



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 33 OF 2017

REPUBLIC.....ODPP

VERSUS

SAMSON SHIRURI KHASAVULI.....ACCUSED

RULING

The accused person Samson Shiruri Khasavuli is charged with **Murder c/s 203 as read with 204 of the Penal Code**. It is alleged that on the 2nd July 2017 at Mzee Wanyama Trading Centre Estate in Nakuru East Sub County within Nakuru County he murdered Margaret Mbaire Kamau.

The case for the prosecution was that the deceased and the accused lived as husband and wife. According to PW4 the proprietor of the local pub, the deceased used to take alcohol but her husband also known as *Wa Ingo* did not.

On the material night the deceased went to PW4's pub at 9:00pm where she remained till 10:30pm. She did not take alcohol by the time she left.

About 2:00 a.m. PW1 who was their landlady heard something fall on her side of the fence. She explained that her tenants have a different gate. There was commotion in the compound and she could hear the accused asking the deceased who had opened the gate for her. She heard the deceased tell the accused that it was PW1 who had opened the gate. The deceased then went and knocked on PW1's door and asked her whether she was the one who had opened the gate for the deceased. She had not and she told him as much.

She could hear them quarrelling as they went away. She could also tell from the way the deceased was talking that she was drunk. She could not tell whether the accused was drunk.

The following morning as she went to buy stuff for her breakfast, she met PW4 and as they were talking, the accused found them and enquired from PW4 what time she had closed the pub the previous night.

The deceased used to clean PW4's pub. PW1 then went to call the deceased to clean the pub.

The deceased's and accused's house was a single room partitioned by a curtain. When PW1 got there she found the door was open. She called out the deceased's name: Maggie? Maggie? There was no response. She lifted the curtain and noted that Maggie appeared to be sleeping. She went and called PW4 who also came and tried to call her with no response. Another neighbour came in and after seeing what she saw, began screaming, drawing a crowd.

The village elder PW2 was among those drawn to the crowd. By then the accused had been traced by a mob that was beating him. The village elder called the police among whom was PW7. They came, collected the body of the deceased and the suspect as well. According to PW7 upon arrest the accused was just sad.

A post-mortem report by PW5 showed that the deceased had multiple facial bruising including a human bite on the right cheek, multiple bruises and pressure points on the neck, a large swelling on the occipital region of the scalp, bruises on shoulders, arms and both knees. There was a clot over the occipital region, and the brain was swollen. He determined the cause of death as severe head injury secondary to multiple blunt force and strangulation.

The suspect was charged with murder and he denied the charge. A plea of not guilty was entered.

At the close of the case for the prosecution it was submitted for the accused by his counsel Ms. Kabalika who was holding brief for Mr.

Orege that the prosecution had not established a *prima facie* case to warrant the accused being put on his defence. That the case for the prosecution was hinged on circumstantial evidence and there were no eyewitnesses. It was argued that there were witnesses that state had not called and this court ought to draw the inference that these would have been adverse to the case for the prosecution. On this she relied on the case of **Joseph Peitun Losur vs Republic Criminal Appeal no. 168 of 2001** where the case of **Bukenya vs Uganda (1973) EA 549** was cited with approval.

There were no submissions by the state as the DPP chose to rely on the evidence on record.

I have carefully considered the evidence and submissions on record.

The issue for determination is whether the provisions of **Section 306(2) of the Criminal Procedure Code** apply in this case. The section states:

“When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.”

From the evidence above it is correct that there were no eye witnesses, only circumstantial evidence. The deceased and the accused lived alone in their house. PW1 heard them quarrel on the material night, and there was evidence of quarrels mostly because the deceased used to drink and come home late. On the material night there is evidence of a quarrel at about 2:00 a.m. between the accused and the deceased, only for the deceased to be found dead in the morning. The accused was the last person to be with the deceased. All these facts put together, in my view lay sufficient *prima facie* evidence to warrant the accused being put on the defence.

Dated this 13th January 2021

Mumbua T Matheka

Judge

Signed and delivered virtually this 22nd day of January 2021.

Mumbua T Matheka

Judge

In _____ **the** _____ **presence** _____ **of:**
Court Assistant: Edna

Mr. Limisi for state

Ms Mungai for accused

Accused present