridor at the rear. On checking, he found deceased lying down saying he had been stabbed by Naftali alias Toprank. Kevin did not see the appellant and did not see Prisca. One must ask why the appellant had to come up with that story which put Kevin at the scene of the fight right from its commencement? And if his story was the truth, why was Kevin not cross examined on it? We cannot accept it, but as we have stated the prosecution had to prove its case notwithstanding that the appellant was economical with truth. In our view, if the deceased was the aggressor, and if she kicked the appellant, pushed him to the wall, threw utensils at him and made attempts to stab him with a knife, the prosecution's witnesses would have been cross examined on those aspects and the appellant would have had the doctor examine him on his injuries, fill up a P3 form for him at least when he appeared before the doctor for examination as to whether or not he was fit to stand trial. He did not do all these and we see no ground to hold that the deceased was in any way violent or was the aggressor.

Was there any evidence that the appellant in killing the deceased had *mens rea* or had intention to do so? Intention can be inferred from overt actions, or words or both. In this case, few instances need to be considered. First, it is not in dispute that the appellant and deceased lived together as husband and wife about three or so weeks prior to the incident. The appellant described the deceased as his wife. However, at the time of the incident, they were not living together. Appellant says they had misunderstanding relating to financial matters. Prisca was deceased's sister and according to Prisca, she had been visiting them. However, on 29<sup>th</sup> February 2008, the date of the incident, when Prisca and deceased visited Marks video shop, the appellant, on seeing Prisca, told her that he did not want to see her around. He then went to video shop where the deceased was with a knife and as the deceased ran away, he pursued her as he was beating her. When the deceased fell down, he lifted her and stabbed her inflicting a fatal wound which the learned Judge of the superior court described as vicious attack on the deceased. Further, he apparently left the deceased at the spot where he had stabbed her for members of the public to arrange for her being rushed to the hospital for treatment. If his wife had injured herself as he alleged in defence, and he had also been injured but not seriously, as he admitted, then if he did not have the intention to cause her grievous harm or to kill her, why would he not take steps to ensure she gets quick first aid? In our view, all these overt actions and omissions clearly demonstrate that he had formed the intention to either kill the deceased or to cause her grievous harm. Either way, under the law, the intention to murder was established.

In conclusion, having revisited the evidence afresh as was our duty to do in law, and having analysed it and evaluated it, we are of the opinion that the trial court's decision cannot be faulted. We have in this judgment considered all matters raised in this appeal and we see no merit in the appeal. In our view, the evidence that is on record established murder and there was no basis for considering the lesser offence of manslaughter as indeed the intention to commit murder was proved.

This appeal cannot stand. It is dismissed.

***Dated and delivered at Kisumu this 2<sup>nd</sup> day of NOVEMBER, 2011.***

**R. S. C. OMOLO**

.....  
**JUDGE OF APPEAL**

**E. M. GITHINJI**  
.....  
**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**  
.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**