



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 64 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES KYALO MWATHE.....ACCUSED

JUDGMENT

1. **Charles Kyalo Mwathe**, the Accused herein is charged with the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code. The Information states that on the night of 6/7th November, 2015 within Kisii Estate, Makongeni Area of Thika West Sub-County, Central Region, the Accused murdered **Rose Kasyoka Masila**. The Accused denied the charges and was represented by Mr. Saeni.
2. The prosecution case through eight witnesses was as follows: The deceased **Rose Kasyoka Masila** and the Accused were man and wife, cohabiting at a place known as Kisii estate in Makongeni area since the late 1990s. They had two children. The oldest **IKM** was a pupil in boarding school in 2015 while the youngest **CK** (PW1) attended a local day school and stayed with his parents at Kisii estate. **CK** was aged 10 years in 2015.
3. The deceased and the Accused had apparently lived peacefully in the early years of their marriage and established their home on their own plot. But it seems that by 2015 the Accused had fallen on hard times and deceased was unhappy that he was not playing his part in supporting the family. As a result of growing tensions in the marriage, the deceased had confided in her brother **Daudi Mwanzia Masila** (PW2) and her parents.
4. In October, 2015, the parents and other relatives held a meeting with the couple in a bid to resolve the matter. Seemingly, the main problem between the couple was the alleged failure by the Accused to maintain the family. He allegedly apologized and promised to change. However, it seems that the relationship did not improve.
5. On the evening of 6th November, 2015, the deceased collected PW1 from school, made supper and left for some meeting in the company of a former employee of the family, and friend **Peninah Katui Wambua** (PW3) who was the couple's next door neighbour and tenant. At 8.00pm, the deceased had not returned and PW1 and the Accused had their supper. The deceased and PW3 returned before 10.00pm and also had supper. PW3 then left as the deceased retired to her bedroom. Thereafter, PW1 also went to bed leaving the Accused watching television.
6. No commotion was heard in the house until about 4.30am -5.00am when the child PW1 noted the Accused leave the house. The Accused did not return but called PW2 early in the morning. He reported to PW2 that the deceased had taken poison and died. PW2 proceeded to the sister's house and found the body of the deceased in bed and fully covered. Upon uncovering it, he noted white powder around the face. He reported at Makongeni Police Station.
7. **PC Lemomo** (PW7) and others visited the scene and commenced inquiries. The body was removed to the mortuary. Later that day at about 6.00pm the Accused presented himself to **CIP Ngaira** (PW5) of Makongeni Police Station and reported that he had had a quarrel with the wife in the night of the 6th November, 2015 and that he had left home only to return on the next day to find her dead. The Accused was detained.
8. On 9th November, 2011, a post mortem examination of the deceased's body was conducted by **Dr. Josephine Muthomi** who completed a post mortem form. The report was produced on her behalf by **Dr. John Mathaiya** (PW6) as P. Exhibit 2. According to the report, the body had no external injuries save for petechial hemorrhage in the eyes due to burst blood vessels. Internally, there was bruising in the left anterior chest wall and bruising on the hyoid bone and muscles and pulmonary edema. The cause of death was identified to be asphyxia due to throttling. The Accused was charged after the investigating officer **IP Ruto** (PW8) completed investigations.
9. Upon being placed on his defence, the Accused elected to make an unsworn statement. To the effect that in the material period, he and his deceased wife lived at Kisii estate, Thika. They had two children and in 2012, moved to their own plot where they had developed a home. He was a businessman while his wife was employed. On 6th November, 2015, he remained at home while the deceased went to work,

returning in the evening with their child. She then left in the company of PW3 to attend a meeting, while he and PW1 remained behind and had had supper by the time the deceased returned. She had supper with PW3 who then left. PW1 retired to bed thereafter while he remained behind watching television.

10. When he eventually entered the bedroom, the deceased was packing clothes and she demanded to know why he had eaten food that he had not helped provide. When he sought an explanation, the deceased allegedly became enraged and grabbed him by the scruff of the neck. A fight erupted and in the course of the ensuing scuffle, he noted the deceased had become unconscious and was actually dead.

11. He stated that it was not his intention to kill her except that he had pushed her off and she was hit by the bed frame. He had called his brother-in-law and notified him. He also travelled upcountry to notify the parents, and when he later reported to police at Makongeni, Police Station, he was detained. He stated that he did not intend to kill his wife and regretted the incident.

12. The defence reiterated earlier submissions and asserted that malice aforethought had not been established. The prosecution on its part relied on submissions made at the close of their case.

13. The court has considered the evidence on record and submissions by the respective parties. There is no dispute that the Accused and deceased were living as man and wife during the material period. That on the material night, the deceased had gone out of the house and returned after the deceased and PW1 had served themselves supper. That the deceased had upon her return in the company of PW3 had her own supper before retiring to her bedroom after PW3 left; that she met her death in her bedroom, while in the company of the Accused; that the Accused left the house on the next morning; and that having notified PW2 he travelled upcountry and, in the evening, returned to make a report at the Makongeni Police Station. He was then placed in police custody.

14. The court must determine whether of malice aforethought the Accused committed the unlawful act that resulted in the death of the deceased. The immediate cause of the death of the deceased according to PW6 and post mortem report (**P.Exh. 2**) was throttling or strangulation, which was evidenced by the injuries area around the hyoid bone. The deceased bore no external injuries.

15. The prosecution evidence regarding the cause of death was not challenged in any serious way, the Accused admitting, albeit indirectly, that the deceased succumbed to her death in the cause of the fight between them and asserting that the deceased was hit by the frame of the bed after he pushed her in the course of the scuffle. Had the deceased been hit by the bed frame as suggested by the Accused, there would have been some external physical evidence on whatever part of the body that had contact with the bed frame. And if indeed the injuries on the neck region were caused by the said frame, external injuries would have resulted. The evidence of PW6 clearly reveals that the deceased was strangled to death, hence the injury on the internal neck area and petechial haemorrhage in the eyes caused by the bursting of blood vessels, and not any other cause.

16. The case against the Accused rests primarily on circumstantial evidence. The principles applicable in dealing with a case where the prosecution case rests primarily on circumstantial evidence are settled. In **Joan Chebichii Sawe -Vs- Republic (2003) e KLR** the Court of Appeal restated the principles applicable in considering circumstantial evidence. The Court observed that: -

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the claim of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

17. This passage captures the principles pronounced in the timeless decisions on circumstantial evidence, namely **Republic - vs Kipkering Arap Koske [1949]16 EACA 135** and **Simoni Musoke -Vs- Uganda (1958) EA 715**. In **Musili Tulo -Vs- Republic [2014] eKLR** the Court of Appeal reiterated the need to closely examine circumstantial evidence before making an inference of guilt, the object being to ascertain whether such evidence satisfies the principles in the case of **Kipkering Arap Koske** and in **Musoke’s** case. In **Tulo’s** case, the court restated the principles as follows: -

“i)?The circumstances from which an inference of guilt is sought to ?be drawn, must be cogently and firmly established;

ii)?Those circumstances should be of a definite tendency unerringly ?pointing towards the guilt of the accused;

iii)?The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”

18. The Court went on to state that:

” In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Accused and incapable of any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of **Musoke -Vs- Republic [1958] EA 715 citing with approval **Teper -Vs- Republic [1952] A.C. 480** thus:**

“It is also necessary before drawing the inference of the Accused’s guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which weaken or destroy the inference.”

19. As regards the identity of the person who applied the pressure to the deceased’s neck throttling her, the Accused all but admits that the

deceased died as the two allegedly were locked up in combat. The evidence of the Accused is that prior to the combat, the two had an altercation after the deceased questioned why the Accused had eaten supper that he had not paid for. This echoes the evidence by the deceased's brother PW2 and her father, **Daniel Mwanzia Masila** (PW4) that prior to the material date, relations between the deceased and Accused had been strained as the deceased complained that the husband of not providing for the family, and that family meetings had been held in a bid to resolve the dispute.

20. The Accused was the only person present in the couple's bedroom where the deceased met her death. Under section 111 of the Evidence Act, he is the person best placed to furnish an account concerning the events leading up to the death. Section 111 is in the following terms:

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity”.

21. If indeed a hot altercation occurred between the Accused and an allegedly enraged deceased and a vicious fight allegedly followed, two things were likely to have happened. Firstly, either or both combatants would have sustained physical injuries; and secondly, PW1 who was in his room inside the house, PW3 or other neighbors would have heard the commotion.

22. PW1, who on all accounts was a truthful witness stated that he did not hear any commotion on the material night. This is consistent with his conduct on the next morning; when his father left home, PW1 got up and believing his mother to be asleep, sat unperturbed watching TV until PW2 arrived. PW3 whose house was near the house occupied by the couple stated that she did not hear any commotion during the material night. For these reasons, the Accused's version that an exchange of angry words and scuffle had occurred between him and the deceased on the material night appears doubtful.

23. The Accused's alleged conduct after the so-called fight in which the deceased died raises doubt concerning the veracity of his explanation as to what exactly transpired on the material night. The Accused is not a doctor, and he could not certify the deceased had died during the fight. Regardless, the Accused did not attempt to seek help for the deceased or notify police or call relatives to come to the home to help.

24. He waited through the night and disappeared from the house early the next morning again without notifying police, only having informed PW2 that the deceased had taken poison and died. In other words, that the deceased had committed suicide. The witnesses PW2, PW3 and PW7 who were among the first to see the deceased's body on the morning of 7/11/2015 testified that the face had traces of powder, PW7 adding that a pesticide container lay close by. Unfortunately, neither the photographs of the deceased's body at the home nor the alleged pesticide can were produced at the trial. That notwithstanding, it is self-evident from the proven facts that the Accused having strangled the deceased attempted to cover up for his actions by his false report to PW2 and the narrative that there had been a scuffle between him and the deceased, the latter which is clearly incredible given testimony by PW1 and PW3.

25. **Lesiit J in Republic v Nicholas Ngugi Bangwa (2015) e KLR** relied on the Court of Appeal case of **Ernest Abang'a alias Onyango V Republic C.A NO. 32 OF 1990**, where the Court had observed that:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent evidence available”.

26. The Accused's explanation does not stand to scrutiny; it is patently false. Moreover, even if that narrative were to be believed for a moment, the circumstances would not give rise to a defence of provocation as proposed in the defence submissions. Section 207 of the Penal

Code states that:-

“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, he is guilty of manslaughter only.”

27. Provocation is defined in Section 208 (1) of the Penal Code as follows:

“The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

28. If true, the act of the deceased allegedly grabbing the Accused by the scruff of the neck may have angered him. More so after he was allegedly challenged for eating food he had not provided. However, it would be difficult to justify the excessive reaction which entailed the strangling of the deceased to her death. If indeed he and the deceased were engaged in combat, this was the fight between a man and a woman. I doubt it required strangling for a man to subdue an unarmed woman. And how could the deceased’s alleged actions so deprive him of the power of self-control that he was induced to throttle her to death?

29. Given the evidence of the ongoing tensions between the couple in the material period over the Accused’s failure to provide for his family, the alleged words, and actions by the deceased on the material night could not amount to grave and sudden provocation that caused him to act in the heat of passion. He did not merely slap or deliver one blow as a result but to throttle the deceased to death, applied consistent and extensive pressure on her neck to the point of injuring the hyroid bone, until the deceased collapsed, literally in his grip and died. The defence of provocation is not sustainable on the facts of the case.

30. As stated in **RC v R. [2005] eKLR** by the Court of Appeal:

“It is a question of fact whether the Accused in all circumstances of the particular case was acting in the heat of passion caused by grave and sudden provocation when the killing was done. See Wero v. Republic [1983] EA 549”.

31. The defence has submitted that malice aforethought has not been established. On the contrary, the established facts relating to the deceased’s death, even if the Accused is believed, point to malice aforethought, as defined in Section 206 of the Penal Code. The relevant part of the section provides:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;

a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not; although such knowledge is accompanied by indifference whether the death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c) ...

d)”

32. The key uncontroverted fact proven by the prosecution is that the deceased herein was strangled to death. The Accused claims that he had no intention of killing the deceased. Death through strangulation does not come with a brief or light application of pressure on a victim’s neck but from sustained and tight pressure which blocks the airways. In the case of **R v Tumbere s/o Ochen [1945] 12 EACA** cited with approval by the Court of Appeal in **Joseph Wanjohi Ndung’u v. Republic [2020] eKLR**, the court identified certain elements to be considered in order to infer malice aforethought from a set of facts, to be:

1. the nature of the weapon used;
2. the manner in which it was used;
3. the part of the body targeted;
4. the nature of injuries inflicted either a single stab-wound or multiple injuries; and
5. the conduct of the accused before and after the incident.

33. This court has already considered the conduct of the Accused after the incident in question. There is no evidence in this case that a weapon as we know it was used. The deceased was likely strangled using bare hands by which severe and sustained pressure was applied to a sensitive area, the neck, blocking the airways and injuring the hyroid bone and surrounding muscles. The intention to cause grievous harm

if not death is evident from this set of facts.

34. The Accused's assertion of a full-blown fight on the material night appears unconvincing given the evidence by PW1 and PW3 and the subsequent conduct of the Accused, including the attempted cover-up of the murder and failure to notify police promptly. It appears more likely that the deceased was attacked in her sleep and throttled to death, having no opportunity to resist. Which would explain why the deceased's body bore no physical injury and the fact that PW1 did not hear any commotion on the material night. The line of questioning adopted by the defence especially of PW2 suggests a tussle over some properties which the Accused appeared to lay claim to. Whatever the case, the prosecution was not obligated to establish the motive underlying the killing of the deceased in proving the offence of murder. See section 9(3) of the Penal Code; **Choge v Republic (1985) KLR 1**; and **Libambula v Republic (2003) KLR 683**.

35. Even if it is believed that the Accused was attacked by the deceased and was merely resisting the attack, he certainly did not need to throttle her to do so. Reviewing all the inculpatory facts, the court finds that whether or not an altercation and scuffle may have preceded the throttling of the deceased, the Accused's action of manually strangling the deceased to death was accompanied by an intention to cause death or grievous harm, or in other words, malice aforethought.

36. The court is therefore satisfied that the prosecution has proved its case beyond any reasonable doubt and will convict the Accused as charged.

DELIVERED AND SIGNED ELECTRONICALLY IN VIRTUAL COURT ON THIS 23RD DAY OF MARCH 2021.

C. MEOLI

JUDGE

In the Presence of:

Mr Kasyoka- For the Prosecution

Mr Saeni- For the Accused

Accused- Present

C.A: Nancy.