



REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL CASE NO. 62 OF 2014

(FORMERLY KISII HCCR NO. 18 OF 2014)

BETWEEN

REPUBLIC.....PROSECUTION

AND

CYRUS ONONO OMEGA.....ACCUSED

JUDGMENT

1. **CYRUS ONONO OMEGA** (“the accused”) is charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on the 24th January 2014 at Oruba Village, Got–Uriri Sub-Location within Migori County he murdered **ROSE ANJAO VULIMU** (“the deceased”). The prosecution marshalled 7 witnesses to prove its case while the accused gave sworn testimony.

2. The deceased’s husband, John Vulimu Omega (PW 1) recalled that on 24th January 2014 he returned home in the evening after a long day’s work. He had seen his wife at lunchtime when she prepared lunch for him and the children. When he returned at home at 5.00pm, the deceased was absent and although he could hear her talking in the vicinity, he did not see her. He waited for her briefly but decided to go to a neighbour’s place to collect some chicken he had bought. As he was going his brother, Timothy Majinga, called him to inform him that the deceased was fighting with the accused and that she had collapsed. Before he could inquire further, the call was cut. He turned and went back home.

3. When he arrived home he found his aunt, Agnes Kageha Soga (PW 4), screaming. The deceased was lying at the door of his house in a pool of blood. She had deep cut wound injuries on her hands, shoulders and on the head. Many neighbours had arrived in the compound after hearing the alarm. At about 6.30pm, the Assistant Chief, William Omega (PW 2), came with administration police officers from Uriri. He called police officers from Migori who came with a vehicle and took the deceased’s body to Migori District Hospital Mortuary.

4. According to PW 1, the accused was the son of his sister. He was born before she got married. The accused was staying in his late grandmother’s house in PW 1’s homestead. PW 1 recalled that on 21st January 2014, he confronted the accused about some maize had harvested without his permission. The accused told him he had nothing to eat. When PW 1 told him that he should have asked for his permission, the accused took the sack of maize he was carrying and poured it at the entrance of PW 1’s

house. He then stated that he will do something that will shock everybody and that he will not eat that maize. PW 1 thought that the accused was joking.

5. PW 1 further testified that on 23rd January 2014 at about 10.00am, the accused started chopping a tree within the homestead. He had invited people with power saws to assist in cutting but when he saw PW 1 he ran away. PW 1 next saw the accused on 24th January 2014 at about 1.00pm. The accused asked him for his panga but PW 1 told him that the tree cutters had left with it. The accused left and went to his house as PW 1 went to have lunch his my wife.

6. William Onyaji Omega (PW 2), the Assistant Chief of Got Uriri Sub Location, South East Kanyamkago Location in Uriri testified that on 24th January 2014 at about 6.30pm, he received a call that his sister in law had been killed by the accused. After calling the District Officer and the Commanding Officer, Migori Police Station, he proceeded to the deceased's homestead. Upon arrival he saw the deceased's body in a pool of blood at the doorstep. He noted that her neck was almost severed, the left hand and right shoulders had been cut and the head had fracture. Police officers came from Migori and collected the deceased's body which they took to Migori District Hospital Mortuary. PW 2 identified the deceased's body when he attended the post mortem on 2nd February 2014.

7. PW 2 further testified that the accused was arrested on 26th January 2014 at Opassi in Suna East Division. He was called by one George Fredrick Otieno Ngaji who told him that he had seen the accused boarding a motorbike going to Ogdwedi. PW 2 told him to ensure that the accused did not run away. The accused was arrested by members of the public. In the meantime, PW 2 went with his motorbike to Opassi, arrested the accused and brought him to Migori Police Station. PW 2 confirmed that the accused was residing at the homestead with PW 1 since his childhood as he was born outside wedlock so he lived with his grandmother who had died. At the material time he was staying in his late grandmother's house. He last saw the accused on 23rd January 2014 in the morning before he left for work. He stated that the accused had been having problems in the homestead since his grandmother died. He wanted to burn charcoal for survival and started chopping trees in the homestead.

8. Agnes Kageha Soga (PW 4), the deceased's mother in law, recalled that on 24th January 2014 at about 4.00pm, she was in her house when she saw her grandchildren, who had gone to fetch water, running towards her house. They were calling her to go and see the deceased who had fallen down and was bleeding. She went towards the fence and saw the accused running towards the sugar cane plantation with a panga. When she reached the deceased's house, she found her lying near the door bleeding. She noted that the deceased was cut on the head, the arms and leg. She immediately raised alarm causing people to come. Duncan Ombima (PW 6) recalled that he had gone to fetch water with other children when he heard screaming near the Chief's home. He went to the homestead where he saw a woman on the ground bleeding. He could not tell who cut her.

9. Corporal Josephat Ongori (PW 5), a police officer working at Migori Police Station Crime Officer, was the investigating officer in this matter. The Commanding Officer called him on 24th January 2014 at around 7.00pm to attend a scene of murder at Ombo Village at Uriri. He proceeded to Ombo Village and found AP officers from Uriri AP Post. He found the body of the deceased, who was identified as Rose Anjao Vulimu, lying outside her house. He observed that her head, right shoulder, left arm, neck and fingers had been severed with what he opined was a sharp object. He did not find the weapon at the scene. He prepared a sketch plan of the place and took the body to Migori District Hospital Mortuary.

10. PW 5 commenced investigations and learnt that the accused had on 21st January 2014 uttered death threats to the family of the deceased. On 26th January 2014, PW 5 stated that he was called to rescue the accused who was being attacked by members of the public at Opassi. The accused was arrested by

members of the public and was detained by officers from Rabuor AP Post. PW 5 went there after he was called by the AP Officers. The accused was caught with a panga which PW 5 recovered and produced as an exhibit. The accused was re-arrested and taken for treatment for injuries sustained as a result of assault by the mob at Opasi. He also took the accused person for mental assessment on 28th February 2014 and it was confirmed that he was mentally fit to stand trial.

11. When the accused was put on his defence, he elected to give sworn testimony. He denied that he committed the offence. He stated that he started selling milk in 2011 in the area around the border of Nyanza and Rift Valley. He recalled that on 24th January 2014 he was in the Ogwedhi area and at about 11.00am, while he was selling milk to customers at Opasi, he saw a motorbike pass him. It was carrying a person called George whom he knew from home. The said George stopped the motorbike and greeted him. George told him that he looked like somebody related to the Assistant Chief Omega (PW 2). The accused responded that he was actually a son to the daughter of the Assistant Chief and that he had not been at home for a long time. George told him that his uncle's wife had died and that there were rumours that he was the one who killed her. He denied that he had killed her whereupon George called the Assistant Chief (PW 2) to tell him where the accused was. George then called boda boda riders who started beating him. PW 2 then arrived and told the crowd not to beat him as the matter was still being investigated. He was brought to Migori District Hospital for treatment and later charged at the High Court at Kisii.

12. At the close of the defence case, counsel for the accused submitted that the prosecution had not proved the case against the accused beyond reasonable doubt. He contended that there was no evidence connecting the accused to the offence apart from mere suspicion. He urged the court to scrutinize the evidence of the witnesses very carefully and reach a conclusion favourable to the accused. He also submitted that the accused had a credible defence which should be believed.

13. As this is a case of murder the prosecution is required to establish the following ingredients under the provisions of **section 203** and **204** of the **Penal Code**;

- a. Proof of the fact and the cause of death of the deceased.
- b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.
- c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the **Penal Code**.

14. The fact and cause of death is not in dispute. The deceased's lifeless body was found at her doorstep with several injuries which were described by PW 1, PW 2, PW 4 and PW 5. These injuries were consistent with the findings of Dr Vitalis Owuor Kogutu (PW 3), a medical officer at Migori District Hospital, who conducted the postmortem on the deceased's body on 3rd February 2014 after it had been identified by PW 2. He noted that the deceased had five deep cut wounds on the head. One of the cut wounds running across the middle of the skull was about 4 cm. There was an 8 inch cut running across the neck cutting through the cervical vertebra and spinal cord. There was also a 6 cm cut wound on the left forearm running vertically on the posterior aspect and another 6 inch cut on the right shoulder running from the shoulder joint to shoulder blade. The deceased had cut wounds on the left hand, dorsal aspect of the 3 last fingers. Internally the right jugular vessels on the neck were severed. There was a skull fracture and as a result the brain was injured. The spinal cord was cut. The doctor certified that the cause of death was as a result of the cut cervical spinal cord. He opined that the injuries were inflicted by a sharp object probably a panga.

15. The next question is who inflicted the injuries that led to the death of the deceased. In this case the

evidence is clearly circumstantial as no one saw the accused cut the deceased. PW 4 who lived close to the deceased's homestead testified that she saw the accused leave the deceased's home carrying a panga immediately after her grandchildren called her to come and see what was happening. Although the accused stated in his defence that he had not been at home for a long time and that he was carrying on business of selling milk in Ogwedhi, he was seen at least three days prior to the incident by PW 1 and PW 2. I have no reason to believe that PW 4 was lying when she testified that she saw the accused within the vicinity of the murder carrying a panga. It was at still day time and PW 4 knew the accused very well hence there was no possibility of mistaken identity.

16. As this is a case of circumstantial evidence, the prosecution had to exclude the possibility that someone else could have committed the offence. PW 1 as the husband of the deceased gave evidence that he had just left home when he was called back just to find that his wife had been murdered. He could not have committed the murder as his conduct was consistent with that of a grieving husband after the act. On the other hand, the accused was the only other adult who lived in the homestead. He was living alone in his deceased's grandmother's house within the homestead and had the motive to inflict harm on the deceased as expressed by the sentiments to PW 1 a few days before.

17. As the **case against the accused was grounded on circumstantial evidence, motive was an important element in the chain of presumptive proof. Such motive may be drawn from the facts, though proof of it is not essential to prove a crime (see *Choge v Republic* [1985] KLR 1 and *Libambula v Republic* [2003] KLR 683).** PW 1 testified how the accused had made statements to suggest that he was going to do something bad to PW 1's family and likewise PW 2 pointed to the fact that the accused wanted to cut down trees and burn charcoal which PW 1 refused. This point's to a clear motive to harm the deceased and her family.

18. The fact that the accused disappeared after the incident closes the chain of circumstantial evidence. The accused ordinarily lived with the deceased's family and would have been in mourning with them after the incident. He was found far away trying to escape. His defence that he lived in Ogwedhi area selling milk for a long time was clearly discredited by the testimony of PW 1, PW 2 and PW 4 who all stated that the accused was a resident at PW 1's homestead and was residing there. Nothing was suggested to them in cross-examination that the accused was in the business of selling milk far away from home. In any case, the accused's description of how he was arrested is consistent with the testimony of PW 2. His act of running away is clearly inconsistent with his innocence (see *Gathegu v Republic* [1984]KLR 652). In light of the entire evidence I am satisfied that the prosecution proved that it is the accused who inflicted the injuries on the deceased which caused her death.

19. The injuries inflicted on the deceased were multiple, vicious and aimed at parts of the body where the intention was to clearly kill the deceased. These are the kind of injuries inflicted with, "*An intention to cause the death of or to do grievous harm to any person, whether the person is actually killed or not*" within the meaning of **section 206(a)** of the **Penal Code**. I therefore find that the prosecution proved that the injury was inflicted with malice aforethought.

20. Having considered all the evidence, I find the accused **CYRUS ONONO OMEGA** guilty of the murder of **ROSE ANJAO VULIMU** and I therefore convict him.

DATED and DELIVERED at HOMA BAY this 16th day of November 2015

D.S. MAJANJA

JUDGE

Mr Okenye instructed by C. A. Okenya 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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