



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

CRIMINAL CASE NO. 11 OF 2020

REPUBLIC.....PROSECUTION

VERSUS

KENNEDY MULONGO SIMIYU.....ACCUSED

J U D G M E N T

The accused **KENNEDY MULONGO SIMIYU** is charged with the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on the night of the 21st and 22nd February, 2020 at Sesik village of Chongeywo location within Bungoma county murdered **LYDIA NAKHUMICHA NYONGESA**.

The case for the prosecution is that the accused is the husband of the deceased **Lydia Nakumicha Nyongesa**. On 22.2.2020 at 8 a.m. **PW3 Gladys Nanjala** a village elder received a report that accused had assaulted one Doris. She in company of nyumba kumi officials went to the home of accused. They found the accused present. They also found the deceased seated on a seat. They observed and saw she had injuries on her head and was not responding to questions. Next to her they saw a panga and rungu that were blood stained. She informed the chief who called police officers and apprehended the accused who was trying to go to Busia.

PW6 Doris Nekesa is the wife of Wycliffe who is the brother of accused. On 21.2.2020 at 7 p.m. Doris was at her home when accused went there and asked her why she had reported his brother to nyumba kumi. The accused then assaulted her and went away. On 22.2.2020 she went and reported the incident to Nyumba kumi officials. Together with village elder, they went to the house of accused with the aim of arresting him for assaulting Doris. On arrival they found accused in the house. They found the deceased on a chair with injuries. Police officers were called and arrested the accused.

PW1 Catherine Nafula Nyongesa the sister of the deceased testified that on 22.2.2020 she received information that deceased had died. She went to the home of deceased. She and other people found accused in the house and the deceased on a seat. On observing deceased she saw deceased had injuries on eyes and back of the neck. She also saw blood stains on household items. The accused was present. They recovered a panga and sticks which were blood stained. She confirmed that accused and deceased were married with 5 children.

On cross examination she stated that when she asked accused why he had killed the deceased, accused replied that it was Doris. She confirmed that when she arrived she found the deceased already dead.

PW2 Evans Wafula Nyongesa the brother of the deceased received information that accused had killed the deceased. He went there and found accused present in the house and deceased with cut wound on head and the left arm was bent. He asked accused why he had done so and accused said it was Doris who had done that. He saw there was a panga and stick in the house which were blood stained. He informed the chief and was apprehended by members of public when he wanted to walk away. On being cross examined he testified that on arrival he found the deceased already dead.

PW5 Micah Mulongo's evidence was taken on 20.7.2020 but midway through his evidence the internet connection became poor and he was unable to complete his testimony. He however stated that he saw the accused hitting the deceased on the material night while they were in the house.

PW8 FNO. 77098 Copl Geoffrey Too the Investigating Officer testified that upon instruction of the OCS Kipsigeon police station he visited the scene. On entering the house he saw the body of the deceased, lying down. The body had injuries on the head which was bleeding. He did not find accused present as he had been beaten by members of the public and was undergoing treatment at Kapsiro hospital.

PW5 Dr. Wanambisi Watta who performed the post mortem examination on body of deceased found she had a deep cut wound on left side

of the head which caused injury to the brain. He formed opinion that cause of death was due to brain trauma injury.

The accused on being placed on his defence gave sworn evidence. He testified that the deceased was his wife. On the night of 21-22 February 2020 he was in his house with children. Deceased was not present. On 22.2.2020 the deceased knocked the door and accused opened for her. She entered the house in a hurry and went to sleep. He then heard her calling over. He went there and found when she was in bad shape. He went to call neighbours who came and found she was dead. His inlaw called Evans PW2 came with a panga and stick and they started beating him.

Mr. Wekesa for the accused submitted that the only evidence against the accused is that of **PW11 Micah Mulongo** a son of the deceased who testified that he saw the accused assault the deceased at night who then fell down. The next day he saw the accused cleaning the house and later noticed that deceased had died. Counsel submitted that the accused was not positively identified as the person who inflicted the injuries and that the court should be careful before convicting the accused on the evidence of a single eye witness.

That the deceased Lydia Nakumicha Nyongesa died from injuries inflicted on her that fateful night is not disputed. Even the accused in his evidence confirmed that the deceased died from those injuries. He however denies that he is the one who caused the injuries and lays blame on one Doris (PW6) the wife of accused's brother.

The accused in his defence admitted that on the material night he was at home with the children. He testifies that deceased had earlier left to her parents' home. He admits that the deceased come later and knocked the door and asked him to open. He opened the door and she entered the house and went to sleep.

It is evidence therefore that the deceased was able to walk when she entered the house and went to the bed-room. He testified that she called out and ongoing to check found her with injuries and in bad shape. This prompted him to go and call neighbours who came and found her dead with injuries on the head.

Micah Mulongo the son of both the deceased and accused testified that he saw the accused hit the deceased while in the house with a rungu.

From the accused's evidence and that of his son Micah, they were the only ones in the house. The deceased came in while alive and accused opened for her, she entered the house went to sleep. Later accused testified that he saw her with injuries. This confirms the evidence of Micah that it is accused who inflicted the injuries on the deceased.

From the prosecution evidence and defence by accused, it is evident that deceased had stayed out late at night. When she came the accused having opened for her was annoyed about her coming home late. The injuries inflicted by the accused were as a result of the provocations caused by the wife coming home late. I am satisfied that the injuries were inflicted by accused at the moment of anger due to the lateness in coming home.

Section 207 of the Penal Code provides:

“when a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”

I consequently find accused guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and convict him accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JANUARY, 2022

S.N RIECHI

JUDGE