



State v Sweta (Criminal Case 20 of 2018) [2024] KEHC 771 (KLR) (25 January 2024) (Judgment)

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE 20 OF 2018
RE ABURILI, J
JANUARY 25, 2024**

BETWEEN

STATE PROSECUTION

AND

DEDAN OUMA SWETA ACCUSED

JUDGMENT

Introduction

1. The accused person Dedan Ouma Sweta is charged with the of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* Cap 63 Laws of Kenya.
2. The particulars of the offence are that on the night of 23rd July 2018 at Kibos Market Area Kajulu Location in Kisumu East sub-county within Kisumu County, the accused murdered one Victor Owuor Okita.
3. The accused person pleaded not guilty to the charge against him and the case proceeded to full trial.
4. In support of its case, the prosecution called a total of four (4) witnesses whose testimonies are summarised below.

The Prosecution's Case

5. PW1 PC Patrick Ole Ziro testified that in August 2018 he was based at Car Wash Police Post and was on duty at the report office. It was his testimony that in January 2018 he recorded the statement of a lady called Evaline Akinyi who reported that her phone was stolen and that together with one PC Apaya, they investigated the matter.
6. PW1 testified that he went to the suspect's house where he found one man, a young girl and 2 boys. He testified that on inquiry, he became aware that the accused and Evaline were husband and wife. It was his testimony that they talked to them and the accused gave back the phone to Evaline, his wife.



- PW1 testified that after some months, the accused returned to the police post with a letter from the Children's Officer from their home area directing them to assist him collect his children from Evaline. He testified that the accused had his red motorcycle Registration No. KMDW 653U when he went to the police post and that using the motorcycle, the accused, PW1 and PC Apaya and proceeded to Evaline's residence and took the 2 boys and the young girl. He testified that they informed Evaline that as the letter was from the Children's Department, she could visit that office but she refused.
7. It was his testimony that on the 24th July 2018, at about 5.00am, whilst he was on duty, he heard the sound of 2 motorcycles moving very fast prompting him to get out of the office. He testified that he saw one greenish motorcycle which Evaline had boarded and one red motorcycle that belonged to Dedan. PW1 testified that the greenish motorcycle drove past the office and stopped at the police line, where police officers stayed upon which Evaline alighted and went towards the police quarters while screaming. He testified that the red motorcycle turned around and left followed by the greenish one and that despite his shouts for them to stop, the two motorcycles rode on.
 8. PW1 testified that later, he saw Evaline approaching as she wailed saying that she had been injured and that somebody innocent had been killed. He testified that he tried to calm her but she continued wailing and that on inquiry as to who had injured her, she responded that it was her husband and that she had not known that he was a thug. He testified that he called his in-charge and when Evaline stopped crying, he recorded her complaint in the Occurrence Book. PW1 further reiterated that Evaline was referring to her husband, the accused herein, as a thug. He identified the accused in the dock.
 9. In cross-examination, PW1 reiterated his testimony and further stated that when Evaline first reported the theft, she did not disclose that the thief was her husband but that they discovered this after their investigations. He further stated that apart from entering the report in the Occurrence Book, he did not do anything more. He also stated that he did not know when the actual killing took place.
 10. In re-examination, PW1 testified that when Evaline first reported in January, she and Dedan were not living together and that when he went with Dedan to get the children from Evaline, the couple were living separately. He further testified that he had been advising Dedan to reconcile with his wife but that as at 24th July 2018, the couple had not reconciled.
 11. PW2 Wilson Otieno Okita testified that the deceased was his younger brother. It was his testimony that on the night of 23rd July 2018, he had seen Victor at about 2.00am. He testified that he heard the deceased snoring loudly which was not normal and that at that time, the deceased's house was close to his and he could hear him from his house.
 12. PW2 testified that he went and tried to wake up the deceased by breaking the door after the deceased had failed to open when they knocked and called out to him. He testified that he was in the company of his brother Collins Onyango and wife, Irene Achieng Atieno. It was his testimony that when they first entered the house, they found the deceased lying down on the floor with blood on the floor and further that the deceased had an injury on the right side of his head and was not able to talk.
 13. PW2 testified that they took the deceased to the hospital and paid Kshs.400 that had been requested, but that within a very short time, the medical personnel came out of the room where the deceased was and returned the money to PW2 informing him that his brother was dead. It was his testimony that as he was leaving, intending to go to report to the police, he met the police on the way who were inquiring about his brother.
 14. In cross-examination, PW2 stated that when he went to check on the deceased who was snoring, he found a lady, whom he did not know, sitting outside the deceased's door. It was his testimony that he



inquired from the lady as to what had happened to his brother but the lady was silent. PW2 stated that he did not know who inflicted the injury on the deceased.

15. PW3 Dr. Lucy Ombok testified that the postmortem report was prepared by her colleague Dr. Odhiambo who was at the time attending a course of Masters in Urology, at the University of Nairobi and thus she sought leave of court to produce the report which leave was granted and she produced it as PEX1.
16. It was her testimony that the autopsy report was for one Victor Owuor Okita whose body was identified by Naftally Odero Otieno and Wilson Otieno Okita and the postmortem carried out on the 8th August 2018 at about 1320 hours. Dr. Ombok testified that the cause of death was right temporo-parietal epidural haematoma, in effect, that the deceased died of a head wound due to head injury secondary to assault.
17. Dr. Ombok also produced a medical examination report signed by Dr. Odhiambo on the 9th August 2018 as PEX2, which report was a P3 form for Everline Akinyi Owiti who had been attacked and assaulted alongside the deceased. It was her testimony that the report revealed that Everlyne's clothing had been changed and that she had stated that on the 23rd July 2018 she was assaulted by a person known to her and hit by a sharp object on the head thus sustaining cut wounds, lost blood and passed out. Dr. Ombok testified that the wounds were classified as harm.
18. In cross-examination, Dr. Ombok stated that when bodies are placed in a mortuary they are usually preserved and that whether they are preserved or not does not have a bearing as to the cause of death. She further stated that although PEX2 was dated 2 weeks from the date when the injuries were inflicted, it was sometimes possible for the doctor to approximate the date when injuries were inflicted. She stated that a P3 form and treatment notes are some of the primary medical documents and that the P3 form is filled with information from treatment notes and also actual observation.
19. PW4, Everline Akinyi Owiti testified that on the 18th July 2018 she was at Car Wash in Kisumu working at a Posho Mill which she closed at 8pm. It was her testimony that her friend, one Victor, the deceased herein, called her and informed her that he was at Kondele and asked her to wait for him.
20. PW4 testified that when Victor arrived, they boarded a vehicle which took them to Kibos where they then proceeded to an eatery joint. She testified that after eating on their way to go to her place, they were accosted by a motorbike which initially passed them then reversed to where they were then kept following them whilst shining the light from its lamp into their eyes.
21. It was her testimony that the rider of the motorbike, whom she identified as Baba Ashley, the father to her daughter, then stopped the motorbike and then cut her on the head using a panga. She testified that she asked him why he was cutting her. PW4 testified that she cried to Victor to help her run away then took off running away.
22. At this point, the defence raised an objection arguing that PW4 was not a competent witness as she was a spouse to the accused. In a ruling dated 26th November 2019, the then Judge hearing this case ruled that no evidence had been presented to show that PW4 was married to the accused and thus she was a competent witness and could proceed to give her testimony.
23. The prosecution then made several attempts to have PW4 resume to the witness stand to testify but were unsuccessful in doing so. Having failed to procure the attendance of their fourth and final witness, despite numerous instances since the year 2019, the prosecution elected to close their case.



The Defence Case

24. The accused person was placed on his defence and elected to give a sworn testimony. It was his testimony that he did not know the deceased. He testified that on the 23rd July 2018 he had children so he prepared breakfast for them then left for work at 4.00pm. He further testified that the children were young so he had to go back home and prepare dinner for them. The accused testified that on that particular day, he reached Kibos area.
25. The accused testified that he had a wife, PW4, but they had separated and that after their separation she went away with children but he got the children back. The accused testified that whenever they quarreled in the house, she would report him to Car Wash Police Station and that in the process, he met PW 1 three times. The accused denied PW1's testimony that he had seen him on the 24th July 2018 at 5.00am. He stated that they had never met at that early hour.
26. The accused testified that he was in his house and only used to leave after preparing food for his children. He testified that he paid dowry at his wife's home in 2010 and that when he took dowry, the Chief of that area, North West Gem wrote a letter. He testified that his wife came from Gem while he was born in Seme, Kit Mikayi. He testified that his Chief also wrote a letter dated 27th January 2020 saying he knew that he was married to his wife Everline. The accused denied killing Victor Owuor Okita and stated that he did not know him.
27. In cross-examination, the accused stated that he lived with Everline from 2004 but paid dowry in 2010. He denied knowing Victor and stated that Everline was bitter because he took his children from her. He stated that he heard that she was befriending Victor. The accused further stated that he was suspected because he rode a motorcycle. In re-examination, the accused testified that he heard of the relationship between Everline and Victor after his arrest.
28. DW2 Peter Nyawara the Assistant Chief, Kit Mikayi Sub-location, Seme Location testified that he knew the accused from the time of his birth in 1980 as he hailed from his locality and further that he was aware that the accused married in 2004 to one Everline Akinyi Sweta. It was his testimony that the accused also paid dowry to her parents at Gem Wagai in 2010 comprising two heads of cattle and a goat and that the accused went to him to write a letter to allow movement of animals from Seme to Gem Wagai.
29. It was his testimony that he also wrote a letter to show that he knew Everline Sweta to be a wife to the accused and that dowry had been paid under Luo Customary Law which he produced as DEX1. DW2 also produced a letter written by B. Otieno, Chief for North West Gem in Siaya sub-county that detailed where Everline was born and that dowry was paid for her as DEX2.

Analysis and Determination

30. I have carefully considered the evidence adduced in this case and the arguments in submissions by the accused's counsel. The accused faces a charge of murder contrary to section 203 of the *Penal Code*. That section defines murder as follows:

“ Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”
31. To sustain a charge of murder, the prosecution has to adduce evidence to establish that the guilt of the accused person beyond reasonable doubt. The prosecution must prove all the elements of murder which are: that there was death, the cause of that death, that the death was unlawfully caused, that it



was the accused who unlawfully killed the deceased by acts or omissions and that the accused person's acts and or omissions were with malice aforethought. The essential ingredient for the offence of murder is malice aforethought. The circumstances which constitutes malice aforethought are described under Section 206 of the *Penal Code* as follows:

- “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.”

32. The first and second issues for consideration is proof of death and its cause. The deceased persons' death was confirmed by PW2, his brother who discovered his body on the night of the incident and took him to hospital where the deceased was announced dead. PW3, Dr. Ombok also produced a postmortem report carried out by Dr. Odhiambo on the 8th August 2018 that showed that the deceased's cause of death was right temporoparietal epidural haematoma due to head injury due to assault. Accordingly, it is my finding that the prosecution has satisfied these two elements of murder beyond reasonable doubt.
33. The next question is whether the death of Victor Owuor Okita was caused by an unlawful act or omission. Article 26 (1) of *the Constitution* guarantees every person the right to life. The postmortem report prepared by Dr. Odhiambo and adduced by Dr. Ombok revealed that there was a massive force epidural haematoma on the deceased's right temporoparietal region due to an assault that was the cause of the deceased's death. The deceased was found lying in his house and groaning. There is no evidence that the injuries he sustained which were fatal, were self-inflicted or that they were justified through self-defence or in defence of property. Thus, I find that those injuries were caused by a third party and that the death of the deceased was unlawfully caused. In the circumstances, I am persuaded beyond reasonable doubt that the deceased person, Victor Owuor Okita died out of an unlawful act.
34. The other question is whether it was the accused person herein who unlawfully caused the deceased person's death. The only witness presented by the prosecution who alleged to have witnessed the deceased being assaulted after they were accosted walking together was PW4. In her testimony PW4 testified that she was in the company of the deceased when she was attacked by the accused.
35. However, before she could conclude her testimony, the defence raised an objection arguing that PW4 was not a competent witness as she was a spouse to the accused. In a ruling dated 26th November 2019, the learned judge then hearing the case herein which I only took over, ruled that no evidence had been presented to show that PW4 was married to the accused and thus she was a competent witness and could proceed to give her testimony.



36. In his defence, the accused denied committing the offence as alleged stating that he did not know who the deceased was. It was his testimony further that PW4 was his wife but that they had separated and that he had custody of their children. The accused also called DW2, his area Chief who corroborated his testimony that he was married to PW4 in a traditional ceremony and that he had paid dowry of two cows and a goat.

37. From the evidence adduced by the accused, it is noteworthy that the said Everline Akinyi Owiti is married to the accused person under Luo customary law and therefore, there exists a husband and wife relationship between the two of them as it was clearly submitted by Counsel for the accused person. Section 127 of the *Evidence Act* provides for competency of witnesses and spouses. Section 127 (3) & (4) is more applicable in the present case, and it provides as follows:

“In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged –

- (a) with the offence of bigamy; or
- (b) with offences under the *Sexual Offences Act* (No. 3 of 2006);
- (c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.”

38. Under section 127(4) of the *Evidence Act*:

“Under this Section “husband” and “wife” mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.”

39. In view of the foregoing, it can clearly be deduced that an accused person’s spouse can only be permitted to testify against another in a criminal case where the deceased or victim of the offence is a spouse of the accused, or is their child. In the instant case, the deceased was neither the accused person’s spouse nor his child. The Court of Appeal in *Simon Nchore Onyiego v Republic* [2020] eKLR held that:

“We think, with respect, that the learned Judge committed a fundamental error of law in permitting PW1 to be called as a prosecution witness against the appellant who was her husband. She just was not a competent witness against the appellant as the law expressly prohibited her being called at the instance of the prosecution. Section 127 of the *Evidence Act*, which deals with competency of spouses, provides in clear terms as follows;

“Section127

- (2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:

Provided that:

- (i) the person charged shall not be called as a witness except upon his own application;



- (ii) save as provided in subsection (3), the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;
- (iii) the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.

.....

- (4) In this section ‘husband’ and ‘wife’ mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.”

Only if called by the accused person himself is a spouse competent to testify in a criminal trial unless the charge be one of bigamy or an offence under the [Sexual Offences Act](#) or in respect of an act or omission affecting the person or property of the spouse or the children of either of them, is the spouse both competent and compellable, and not otherwise. That is the thrust and meaning of section 127(3) of the [Evidence Act](#) and the same did not apply to the case before us.”

- 40. The accused person in this case did not consent to his wife testifying against him. It is also clear that the accused person did not call his wife to testify in his favour. PW4 was a crucial witness since she claimed that she was also assaulted by the accused using a panga. And her P3 form was produced by Dr Ombok Lucy to prove the injuries that she sustained in the assault.
- 41. It follows that the prosecution ought to have filed a formal application and/or in the very least, filed an affidavit sworn by the said Everline Akinyi Owiti deponing to these facts. In the absence of the said affidavit, the court finds that her partial testimony was worthless as against the accused person herein as far as his involvement in the death of the deceased is concerned. This is due to the legal bar under section 127 of the [Evidence Act](#) reproduced herein above.
- 42. As it is, it is not clear whether or not PW4 was being coerced to testify against her husband the accused person herein especially in light of the fact that the prosecution failed to secure her subsequent attendance in court to testify on what she witnessed. I concur with the decision in [Julius Mwita Range v Republic](#) [2003] eKLR, where the Court held that:

“Elizabeth Nyaitoto was a marriage covered under section 127(4) and thus Elizabeth Nyaitoto was in law still the wife of the appellant notwithstanding that they were living separately. She was a competent witness but could only be called as a witness upon the application of the appellant who was the person charged. She was called by the prosecution and this was not proper as that was making her a compellable witness.

The defence did not apply for her to be called nor did the defence apply for her to proceed with her evidence now that she had been called and was thus made available. We do feel the learned judge was plainly right in not allowing her to testify for the prosecution and we cannot fault the judge in his well-considered decision on that aspect.”



43. Similarly, in the case of *Joseph Munyoki Kimatu v Republic* [2014] eKLR the Court of Appeal found that;

“The fact of death or injury to one’s parent does not fall within the exceptions in section 127(3) of the *evidence Act* (*supra*). It was therefore necessary for the Court to obtain the consent of both the appellant and PW3 before putting PW3 into the witness stand to testify against the appellant, her husband. Failure to take this precautionary measures was fatal to the prosecution’s case.”[Emphasis added]

44. For the reasons explained herein above, it is my finding that the said Everline Akinyi Owiti was not a competent and compellable witness in line with the provisions of Section 127 of the *Evidence Act* Cap 80 Laws of Kenya, and that therefore, she ought not to have been made to testify against the accused person herein who is also her husband on behalf of the State.

45. Taking all the above into consideration, it is noteworthy that none of the prosecution witnesses were present when the deceased was unlawfully killed. Whereas it is possible that the accused may have been involved in the alleged murder owing to the fact of the deceased being intimately involve with PW4, the wife to the accused, there is no other strong circumstantial evidence watertight enough to link the accused person to the murder of the deceased.

46. In the circumstances, I hereby expunge the evidence of PW4 from the record. Having done so, and as there is no other evidence linking the accused to the murder of the deceased Victor Victor Owuor Okita; and adopting the decision of the Court of Appeal in the case *Joseph Musyoki Kimatu* (*supra*), that evidence taken of a wife against the accused husband dealt a fatal blow to the prosecution’s case, I find and hold that the prosecution have not adduced evidence to prove the guilt of the accused person herein Dedan Ouma Sweta beyond reasonable doubt.

47. Accordingly, Dedan Ouma Sweta is found Not Guilty of the Information of murder as charged and he is hereby acquitted of the said offence.

48. Therefore, unless otherwise lawfully held, Dedan Ouma Sweta is hereby set at liberty.

49. The surety is discharged and any security deposited in court should be released to the surety forthwith.

50. The defence counsel Mr. Omondi Abande, instructed by the accused is discharged from these proceedings.

51. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

