



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

CRIMINAL CASE NO 61 OF 2013

REPUBLICPROSECUTOR

VERSUS

EVERLINE OWUOR ODERO.....1ST ACCUSED

VIOLET ACHIENG ODERO.....2ND ACCUSED

JUDGEMENT

The accused persons EVERLINE OWUOR ODERO and VIOLET ACHIENG ODERO were first arraigned in court on 17th December, 2013 facing a charge of MURDER CONTRARY TO SECTION 203 AS READ WITH SECTION 204 OF THE PENAL CODE

The particulars of the charge were that;

“On the 22nd July, 2013 at an unknown time at Manyatta area Diani Beach in Kwale County in Coast region, the accused persons jointly with others not before court murdered BOILING DIETRICH”.

The accused entered a plea of “NOT GUILTY” to the charge and this trial commenced on 13th February, 2015. The prosecution led by the learned state counsel called a total of eleven (11) witnesses in support of their case. Mr Omari, Advocate acted for the accused.

Pw1, MOSES JIMALI told court that he was an Artisan who does electronic wiring. He said that in the year 2007, he was staying at the white house area where his mother also stayed. That he met Violet Achieng, the 2nd accused person who he befriended and they moved to Dallas area in Ukunda, Diani, where they stayed with the 2nd accused’s sister, Everline Awuor, the 1st accused. Pw1 said that in the month of February, 2012 the accused person’s mother visited them and said that she did not want her daughter to be married. That she stayed and left after staying with them for four (4) days. And on a day he cannot recall, he ate food that he had found served and slept for a whole day and night. He said that when he woke up, he called the 2nd accused and she told him not to contact her any more. He also said that he found his items which included a motor cycle stolen. He never saw the 2nd accused person again and it took him 6 months to recover. Pw1 went on to state that in the month of July, 2012, the accused persons called and asked him to take them to town since he had a motor bike. That they went to withdraw money in town and he returned them. He said that the following day he heard that a foreigner had been killed and police officers came to interrogate him. He was shown a photograph of the 2nd accused person and he told them about the relationship with her. He told court that he had been informed by the mother of Yusuf that a Whiteman had been killed by the 2nd accused person.

When cross examined by the defence lawyer, Pw1 said that he had stayed with the 2nd accused person for 4 years as his wife though the marriage was not solemnized. He also said that he had been called as a witness but did not clearly understand the charges the two accused persons were facing. He said that the accused persons drugged him and stole his items. He did not go to hospital but reported the matter to the police and his family. He then said that he got rumors that a white man had be killed but did not see the victim.

Pw2, NO. 48617 SERGEANT NAFTALI CHEGE, testified that he was attached to Diani Tourism police base as the in charge. He told court that on 22.7.2013, he was called by IP Hamadi, the officer in charge and told that a White man had been killed at a Diani shopping Centre. He was instructed to proceed to the scene where he found police officers from the CID and OCPD's offices. He observed the scene and saw the main door was not closed and bedroom door was open. He saw the deceased's body with a cello tape on the mouth, and his legs and hands tied to the bed by belts and bed sheets. He also saw the body was that of a white man and had injuries on the back of his head. Pw2 said that the scene of crime personnel came and took photographs and the body was taken to Pandya hospital mortuary for preservation. He said that a shamba boy at the scene informed them that the deceased had had lady visitors. He was then instructed to attend the post mortem examination of the deceased which he did as part of the investigations on 24.7.2913.

In cross examination, Pw2 said he did not know the murderers

Pw 3 SEIF BAKARI KADI, testified that on 20.7.2013 at about 7.30 am, he was called to help a mason at a construction site. He said that at about 3.00pm, he saw two girls at the gate, who said they had an appointment with the Mzee, Mr Didi. That Mr. Didi proceeded with the girls to the swimming pool where they swam and then embarked on love making. He said that when they finished, the deceased told him to lock the garage which he did and left the deceased with the two girls. Pw3 said that he returned the following day, opened the main gate and entered the compound. He found the main door open and he thought that the deceased and the two girls were still love making. Then at 1.00pm, he went and knocked on the door but no one answered. He again thought that they were still love making and left at 2.00pm. He went back to the place the following morning and found the other workers. He informed them that he had not seen the deceased the day before, that is, Sunday. They checked around and found the deceased who appeared dead and was tied with ropes. They contacted Group 4 people who were security people for the place and the police, and they came. He said that they found the deceased's laptop missing. He also said that he saw the deceased had injuries on the back of the head and a stab wound. He said that the body was taken to the morgue. He identified the accused in the dock as the two girls who had come and told him that they had an appointment with the deceased.

When cross examined, Pw3 told court that this was the first time for him to see the accused persons. He said that he worked on 20th and 21st but was not in the compound on 22nd July, 2013. He also said that he was not paid his wages for 21st July, 2013 on which day he did not find the girls nor the deceased. He then said that he had the keys but did not lock the main gate. He further said that he did not see who killed the deceased but he left the deceased in the company of the accused persons. He said that he had seen the deceased and company appear to be a happy lot. He confirmed that the deceased's legs and hands had been tied with ropes to the bed and the body had injuries on the back of the head.

Pw4, DICKSON NGONGO NGARAME, a security officer at Malindi told court that on 20.72013, at about 2.00 pm, he was on duty at Diani, Kwale, where he was working as a gardener for the deceased, DIETRICH. He said that he had worked for the deceased for about three weeks before he was employed on permanent basis and he would report to work at 8.00 am and leave at 5.00 am. He described the home as having one main gate to the compound with a stone wall of about 5 feet high with bougainvillea. He said that the deceased would come with visitors who wanted to swim at his swimming pool and he would open the gate for him. He also said that most of the deceased's guest were ladies. Pw4 said that there were two sets of keys to the main gate, whereby he had custody of one and the cook the other one. And on 20.7.2013, he left at 2.00pm and gave his key to the main gate to Seif (Pw 3). He met Pw3, and the cook at the deceased's home where they found the main door half open which was unusual. Pw4 asked Elizabeth, the cook to call their boss an inform him that Seif (Pw3) was waiting for his payment. She

used his phone to call their boss but there was no response. They then went round the house and saw the deceased's hands and legs tied against the bed. They saw he had injuries on the head and the nose had bled. They then called the Group 4 Company by alarm as they were the ones providing security. The police were also called, photographs of the scene taken and boy taken away.

In cross examination, Pw4 told court that he was on duty at the deceased's home on 20.7.2013 and left at 2.30 pm. He did not report on duty on 21.7.2013. He said he left Seif (Pw3) with the deceased and he is also the one who was on duty on 21.7.2013. He could not tell whether Seif was paid his dues or not. He also said that he did not see the accused and that it is Pw3 who first saw the body through the window. He further said that the house keys were with the deceased and Elizabeth and the premises was under the surveillance by G4S group. He said that he did not know who killed the deceased.

Pw5, NO. 60026 Corporal EMANUEL KONDO of scenes of crime, Kwale county, gazetted under No. 5853 of 31.8.2001 recalled how on 22.7.2013 he received a digital memory from PC Naibel of CID Msamwbeni who informed him that the card contained photographic images taken from a scene of murder within Diani beach. He was requested to make photographic enlargement and printed photographs showing;

- (a) the general view of the house where the crime had been committed.- No 1-2
- (b) the swimming pool area No.3
- (c) close up view of three padlocks and three bunches of keys on ground mat – No.4
- (d) general view of motor vehicle registration No KAV 562 which was parked in the compound – No.5
- (e) general view of interior room where the crime had taken place, - No. 6-7
- (f) general view of a section of the house used as exercise area for fitness –No. 8
- (g) General view of a dead body of a European on the bed with hand and legs tied together No. 13,14,15, 16 and 17
- (h) close up view of the deceased showing his facial view No. 18-19.

He prepared a certificate to this effect which he produced as an exhibit in this case together with the photographs.

In cross examination, Pw5 confirmed that he did not visit the scene.

Pw6, ELIZABETH ANYANGO MALALU, told court that she had worked for the deceased for six (6) years and confirmed that he used to enjoy the company of visitors, both male and female. She said that she was on duty on 20.7.2013, which was a Saturday and did not report on Sunday as she was off duty. She then said that on 22nd, which was on Monday a gardener by the name Seif came there and demanded to be paid his dues for the two days he had worked. The deceased was not answering calls and Pw6 asked the colleagues that they go round and check in the bed room. They did so and found the deceased tied with ropes on his legs. Pw6 then pressed the alarm and G4 security came. They commenced investigations and called the police to the scene. Pw6 said that the deceased's home had a bougainvillea fence and a grill gate. She then said that she had a set of keys for the gate, while Dickson (Pw4) and the deceased had other sets hence the ones who had access to the compound. She could not tell who killed the deceased.

When cross examined, Pw6 said that she left Seif (Pw3) with the deceased. She also said that she had not known Seif (Pw3) for long and so she did not know his full names. She then said that she found the door to the deceased's house open on 22nd July 2013 and that it was Pw3 who first saw the deceased's

body . She further said that she did not know who else was in the compound on 21st July, 2013.

Pw7, MICHAEL NGUMBAO KATANA told court that he had worked for the deceased for close to ten (10) years and on 20.7.2013, he was constructing a building for him. He said that on this day he was with Eliza (Pw6) and Dickson (Pw5) He went off duty at 2.00pm, leaving behind a reliever by the name Seif (Pw3). He also said that they left him with the keys on this day. He then said that he received information on a Monday that the deceased had been killed. He also said that he did not know who killed the deceased.

Pw8, DIETRICH BUILING introduced himself as the son of the deceased and that he had been living in Kenya since 1990. He stated that he got information while in Germany that his father had been killed and was required to attend the post mortem examination. He travelled back to Kenya on 24.7.2013 and proceeded to hospital where he identified the deceased's body as that of his father. He said that he saw his father had bled from the nose and had facial injuries. He also said that he used to visit his father at Diani where he lived in a big house within a swimming pool and there was a fence and gate.

Pw9, DR. FRANCIS OTIENO, is a medical officer attached to Coast General hospital with a degree in Medicine and Surgery from the University of Nairobi. He told court that he had been assisting the pathologist for 6 years having conducted more than NINE hundred post mortem examinations. He testified that he conducted the postmortem examination on the body of deceased, BOILING DIETRICH on 24.7.2013, which body was identified to him by one DIETRICH PAUL GERHARDT. He established that there was "anoxia" which is oxygen deprivation of the tissues with swelling of both eye lids and bleeding into the cages. He also observed a cut wound measuring 2 cm in length above the left eye with fresh bruises on the left foot

- (a) faint marks on the hands attributable to ropes;
- (c) evidence of enlargement of the left side of the heart;
- (d) evidence of clotting of blood caused in people with high cholesterol levels
- (e) enlarged prostate and uritis
- (f) bleeding on the scalp into the brain but no fractures;

He concluded that the assault could have accelerated the death and formed an opinion that the cause of death was bleeding into the brain caused by a blunt injury. He filled and signed the post mortem examination report which he produced as exhibit P3.

Pw10, No. 234741 C.I.P KHAMALA MAENDE, a liaison officer with the police force testified that on 22.7.2013, he was the acting in charge of the Tourist police, Diani Base when he received a call from the Group 4 security company's telephone operator that one of their clients, one Mr BOILING DIETRICH, a German aged 81 years old had been found dead by the workers at his house. He, together with his colleagues Sergeant Chege and PC driver Seror proceeded to the scene where they found three (3) guards from Group 4s at the scene together with the workers of the deceased. They were led into the deceased's bedroom where they found him lying down and dead with his hands tied from behind with a masking tape and the legs tied together with a leather belt. He said that they checked the body and saw it had bruises on the back of the neck and knees. He then informed the D.C.I.O, one Mr. Mwendwa and O.C.P.D, and both came to the scene with the scenes of crime personnel, Corporal Kondo.

Pw10, went onto testify that he commenced investigations by interrogating the three workers of the deceased, who were Elizabeth, the house help, Dickson the regular shamba boy and Bakari Seif, the casual gardener. He then learnt that the three workers had all reported on duty on 20.7.2013 which was a Saturday in the afternoon, Elizabeth (Pw 6)and Dickson(Pw4) left for their homes leaving Bakari Seif behind. He was then informed by Bakari Seif (Pw3) that after about 30 minutes of their departure, two (2) ladies knocked on the gate and he attended to them. That these ladies told him that they had an

appointment with Mr BOILING and he led them to his house directly. And that after a short while the two ladies and Mr. Boiling went to the swimming pool while wrapped in towels. That he (Pw3) was working near the pool and so Mr. Boiling directed that he gets into the house since he wanted to enjoy himself with the two ladies. That they Enjoyed themselves in the pool until 5.00pm when they got into the house. He (Pw3) then left for his home. Pw10 went on to state that Pw3 told him that he reported back on duty on 21.7.2013 and proceeded to work but did not see Mr. Boiling. He had not been paid and so he went to knock at the door to Mr Boiling bedroom but there was no response. He then left and returned on 23.7.2013, which was a Monday to claim his dues for work done over the weekend. Pw10 stated that Pw3 and other workers knocked on the bedroom door but there was no response. They called him on his phone and again no response. That they then decided to check into the bedroom through a window behind and they saw Mr Boiling lying dead on his bed. They then pressed for group 4 security personnel who rushed to the scene and they then informed them of what they had found.

C.I.P Maende told court that the body was moved to Pandya hospital and he forwarded the file to the D.C.I.O, Msambweni for further investigations. He later learnt that on December 2013, two suspects were arrested and charged with the offence of the murder of Mr Boiling Dietrich. He said that the arrest of the accused persons was done by corporal Mureithi.

When cross examined Pw10 told court that when they arrived at the scene, they secured the same. He also said that the work of dusting the door/scene is the work of scenes of crime personnel. He further told court that he handed over the work and only engaged himself with Bakari (Pw3) and two other workers, so that all he has told court, is what they told him. He said that Pw3 was left behind and he told him he locked the gate from inside and the deceased had the key. He said that Bakari (Pw3) told him that when he came back the following day, he found the gate opened. He did not say who opened it. He finally said that Pw3 did not tell him that he witnessed the murder and that the evidence is based on circumstance.

Pw11 , NO. 63173 PC MOSES NIBEI told court that on 3.12.2013 he was called by the DCIO, Diani, MWENDA ETAIBA who he was working with then and informed him that there were two murder suspects who were being held in the cells at Diani police station. That the DCIO also informed him that a report involving a murder case had been made at the police station and a file opened by the Corporal in Charge of Tourist police in Diani which he required him to go and collect. Pw11 proceeded to the Tourist police unit where he met Corporal Chege and he handed over the file to him while informing him that there were two lady suspects who had been arrested by Corporal Muriithi. He proceeded to see Corporal Muriithi with the file and he confirmed to him that the two lady suspects were in the cells. He even showed him the lady suspects who were Everline Odera Owuor and Violet Achieng OODera, the accused persons in this case. He collected and took them to their office where he recorded their statements and took their finger prints before returning them to the cells. He then prepared a charge sheet where he charged them with the offence of murder

In cross examination, Pw 11 said that he was only involved in recording the statements for the two accused persons, taking their finger prints and charging them by using the evidence that was already recorded by the witnesses.

At the close of the prosecution case, the accused persons were found to have a case to answer and were called upon to defend themselves pursuant to section 306 (2) of the Criminal Procedure Code. The accused elected through their counsel elected to give unsworn defence in which they denied having intentionally killed the deceased. They called no witnesses.

The accused EVERLINE AWUOR ODERO, told court that on 3.12.2013, her sister, VIOLET ACHIENG ODERO, who is also her co- accused in this case was plaiting her hair outside the house at Ukunda Darate in Diani when people who included one MOSES JIMALI (Pw1) came there. She explained that Moses Jimali had been her sister's friend and they had cohabited but disagreed. She also said that the second person in the group of people was SEIF BAKARI (Pw3) who was JIMALI'S friend. She said that there was a third man whose name she did not know. The 1st accused person went on to state that Pw1 and Pw2 pointed them out to this 3rd person that "these are the girls". The accused persons asked what the problem was and without telling them anything, the 3rd person who later

introduced himself to them as they were heading towards Diani as Corporal Muriithi, asked them to lock the door of the house and leave. He told them that they would know what the problem was ahead. They were taken to Diani police station where they were placed in the cells. The 1st accused said that on interrogation she denied knowing about any death, the area where the incident occurred or knowing the deceased. Her finger prints were taken and she was arraigned in court, having been jointly charged with her sister Violet, for the offence of murder, which she denies to date.

According to the 1st accused person, the evidence of Pw1 and Pw3 against them was out of a grudge because her sister Violet who had been a friend to Pw1 had left him and they had vowed to land them in a ditch so as to teach them that this was the Coast and not upcountry. She also said that the salon where her sister, Violet, who is her co-accused, was working is opposite the police station at Diani so that if they committed such an offence, they would have ran away as it took about six (6) months to have them arrested.

The 2nd accused VIOLET ACHIENG ODERO, in her unsworn defence also gave similar evidence as that of her co-accused, EVERLINE. She testified as to how they were arrested and how they ended up being taken to Diani police station where they were charged with the offence of murder, which she still denies. She also confirmed that Pw1 had been her friend and they had lived together in the same house but disagreed. She also confirmed that he was also a friend of Pw4 and their evidence was instigated by a grudge. She said that it was Pw1 who caused them to be arrested.

The defence filed written submissions upon the close of the prosecution's where they stated that the "mens rea" and "actus reus" remained unproven and in the consequent, the possible outcome in this case was an acquittal.

Submissions were also filed by the advocate representing the victim's family, who stated that the prosecution's evidence was uncontroverted by the accused person's unsworn statement in defence which could not be tested through cross examination, hence rendered almost irrelevant. He urged the court to find the accused persons guilty as charged and convict them.

It is now upon this court to render judgment in this case.

The offence of murder is defined in section 203 of the Penal Code as;

"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder"

This definition very well captured in the latin maxim

"Actus non facit reum, nisi mens sit rea" which means "The act itself does not constitute guilt unless done with a guilty mind."

From this, three critical ingredients require to be proved in order to establish the offence of murder. These are:

- (1) the prosecution must prove the fact as well as cause of death of the deceased;
- (2) the prosecution must prove that the accused committed the unlawful act that led to the death of the deceased;
- (3) the prosecution must prove that at the time the unlawful act or omission was committed the accused had malice aforethought.

The second ingredient constitutes the "actus reus" or action of the offence of murder while the third ingredient constitutes the "mens rea" as the guilty mind required to prove the offence of murder. To sustain the charge of murder, these ingredients, must, according to the law be proved beyond reasonable

doubt.

For the fact of death, it was the testimony of Pw2,Pw3,Pw4 Pw5, Pw6, Pw7, Pw8, Pw9 and Pw10 that the deceased was found dead in his house at Manyatta area in Diani Beach on 22nd July 2013. The identity of the deceased was provided by Pw8, the deceased's son, who told the court that upon receiving the news of his father's death, he travelled from Germany and was able to identify the body to the doctor for post mortem examination. Pw9, Dr FRANCIS OTIENO confirmed he performed post mortem examination on the body of the deceased to establish the cause of his death.

It is not in contention or denied by the accused that the deceased died. In fact, according to both accused in their unsworn defence, they neither knew the deceased, where he lived nor how he died.

On the question of the cause of the deceased's death, there was also no contention. Pw2, Pw3, Pw4, Pw5, Pw6, Pw7 and Pw10 all said they found the deceased's hands and legs tied to the bed, and he had blood on his nose. They also observed injuries on the back of his head. Pw5 No. 60026 CORPORAL EMMANUEL KONDO, the scenes of crime officer, did not visit the scene of crime but produced photographs he printed from a digital memory which was handed over to him by PC Naibei. He took nineteen (19) photographs and photographs No 13,14,15,16,17,18,and 19 show an adult man lying on the bed with his legs and hands tied on the bed. There was conclusive medical evidence as to the cause of the deceased's death by DR F. P. OTIENO that the deceased died due to subarachnoid Hemorrhage due to hypertensive heart disease and possibly blunt object injury to the head. (Exhibit P3). He testified that he observed;

- These was "cyanosis" which is oxygen deprivation of the tissues with swelling of both eyelids and bleeding into the cages;
- a cut wound measuring 2 cm in length above the left cage with fresh bruises on the left foot;
- faint marks on the hands attributed to ropes;
- evidence of enlargement of the left side of the head;
- evidence of clotting of blood caused in people with high cholesterol levels;
- enlarged prostate and uritus;
- bleeding in the scalp into the brain but no fractures.

This evidence was not challenged or controverted by the defence in any way . It is therefore clear that the deceased's cause of death has been proved beyond reasonable doubt.

It is not sufficient to prove a charge of murder by merely proving a death occurred and what its cause was. The fact that the prosecution is further required to prove is whether the accused persons caused the deceased person's death, and if they did , whether they did it with malice aforethought.

The accused persons were charged with the offence of murder of the deceased, DIETRICH BOILING. The prosecution adduced evidence of eleven (11) witnesses, out of whom only PW3, SEIF BAKRI SADI, gave evidence that on 20.7.2013, he was working at the deceased's compound with other employees namely DICKSON NGONYO NGARAMA (Pw4), ELIZABETH ANYANGO MALALU (Pw6) and MICHAEL NGUMBAO KATANA (Pw7) , who reported off duty at around 2.00pm and left him behind. That he then saw the two Accused persons come there and they told him they had an appointment with the deceased. He let them in and they proceeded to the deceased's house. Pw3 said that the deceased and the two girls proceeded to the pool soon after and he saw them engage in love making as they swam. That when they finished, the deceased told him to lock the garage, which he did and he left him with the accused persons. He said he did not see or meet the deceased the following day when he returned to work and collect his dues. He said that he saw him on 22.7.2013 tied to the bed and was already dead.

The analysis of the evidence adduced by all the witnesses, reveals that the accused persons were suspected and arrested for the murder of the deceased from the testimony of Pw3, who alleged that he left them having fun with him at this home on the 20.7.2013, and two days later he was found dead.

It is worth noting that none of these witnesses, even the said Pw3, witnessed the 1st and 2nd accused persons tie up and cause the death of the deceased through any action and or omission.

It is also worth noting that it is only Pw3 who said he saw the 1st and 2nd accused persons come to the deceased's home. And it is further worth noting that he told the court that it was the first time for him to see these ladies. His evidence of seeing and leaving the 1st and 2nd accused persons with the deceased at his home on 20.7.2013 was not corroborated by any other witness or evidence.

Both accused persons in their defences, though unsworn, deny knowing the deceased or even going to his home. They said that they were arrested and charged with the said offence because of a grudge, Pw1, Moses Jimali, who was a friend of 2nd accused, had against them because of the 2nd accused leaving him. And that Pw3, was his friend and they were together when they threatened to teach them that this was the Coast. While this piece of their evidence could not be tested as to its credibility, a look at the evidence of Pw1 reveals that it had no worth to the case in question. It is not even clear how he was involved in the whole scene for him to have been included as a witness

In my analysis of the entire evidence, I find no direct or circumstantial evidence that the accused committed the offence. I am convinced that the investigating officers in this case left out key leads such as dusting the scene, body of the deceased and taking of finger prints of all those who had been at the home of the deceased or worked for the deceased before he died, for comparison, establishing the motive of the said murder and perusing any lead with regard to this.

Simply put, the police did not exhaust all avenues of investigation available to the state in establishing the culprits in this case.

All in all, I find that the state has not proved the charge of murder by failing to prove who caused the murder of the deceased. In that case, the issue of malice aforethought does not arise.

I therefore find that the circumstantial evidence adduced by Pw3 against the accused persons insufficient to warrant this court to draw an inference of their guilt.

As a result, the prosecution has failed to discharge the burden placed upon it of establishing the guilt of the accused persons beyond any reasonable doubt.

The accused persons are hence found not guilty of the offence of the murder of the deceased DIETRICH BOILING and are acquitted accordingly.

Judgement delivered, signed and dated this 5th day of May 2017.

D.O.CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

Mr Egunza for the accused persons

Mr Mutugi watching brief for the deceased's family

C/clerk – Buoro Steve