



**Republic v Browns & 2 others (Criminal Case 3 of 2020)
[2024] KEHC 4193 (KLR) (25 April 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE 3 OF 2020
RPV WENDOH, J
APRIL 25, 2024**

BETWEEN

REPUBLIC STATE

AND

HEZEKIAH HAVILLA BROWNS 1ST ACCUSED

FREDRICK OMONDI OJWANG 2ND ACCUSED

HUMPREY ODHIAMBO 3RD ACCUSED

JUDGMENT

1. Hezekiah Havilla Browns, Fredrick Omondi Ojwang and Humprey Odhiambo hereinafter referred to as 1, 2 and 3, were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of Penal Code.
2. The particulars of the charge are that on 5/5/2020 at Koguta Village, Central Kamagambo Location, with others not before the court, murdered Roselyne Atieno Kisuge.
3. The accused denied committing the offence and the case proceeded to full hearing. Before hearing commenced, the second Accused Fredrick Omondi Ojwang absconded and the trial proceeded in his absence. The prosecution called a total of eight witnesses. When called upon to defend themselves, both Accused 1 and Accused 3 testified on Oath and did not call any other witnesses.
4. PW1, Jacob Ochieng Osongo of Kamondi Village told the court that on 5/5/2020 about 11:00 a.m, he was walking from the river going home when he met Hezekiah Havillah (Accused 1) with another person he did not know; that Accused 1 stopped to talk to him while the other person walked on towards the river. PW1 and Accused 1 went to a nearby home where bricks were being made where the Accused 1 picked a stick. PW1 left Accused 1 at the said home. On 6/5/2020, he heard noises, proceeded to the place the noises emanated from and found Roselyne’s body, by then she was dead.



He found many people; police came and took the body. He also saw the police take a stick from the scene; that the stick looked like the one the Accused 1 had picked from the home where bricks were being made. He identified the stick in court, PEXNO. 1. He informed the Assistant Chief of having seen the Accused 1 with the said stick.

5. PW2 Wright Gift Audrine Okoth is the son of the deceased. He recalled that on 5/5/2020, the mother left home about 8:00a.m to go to her farm where she was building a house, about 2 – 2 ½ Kms away where she expected material to be delivered. She did not return and that was unusual. PW2 could not trace her on her phone. The next day, he started to call relatives to find out if they had seen her and he later reported to the police station with her uncles and the police officers advised them to retrace her whereabouts. They went to the farm and split in groups. One Fred called PW2 to inform him that he had found her. PW2 observed the mother's body and noted that she had injuries to the head, eyes and blood where the body lay. Police came to the scene and the body was removed to the Rosewood mortuary. PW2 was aware that the mother had bought land from the Browns sons and had paid for it in installments but that the mother informed him that one of the Browns sons had decided to resale the land to another person; that one Saturday, before her death, Humphrey had disagreed with his mother over the said land. PW2 recalled that before that the browns related well with his mother, as if they were his sons.
6. PW3 Salmon Odhiambo Odede recalled that on 5/5/2020 about 7:30 a.m., he met his sister -in-law Roselyne, the deceased. PW3 was on a motor cycle. He gave her a lift to go to her farm at Matafari where he also had land. He took her to the place the deceased was building a home and when leaving, he saw the deceased talking to two men. He went to school and worked till evening. About 8:00p.m his wife received a call from the deceased's brother asking if he had seen the deceased. On 6/5/2020 he went to the deceased's house where he found deceased's brothers, Fred Oyage and Jabez. They found that PW2 had reported to police the previous night and they were advised to search for deceased. They proceeded to the construction site and undeveloped plot and bushy. They split into two groups; that Fred tried to go down the slope through a thicket and they heard him scream. They proceeded where Fred was and found Roselyne's dead body and it had injuries to the head and that plants around the body had turned yellow. They reported to the police station. Police recovered a mask, and a bluish bag at the scene. PW3 attended the post mortem. PW3 denied that he was able to identify the two men he saw talking to the deceased on the fateful day.
7. PW4 CPL Leonard Pamba, recalled 19/5/2020 when he and PC Moses Wambua and others travelled to Mbita DCI's office to collect a suspect of murder Fredrick Omondi Ojwang (Accused 2) who had been arrested for being a suspect in Roselyne's murder.
8. PW5 Polycap Lutta Kweyu, a Government Chemist based at Kisumu, testified that on 14/5/2020 he received some items for DNA profiling, namely vagina swab from Roseline Atieno 1B, cartilage from Roselyne Atieno 1 A, a blue mask 2B, A broken wooden club with strands of hair M 3, Wooden stick with strands of hair – M 4, a navy blue trouser (6), A white / green stripped shirt sleeved shirt No. 5. Dry leaves No. 2; swab from mouth of Hezekiah Havilla – Accused 1, and on 15/6/2020 a blood sample of Fredrick Omondi was submitted to Government Chemist. The stains were for analysis and he was to establish if there was any genetic relationship between the items. After the analysis, he found that the vaginal swab had no seminal fluid; the stains on the face mask (2B), t- shirt, the trouser and wooden club tested positive for human blood; the DNA Profile from the blood stains and hair strands found on the wooden club, stick, vaginal swab matched the deceased's DNA; the DNA profiles generated from the face mask (2B) and leaves (2A) were partial and inconclusive; the DNA profiles generated from blood stains on the T-shirt and trouser (5 & 6) belonged to 2 different unknown male persons; the DNA profiling of Hezekiah Havilla and Fredrick Omondi did not match with any of the DNA profiles



generated from the named items. He denied having received any blood samples from Humphrey – Accused 3.

9. PW6 PC Moses Wambua of DCIO Kondele, Kisumu and formerly of Rongo DCI was the investigating officer in this matter. He recalled that on 25/5/2020 Chief Inspector Kipkemboi received information of a murder at Matofari area. Together with other officers, they proceeded to the scene. At the scene, he saw the deceased's body, a wooden club with some hair; long stick with hair; face mask, dry leaves which were all near the body, with bushes around which had been disturbed. He noted a deep cut injury on the head; eyes were punctured with a sharp object, and body had no clothes. Investigations commenced and led them to Hezekiah Havilla (Accused 1 and Fredrick Omondi Ojwang (Accused 2). Hezekiah was summoned by the Chief to go to police station and he did but when they went to Fredrick's house, he had fled. They were shown his house, opened and recovered a blood-stained T – Shirt and a trouser (PEX 8 & 7). They later found Fredrick in Mbita where he had been arrested and the police went for him. After the two suspects were interrogated, they agreed to record confessions and were taken before Senior Principal Magistrate Rongo Hon. Lagat who recorded the confessions on 27/5/2021. Later, they arrested Humphrey Accused 3. Accused 3 agreed and led the police to a latrine behind a club where they recovered KCB ATM plate in the names of Roselyne Atieno Kisinga (PEX 10), National ID card for the deceased, ID NO. 7309417 (PEX 11) and Naivas Reward Card for Teresia Atieno. That the items were in an exhaustor pipe. He forwarded the items found at the scene, and deceased's cartilage to the Government analyst. PW5 stated that Accused 3 was not mentioned by witnesses but was mentioned by Accused 1 as the mastermind of the plot to kill.
10. PW7 Dr. Awinda Victor, performed post mortem on the body of the deceased on 11/5/2020. He found that the deceased sustained multiple bruises to the head, torso, chest and abdomen, bleeding, the eye balls were punctured and collapsed , deep cut wounds on the head and the frontal scalp and left parietal region. He formed the opinion that the wounds were inflicted with a sharp object. There was a deep groove on the anterior neck extending to left side of mandible; there was compression of the trachea and fracture of 1st cricoid cartilage, collapsed trachea and fractured cartilage. He formed the opinion that cause of death was asphyxiation which led to cardiovascular respiratory arrest.
11. PW8 Raymond Langat, Principal Magistrate Rongo Law Courts testified that he recorded confessions from two suspects on 27/5/2020 and 28/5/2020.
12. On 27/5/2020, he recorded Fredrick Omondi's confession after he cautioned him, confirmed that it was free of threats and allowed him to call whoever he wanted to be present and he went ahead to narrate as PW8 recorded. He did likewise for Hezekiah on 28/5/2020. He read the statements to them, allowed each to make any corrections or make amendments if necessary but none did. The Accused 1 and Accused 2 signed the statements together with their relatives. The confessions were produced in evidence as PEX 14 and 15 by consent. The defence did not object to their production
13. PW9 PC Salim Juma, formerly of Seme Police Post, Mfangano Island recalled that on 18/5/2020 while at the police station, a person who introduced himself as Fredrick Omondi informed him and the officer in charge that his brother had called to inform him that he was being sought by police and members of public for murder of a woman. They called Rongo police station and confirmed the murder of Roselyne Atieno and a report had been made. Rongo police station asked PW9 to arrest Fredrick and he escorted him to Mbita Police Station to await transfer to Rongo police station. PW9 could not see Fredrick in court.
14. When called upon to make his defence, Accused 1 Hezekiah Havilla Browns (DW1), stated that he was a businessman at Rongo and confirmed having known the deceased who had been like a mother to him and they went to the same church; that he would sometimes lend the deceased money and so would



she. He was an Mpesa operator and that even if the deceased lacked money, DW1 would make deposits for the deceased and she would pay later; that the deceased owed her Kshs. 35,000/= and that on the day of her death, the deceased called him about 6:30 a.m. asking him to go and collect the money she owed him. He found her at her farm and the deceased informed him that she had only Kshs. 5,000/=; that at that time Fredrick (Accused 2) was digging in a nearby farm and heard the conversation; that Accused 1 had a wooden stick which he used to walk because he is disabled; that the deceased started quarreling him and Fredrick (Accused 1) came to ask the deceased why she could not give accused 1 his money; that Accused 2 took the wooden stick, he fell down as Accused 2 hit the deceased on the head and she fell. Accused 1 warned Accused 2 to stop but Accused 2 threatened to kill him; that Accused 2 took the deceased's bag and ran off. Accused 1 denied killing the deceased or asking Fredrick to do so. He recalled that in his confession he said that Fredrick (Accused 2) stated that he had been sent by Humphrey (Accused 3) to kill the deceased. He admitted that some of the deceased's items were found with him and that he led the police to recover them.

15. DW3 Humphrey Odhiambo Browns (Accused 3), told the court that he was mentioned for allegedly planning the deceased's murder. He denied having been mentioned by any of the witnesses and Accused in his confession nor was he placed at the scene of the murder. He said that he sold land to the deceased and at one stage, he wanted to resale it because the deceased had not completed with payment.
16. I have reviewed the evidence adduced. This being a murder charge, the burden rests on the prosecution to prove its case beyond reasonable doubt. The term reasonable doubt was aptly captured in the English case of *Woolmington vs. DPP* (1935) A. C. 462 pp 481 where Viscount Sankey L.C. stated thus:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

17. Taking cue from the above decision, the prosecution has to prove beyond reasonable doubt the existence of the following ingredients.
 - 1) Proof of death;
 - 2) Proof that the accused caused the unlawful act or omission that led to the death;
 - 3) Proof that accused had malice aforethought.

Proof of death:

21. The death of the deceased is not in dispute. The body of the deceased was examined by PW7 Dr. Awinda on 11/5/2020. The doctor found the deceased to have sustained multiple bruises on the head and torso, chest, abdomen, the eye balls were punctured and had collapsed, 3 deep cut wounds on the head between the eyes, one on the front of the head and the one on the left parietal region extending to the occiput with the probable weapon being sharp. He also noted bruises on the thoracic wall and neck indicating force trauma to the region; that there were wounds and bruises on anterior thoracic wall and neck; that a deep groove was on the anterior surface from the left to the right mandible. He found that the trachea had been compressed with a fracture of the 1st cricoid cartilage; that trachea had



collapsed. He also found that there was bleeding in the skull, and blood in the ears. He was of the view that the injury to the head was by a blunt object. He formed the opinion that the cause of death was throttling or strangulation which resulted in lack of oxygen; that the other antecedent cause of death were the injuries found on the head and body. PW1, PW2, PW3 and PW5 all corroborated PW7's testimony. They saw the body of the deceased and the injuries inflicted on the deceased. The deceased did not die of natural causes but was murdered.

The next question is whether Accused 1, 2 and 3 caused the death by their unlawful acts or omissions.

22. The deceased was not a stranger to the Accused persons. They related closely and Accused 3 had sold land to the deceased. The question is what role each of the Accused played in the deceased's murder, if at all. The 1st Accused recorded a confession with the Rongo Senior Principal Magistrates who testified as PW8. The due process in recording confession was adhered to by the PW8. In the confession, Accused 1 admitted to having recorded it willfully in accordance with the law. In his testimony, and the said confession, Accused 1 admitted having gone to meet the deceased at her farm on the fateful day. In fact PW1 testified to having seen the Accused 1 going towards the river where the deceased's land was. Although Accused 1 admitted to having been at the scene and witnessing the murder, he denied having taken part in the said act of assaulting the deceased.
23. Accused 1 blamed Accused 2 for attacking the deceased upon hearing the disagreement between Accused 1 and the deceased over the money he had lent the deceased. On the other hand, Accused 2 in his confession made to Hon. Langat (PW8) claims to have been instigated by DW1 to hit the deceased and that he only hit her twice on the head and she fell. According to Accused 2 he only assisted Accused 1 in the murder because he was owed money by the deceased.
24. Although the Accused 1 and Accused 2 confessed on how the incident occurred, I find that they were not wholly truthful and did not disclose all that they did to the deceased. According to PW7's findings, the deceased sustained injuries inflicted by both or sharp and blunt objects. The Accused 1 and Accused 2 admit to inflicting the injuries to the head inflicted by a stick. PW7 found four deep cut wounds on the head between the eyes, frontal aspect of the head, left parietal region, all with smooth edges meaning the injuries were inflicted by a sharp object. In addition, the deceased's eyes were perforated. Accused 1 and Accused 2 never mentioned who inflicted the said injuries. Another person could not have come later to inflict injuries on a dead person. I also noted that the deceased's body was not found in a farm but in a thicket where those who found the body found it hard to access (PW2 and PW3). The murders therefore tried to conceal the murder.
25. Of great importances is the finding as to the cause of death. PW7 found that the trachea was compressed and collapsed and the cartilage fractured with a deep groove around the neck and the cause of death was asphyxiation. Accused 2 in his confession alluded to Accused 1, having asked him to strangle the deceased but he did not do it. According to Accused 1, the deceased died on the spot. I am satisfied that it is Accused 1 and Accused 2 who attacked deceased and they did not only assault her with sticks but strangled her, perforated her eyes among other injuries
26. To reinforce the fact that Accused 1 was involved in the deceased's murder, after his arrest, he led to the recovery of the deceased's personal property, namely Identity card, Naivas card and KCB ATM card PEXNO. 10, 11 and 12. The Accused 1's explanation for possession of the items that Accused 2 forced him to take them in order to withdraw money from the deceased's bank account is not plausible. If Accused 1 was not part and parcel of the plot to kill the deceased, Accused 1 should have surrendered the items to the police immediately he got them instead of hiding them in the toilet of a bar. I find the Accused 1 was deeply involved in the scheme to murder the deceased either because of the money he



was allegedly owed by deceased or land that had been sold to the deceased and the sellers had changed their minds about the sale.

27. In respect to Accused 2 who absconded, there is overwhelming evidence that he was at the scene of the murder. Accused 1's testimony is corroborated by Accused 2's own confession to PW8 on how he murdered the deceased and which was not controverted at all. Accused 2 gave himself up to the police, PW9, at Mfangano Island where he had fled after the murder.
28. As regards Accused 3, although Accused 1 mentioned that he called to tell him that he was behind the deceased's murder and that Accused 2 told him as much, this is accomplice evidence that requires corroboration so far there is no direct or circumstantial evidence connecting the Accused 3 to the deceased's murder. He is however a prime suspect especially as regards the land he wanted to repossess from the deceased.

Malice afterthought:

29. Section 206 *Penal Code* defines manslaughter as

- “a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted 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 netted 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”.

30. In the case of *Tubere s/o Ochen vs. Republic* (1945) EALR 63 East African Court of Appeal defined what constitutes malice aforethought as:-

“In determining existence or non-existence of malice, one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”

31. In this case, no doubt the deceased sustained very serious injuries to the head and neck. She met a very painful death. The injuries sustained are sufficient testament evidence that the perpetrator wanted the deceased dead. I am satisfied that the prosecution has demonstrated that Accused 1 and Accused 2 possessed malice aforethought flowing from the injuries they inflicted on the deceased. However, there is no evidence of malice aforethought against Accused 3. It is mere suspicion which however strong, cannot be the basis of a conviction.
32. In the end, I convict Accused 1 and Accused 2 (in absentia) for the offence of murder under Section 203 of the *Penal Code*. However, Accused 3 is acquitted of the charge and is set at liberty forthwith.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 25TH DAY OF APRIL, 2024.

R. WENDOH

JUDGE

In presence of; -



Ms. Ikol for the state

Mr. Achola holding brief for Mr. Nyangi for Accused

Ms. Emma –Court Assistant

