



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MIGORI**

**CRIMINAL CASE NO. 79 OF 2014**

**(FORMERLY KISII HCCR NO. 61 OF 2011)**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**CONSOLATA ODERO ODONGO ..... ACCUSED**

**JUDGMENT**

1. This court was informed on 5<sup>th</sup> July 2011 that **CONSOLATA ODERO ODONGO** (“the accused” had murdered **FRANCIS ODONGO OSAWA** (“the deceased) contrary to **section 203** as read to **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. According to the information the deceased was murdered on the night of 19<sup>th</sup> and 20<sup>th</sup> June 2011 at Aora-Jope Village, Alego West Sub-location, South Sakwa Location of Rongo District, Migori County.
2. The accused is the wife of the deceased, who at the time of death, was aged 70 years. They were living together at Aoro Jope Village. They resided in the same house with their grandson David Ochieng Otieno (PW 3). On the morning of 20<sup>th</sup> June 2011, the deceased was found dead near the entrance of his homestead. Police officers from Awendo Police Station came and removed the body and took it to Rapcom Mortuary, Awendo where Dr Emmanuel Oyier conducted a postmortem on 23<sup>rd</sup> June 2011 to establish the cause of death.
3. Dr Vitalis Owuor Ogutu (PW 5) testified and produced the postmortem report on behalf of Dr Emmanuel Oyier in accordance with **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. The significant findings from the autopsy were that the deceased had four deep cuts measuring 2cm long and bone deep on the parietal frontal region. He had a right leg fracture on the right tibia and fibula and a bone deep cut wound on the same leg measuring about 1cm. An internal examination of the head revealed a depressed skull fracture on the left parietal region with a segment pressing in on the brain. There were also multiple linear skull fractures and intracerebral hemorrhage with an injury of the left cerebral hemisphere. Dr Oyier concluded that the cause of death was severe head injury due to depressed skull fracture sustained from assault with a blunt object. Dr Oyier also examined the accused on 20<sup>th</sup> June 2011 to confirm her mental status to stand trial. He examined her and concluded that she was fit to stand trial.
4. In light of the post-mortem examination findings, I find and hold that the deceased died and he

died as a result of severe head injuries inflicted by a blunt object. The next line of inquiry is who inflicted the fatal injury and the prosecution case was as follows.

5. Martin Ben Olulo (PW 1), the first born son of the accused and deceased, recalled that on that morning he went to work as usual and at about 11.00 am, while he was in the shamba, he heard people passing by and saying that his father had died. He rushed there immediately and found the deceased lying dead near the cow pen. The deceased was dressed and he did not see any visible injuries. The accused was inside the house and his nephew, PW 3, was still in school. After a while police officers arrived at the homestead waited for PW 3 to come from school.
6. On the same morning Japheth Abonyo Owuor (PW 2), clan elder at Aoro Jope Village, recalled that while he was asleep, the accused came to his homestead at about 6.00 am. The accused told him that on the previous day her husband did not come home in the evening. She stated that later that night her husband came with two people who were speaking Swahili. She said that the two people knocked the front door so that she could open but she did not open. The people went to where the cows are kept and they forced her husband to open the entrance where the cows were. She told him that the people tried to remove the bull so she started fighting them. PW 2 then asked her whether she raised alarm but she said that she did not and that her son, PW 1, could not do anything. She said that the two people were there until 6.00 am before they ran away. PW 2 told her he would inform the Assistant Chief. Later on at about 11.00 am, PW 2 received a call from Carol Odongo, a daughter of the deceased, informing him of the death. He informed her he would call the Assistant Chief and the police at Awendo. He then proceeded to the deceased's home.
7. David Ochieng Otieno (PW 3), a grandson of the deceased, testified that he was residing in the same house with the accused and the deceased. He recalled that the evening of 19<sup>th</sup> June 2011, he returned from school at about 5.00pm and brought the cows from where they were grazing to the cow pen and left for a while. He came back home at about 7.00pm and had dinner with the accused. The deceased was not at home. Thereafter the accused went to sleep while he continued reading. When he left in the morning for school, he did not see the accused or deceased. When he came back at 1.00pm, he found many people at the homestead among them his mother, Christine Apondo Odongo (PW 4), was weeping. The accused was seated in the house and she did not talk to him. He went outside and found people surrounding the cow pen. He saw his grandfather had died. He stated that this was the first time he had seen his grandfather on that day.
8. The Assistant Chief of West Alego Sub-location, Morris Ong'injo Asindi (PW 6) was at the Chief's baraza on 20<sup>th</sup> June 2011 when he received a call from PW 2 at about 11.30 am. PW 2 informed him that the deceased body had been found in the homestead. He proceeded to the deceased's homestead with some AP officers. He found the deceased lying dead behind the kitchen. There was a rungu beside him. He observed that the deceased's legs were swollen and looked like they were broken. The accused was in the house sitting on the chair. After viewing the body he called the Chief who had gone to Awendo and who in turn informed the Police at Awendo to come.
9. The investigating officer, Inspector Richard Mutiso (PW 7) from Awendo Police Station, went to the deceased's homestead at about 4.00pm. He found the deceased's body lying outside his house. Beside the body he found a rungu (Exhibit No. 3) which he secured. He organized for the body to be taken to the mortuary. He interrogated members of public present and established that the deceased came home the previous night drunk and picked a quarrel with the accused.

The deceased complained that accused had sold a piece of land and misused the money. That the accused picked the rungu, went outside where the deceased was and assaulted him. He stated that he got the information from PW 3. He caused the accused to be charged with murder.

10. The accused elected to give sworn testimony when called upon to make her defence. She recalled that on 20<sup>th</sup> June 2011, she was at home during the day and that her husband had gone out as he used to alcohol. He came back at night at about 2.00am in the company of three strangers she could not see and who were talking in Swahili. The deceased knocked the door and he heard his voice. She did not open the door as she feared it was robbers who were known to be in the area. When she refused to open the door, they pushed the door open. They were saying "*fungua, fungua*". The deceased did not say anything and the men came into the house. She has a stick with which she hit one of them on the hand and they left. She did not see the people as it was dark and there was no light in the house. She stated that she did not know the person she hit with the rod as she thought they were a band of people. She did not go out as she was still afraid. She had heard like people were fighting outside. She closed the door and stayed in the house until 6.00 am when she looked outside saw the deceased. She then decided to go and see PW 2. PW 2 did not come immediately. She went back home and since she was so shocked, she became unconscious.
11. Defence counsel submitted that the prosecution failed to prove the case against the accused. He submitted that the prosecution did not produce direct evidence connecting the accused with the murder. He contended that the accused gave plausible testimony that other persons committed the act and she had a struggle or a fight.
12. From the evidence I am now called upon to resolve the issue whether the deceased was killed by some strangers who came to the accused home late at night in an attempt to steal cattle or whether the accused hit the deceased during a fight in the early hours of the morning.
13. According to the explanation proffered by the accused, three strangers attempted to attack her and she hit one of them. On the next morning she went to see PW 2 and explained to him what transpired on the night. This fact tended to give credibility to her version of events as she went to report the matter to a person in authority at the earliest opportunity. Her explanation is wanting in certain respects.
14. First, if indeed there was an attack then it is likely the same would have been heard by her elder son, PW 1, who lived about 200 metres from her homestead. Further, PW 3, who lived in the same house would have heard the altercation and commotion which according to her testimony went up to 6.00 am. Upon cross-examination she stated that she woke up and told him about the attackers yet nothing was put to him on cross-examination to suggest otherwise. In any case PW 3 categorically denied that he saw or spoke to his grandmother that morning. Although, the accused stated that she was afraid of the attackers, it is really unlikely that she could not have raised alarm to attract attention from the nearby homesteads. I therefore reject the defence that the attackers may have killed the deceased.
15. On the other hand there is evidence, that the deceased was a drunkard. PW 3 testified that the deceased had a habit of coming late at night. PW 4 their daughter also testified the deceased was a drunkard and that he would quarrel with the accused though they never fought. According to the PW 7 there was evidence that the accused and the deceased had a quarrel where the accused took a rungu and hit the deceased.

16. Having rejected the accused's defence that she was attacked by strangers, I find the accused is the only person who could have inflicted the injury on the deceased when he came home late that night. The injuries inflicted were of such a vicious nature and could only have been intended to cause grievous harm or in fact death. I find that the injuries were inflicted with malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

17. I therefore find the accused **CONSOLATA ODERO ODONGO** guilty of murder contrary to **section 203** of the *Penal Code*.

**DATED and DELIVERED at MIGORI this 22<sup>nd</sup> day of October 2015**

**D.S. MAJANJA**

**JUDGE**

Mr Nyakwana instructed by Odero Nyakwana and Company Advocates for the accused.

Ms Owenga, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.



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