



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NUMBER 33 OF 2017**

**REPUBLIC.....STATE**

**VERSUS**

**SAMSON SHIRURI KHASAVULI.....ACCUSED**

**JUDGMENT**

Samson Shiruri Khasavuli (Wa Ingo) lived with Margaret (Maggie) Mbaire Kamau (deceased) as husband and wife at Mzee Wanyama Trading Centre in Nakuru East Sub County within Nakuru County.

They lived as tenants at **PW1's Beatrice Wanjiku Gikini's** plot. The way the plot was built, Beatrice had her own entrance (gate) while the tenants had their own. According to Beatrice this couple used to drink and fight a lot.

On the material night 2<sup>nd</sup> July 2017 Beatrice was sleeping when around 2.00a.m she heard the dogs barking. Then something fell on her side of the fence. She heard Wa Ingo asking Maggie where she was coming from that late. She did not say what Maggie said in response but she said she heard Wa Ingo ask her who had opened the gate for her. She heard Maggie lie to him that it was she, the landlord who had opened the gate for her. She said her house lights were on, and she heard both of them at her door. They knocked, and then Wa Ingo asked her when she had opened the gate for Maggie. She told him she had not. They left and she went back to sleep.

Maggie was PW4 Anne Waringa's friend. Ann operated a club adjacent to Beatrice's plot. Maggie did cleaning jobs for a living and would clean Anne's club. Wa Ingo knew of Maggie's and Anne's friendship.

So, according to Beatrice, the following morning, she was coming from the shop where she had gone to buy things for breakfast when she met Anne. They stood to talk. Wa Ingo found them and spoke to them. He asked Anne what time she had closed the club the previous night. Beatrice did not say what Anne said in response but according to Anne Maggie also known as **one GB** had gone to the club at 9.00p.m. and left at 10.30p.m.

Anyway, after Wa Ingo made the inquiry, he left. Beatrice went back to her house, then went to call Maggie to go and clean the club. She found Maggie's house was not locked. She entered the house. It was a single room-partitioned with a curtain. She lifted the curtain. Maggie was on the bed. She appeared to be asleep. Beatrice called her, but Maggie did not respond. She went and called Anne to come.

Anne came. She too went in and called out to Maggie but Maggie did not respond. Beatrice and Anne called another neighbour. They did not name her. When this neighbour came and saw Maggie, she neighbour began to scream attracting a crowd, among them the village elder PW2 Nahashon Mbugua Kagume. It is he who called the police.

According to Beatrice Wa Ingo had fled, and was arrested by a mob and who handed him over to the police.

On cross examination Beatrice testified that Wa Ingo was a casual labourer. He had been her tenant for 1<sup>1/2</sup> years. That Maggie would clean and wash clothes for people for a living.

She said she could tell from the way Maggie was speaking that night, that Maggie was drunk. She could not tell where Wa Ingo was. She testified that their fights were about her drunkenness and alleged unfaithfulness. She said she could tell that the two were quarrelling and that she saw them clearly.

Ann's testimony was that they parted ways with Maggie on the night of 1<sup>st</sup> July 2017 at 10.30p.m. The following morning Anne met Beatrice who asked her whether she heard screams at night. She said she had not. Then she asked her why she had not gone to assist her

friend Maggie who was beaten at night and was screaming. Anne's response was to send Beatrice to go tell Maggie that she wanted to see her.

However Beatrice called her to go call Maggie. When she got to Maggie's house, she went in and to call her. Maggie appeared dead. When her own landlady went in, she came out screaming. It is at this point that some people followed Maggie's husband Wa Ingo where he worked at construction site (kazi ya mjengo).

In cross examination, Ann said she had known Wa Ingo since 2016. That Maggie took alcohol but Wa Ingo did not. Anne said Maggie was her close friend. That Maggie never told her that they had any problems with Wa Ingo. That she was aware they would have the usual issues and then make up.

That that night Maggie did not take alcohol and left the club with other people at 10.30p.m.

Anne said she did not look at Maggie's body.

That people went looking for Wa Ingo, brought him and handed him over to the police officers who had come to the scene.

According to the village elder **PW2, Nahashon**, on 2<sup>nd</sup> July 2017 about 9.00a.m. He came from his house and noticed that at about 150 metres away a crowd was forming. He proceeded there and found Beatrice who told him that "**one GB**" had been killed by her husband.

She told him that the husband had run away.

He went into the house and found **one GB** on the bed lying face up. He called the police.

On cross examination he said that he noticed that deceased did not have clothes from the waist up. The only injury he noted was a swollen neck. He did not see when the accused was brought by the crowd but he noted that there was a man who had been forced to sit on the ground and whose face was swollen.

**Eunice Wangui Gitu PW3** was Maggie's mother. She testified that the accused had lived with her daughter Maggie for three years. That the relationship between the two was very bad. That this was caused by the accused's jealousy because he did not want her to talk to other men.

That when she heard about the incident she went to where they lived. She did not find the accused. She found Maggie lying on the bed. She saw that she had injuries all over her body, and her camisole was blood stained.

On cross examination she said she was told that the two had fought at night. That at the scene she saw injuries on Maggie's body on the neck, head and torso. She said that the only piece of cloth Maggie had on was a top. The top did not have blood, there was no blood on the bed, but that her body was soiled.

She also testified that the house was clean and neat.

She said she did not know that accused had killed deceased, she however accused him of neglecting her, of beating her, and of having broken her leg once.

**Dr. Daniel Wainaina, PW5** conducted the post mortem on 6<sup>th</sup> July 2017. He testified that Margaret Mbaire Kamau was approximately 33 years old, normal physique, good nutrition.

He observed facial swelling with multiple bruises, a human bite on right cheek, multiple bruises and pressure points on anterior upper neck, large swelling on occipital region of the scalp, multiple large bruises on shoulders and arms and minor bruises on both knees.

Internally there was an intensive clot over the occipital region of the scalp, swollen brain: cause of death: severe head injury following multiple blunt force trauma blow on head, strangulation.

**Danson Gitu Kamau PW6**, Maggie's brother testified that he witnessed the post mortem and saw injuries on her head and arms. He was of the view that there was a struggle before Maggie died.

**PW7 No 81122 PC Elvis Odhiambo** testified had he took over the investigation from Inspector Elijah Kalami. He testified that on 2<sup>nd</sup> July 2017 a report reached the police station from a village elder from Mzee Wanyama area that a man suspected of killing his wife was being beaten by a mob.

PC Odhiambo and his colleagues went to the scene. They rescued the accused from the mob, and were led to the house where they found a woman lying on bed, dead.

He noticed injuries on her body, face and neck.

The house was a single room partitioned with curtain, one side was a bed the other had utensils and some old seats.

The scenes of crime personnel came and processed the scene, after which the body was removed to the mortuary, and the suspect to the hospital for treatment and back to the police station.

At the police station they charged him with **Murder Contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars were that on the night to 2<sup>nd</sup> July 2017, at Mzee Wanyama Trading Centre within Nakuru East Sub County, Nakuru County, he murdered Margaret Mbaire Kamau.

PC Odhiambo reiterated the testimonies of the prosecution witnesses.

On cross examination that he testified that he only recorded his statement after the 1<sup>st</sup> investigating officer retired, and the 2<sup>nd</sup> investigating officer was transferred to Turkana, and it was becoming too expensive for him to attend court as he was not being facilitated to attend court.

He was cross examined on his statement. He had recorded that on the night of 1<sup>st</sup>/2<sup>nd</sup> July 2017 neighbours heard the deceased screaming. He said the neighbours who heard the screams one of them was the landlady (PW1) but others refused to record statements.

He confirmed that PW4 operated a bar next to where the accused and deceased lived. He said he was not aware that she said she never heard any screams that night. He said PW1 said the two quarreled because Maggie came home late and drunk. He said he could not recall how many other tenants shared the compound with the landlady; that her compound was opposite that of the deceased and the accused. He said the whole compound was fenced with a wall, and was gated.

He testified that the body was fully clothed, there were bruises on face but he did not see blood stains.

That the house was mud house, and inside the house, he noted that there were signs of struggle as things appeared disarranged. Questioned about this being contrary to what other witnesses saw he testified that as an investigating officer he could see things, differently from the neighbours. To him the house was in disarray. Asked about the deceased's movements on the night of the murder he said he could not recall how long the deceased was in Anne's bar. Asked whether he established whether deceased was a drunk he said he could not say but that the husband (the accused) is the one who told them that deceased came home drunk and they quarreled.

It was pointed to him that deceased left the bar at 10.30p.m but they arrived home at 2.00 a.m. asked whether she could have sustained the injuries elsewhere he said that it was possible she was drunk that night but if she had been beaten elsewhere she would have told the neighbour.

Asked whether the landlady told him that deceased had injuries, he said no, adding that if she had injuries from elsewhere the deceased and her husband would have been seeking help from the landlady and not quarrelling. Asked whether after the accused and deceased went back to the house there was any report of any noise/quarrel, he responded in the negative.

Upon the close of the prosecution I found that there was *prima facie* evidence to warrant the accused being put in his defence.

Samson Shiruri Khasavuli chose to make an unsworn statement of defence and not to call any witnesses.

He told the court that he and deceased lived as husband and wife. They lived as tenants of PW1. That there were five houses in their compound which were all together in one space. That his wife took alcohol but he did not. That his wife, the landlady and PW3 were friends. His wife would clean PW4's pub for pay. That she also took alcohol at PW4's bar, sometimes with PW4. That it was not unusual for his wife to come home late from her drinking.

On the night of 2<sup>nd</sup> July 2017, she came home unusually late, at 2.00a.m. She was very drunk. She told him she had come from her parent's home. He welcomed her into the house. They slept. In the morning, they woke up together. He left for work at about 7.00 a.m. to a construction site nearby. When he left, she was okay but still drunk.

On the way to work he met their landlady and Anne PW4. He enquired from Ann how long they (she and his wife) had taken alcohol that night. The two just laughed and he went on work. It was while at his place of work some people came and ordered him to come down from the roof where he was watering the concrete. He came down. They told him that he had killed Margaret and ran away. He told them that he had left her when she was well. These people took him back to the house. They beat him up thoroughly.

He was rescued by the police who also took the body away. He said it was not true that at the time Margaret came at night he had left the house. He said they did not quarrel that night. He said that he and Margaret did not fight that night. He was sober as he never took alcohol. He denied killing Margaret. He said he did not know what caused her death. That had there been any commotion their neighbours would have heard.

Having heard all both the case for the prosecution and the accused's statement of defence, the issue for determination is whether the prosecution has proved its case beyond reasonable doubt to warrant a conviction.

The prosecution must establish the ingredients of murder as set out under **Section 203 of the Penal Code** thus:

**“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”**

Hence the prosecutor must establish:

- That a person died.
- That the death was caused by the accused.
- That death was by an unlawful means.
- That the accused had malice aforethought.

Malice afterthought is defined by **Section 206** of the same code in the following terms.

*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 death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- (c) an intent to commit a felony;*
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

The prosecution is required to produce evidence to prove a set of circumstances:-

- i) That the accused had the intention to cause the death of the deceased/ or to do he grievous harm.**
- ii) That the accused was aware – had knowledge that whatever act he committed/failed to commit could probably cause death of the deceased**

Is there evidence to support the above ingredients?

There is no doubt that the deceased died.

The postmortem report states that cause of death was blunt trauma to the head and strangulation indicating that her death was not by natural causes but was caused.

So who caused the death?

The prosecution has presented before the court the deceased's husband as the person they suspect to have caused the death. Have they presented evidence that indeed he was the one who did it?

From the outset there is no direct evidence of anyone actually having seen the accused fighting with or beating the deceased. Neither did anyone see him strangle her.

The only evidence presented is circumstantial evidence

- That the accused person and the deceased were heard quarrelling that night.
- That the deceased had injuries all over her body.
- That the house was in a disarray, a sign of there having been a fight.

It is not denied by the accused person that he slept in the same house and bed with the deceased. There is evidence from PW1, and the accused that the deceased was very drunk that night. It is this PW1 who came up with the allegation that the accused had killed his wife and fled. Yet, this same accused had found her and PW4 talking and spoke with them and left for his place of work which is here he was found by the mob that arrested him. She is the same witness who contradicted her evidence. Telling the court she never heard any screams from the accused and deceased's house that night while at the same asking the PW4 whether she had heard screams of her friend.

She does not explain how she knew that the deceased had killed his wife, neither did she tell the court how she knew he had fled. Did she know more than she chose to tell?

The mother of the deceased PW3 posited that accused was a very jealous husband who did not want her to speak to other men. That the accused would beat the deceased and even broke her leg at one time. It is evident from the deceased friend's, PW4 that the accused and the deceased did not have any serious domestic problems, she testified that the deceased would have told her had there been any. There was also no evidence of any reports to the village elder (who even testified that he did not know the accused well) of any fights or quarrels between

the accused and the deceased. This village elder lived about 200m from the accused person and the deceased.

The allegation of him having broken her leg was not supported by any evidence or any history of reports to the police nor was given as to when it happened and what the circumstances were.

In addition the story by the investigating officer that there were signs of a struggle in the house and that the house was in disarray was in contradiction to the evidence of the witnesses who were first at the scene.

PW1, the landlady, said the house was not in disarray. PW4 deceased's friend did not notice anything untoward when she went in. The deceased's mother confirmed that the house was neat and not in disarray. The house was a single room demarcated by a curtain. These witnesses were there before the crowds, and before the police, they would have noticed if the things in the house were thrown all over the place.

This theory of the investigation officer that the house was in disarray, and that as an investigating officer he would see things differently is not corroborated by any evidence and remains so as the scene of crime officer who allegedly processed the scene did not testify. Hence his testimony there were signs of struggle in the house remains doubtful.

There are also gaps in the deceased's time on the material night which the investigating officer did not account for. It is the case for the prosecution that on the night the deceased died she left the bar, Anne's bar at 10.30p.m in the company of other people. PW1 corroborated the accused's testimony that the deceased came home at about 2:00am. The police did not investigate to find out who these other people were. Neither did the police investigate where she went when she left Ann's bar that night, or who she was with, and where she was from 10:30 pm up to the time she got home at 2.00a.m. There are three and a half hours here that are unaccounted for. Secondly PW4 testified that when deceased left her pub at 10:30 she had not taken alcohol. When she got home at 2:00am she was very drunk. Where did she go? Where did she drink? Who was she with? What happened there?

In addition, PW1's testimony that the two knocked on her door appears to be inconsistent with the facts. She told the court that she had had her own gate to her compound, and her tenants had a different gate. In her testimony she did not tell the court how the accused and the deceased accessed her compound, and how they left to go to their house since she never came out of her house. Did she imply that they jumped over the wall?

What prominently stands out is the evidence of PW1 that she the accused and the deceased were just one of her tenants. The accused's testimony that their house was one among five rooms in the same compound was not controverted by the prosecution. These co-tenants were never interviewed, and they did not testify. Yet, these were the immediate neighbours of the two who knew them, lived with them closely on a daily basis. This omission appears to have been deliberate on the part of the investigating officer and the prosecution and must be held against the prosecution, that whatever these fellow tenants would have said would be adverse to the case for the prosecution. The investigating officer chose to rely on the testimony of PW4 who did not live in the same compound, who lived adjacent to the plot where these two lived and who told the court that she never heard any screams. Indeed PW1 the landlady testified that after the two went back inside their house she never heard any sound coming from their house.

The prosecution did not explain this inconsistency. That PW1 would testify that she did not hear any screams and PW4 would testify that PW1 asked her how whether she never heard her friend's screams the previous night.

The question then is, if it is the case for the prosecution that the accused hit the deceased severally on the head, and strangled her inside their mud walled structure, would the other neighbours not have heard? She came from some place in the dead of night and entered the home noisily not only waking the land lady, the other neighbours must have heard her. If a fight took place that night in their house neighbours would have heard the commotion and so would have the PW1. According to PW1 even PW4 would have heard. There was no evidence of any bad blood between the couple from these two witnesses despite PW1's allegations that the accused had killed his wife.

Regarding the injuries, the witnesses who arrived at the scene first simply stated that the deceased appeared to be sleeping. The facial injuries were not visible to them and the village elder testified to a swollen neck. There was no agreement on the state of her clothing. Her mother testified that her body was soiled. The absence of the scenes of crimes' officers' testimony leaves this evidence in disarray.

According to the postmortem report the deceased was found to have sustained multiple injuries viz: -

- facial swelling with multiple bruising.
- human bite, right cheek zygomatic province region
- multiple bruising and pressure points over the anterior upper neck
- Markedly swollen, bruised scalp occipital region.
- Multiple large bruises with hematoma over both shoulders & arms.
- Bruising of both forearm, in defence marks
- Bilateral minor knee bruising

- Large hematoma, left hypochondrium region,

### **Internally**

- Pressure over the anterior neck normal ribcage: lungs

- hematoma, lateral abdominal wall left hypochondrium region

- large extensive scalp hematoma over the occipital region extending to the right parietal region, contusion of brain tissue

Cause of death: severe head injury following multiple blunt force trauma. *'Also had features of strangulation'*.

It is evident that the deceased sustained multiple bodily injuries, including a human bite on the cheek. It is also evident that the pathologist simply states that there were features of strangulation but that the cause of death was the head injury.

The investigating officer said it was possible that the deceased could have sustained the injuries elsewhere but his theory that the two would have gone to the landlady PW1 looking for assistance is not supported by any reasoning for example that the landlady PW1 told him that, neither is there evidence that they would have done that.

No evidence was led by the prosecution that evidence that it was the accused who hit her on the head and caused all the injuries that were found on the deceased.

No investigation was conducted by any of the three investigating officers to establish the basis of PW1's allegations that the accused had killed the deceased, to seek the murder weapon not only within the accused and deceased's house but within the compound where the accused and the deceased lived, to check for suspect DNA of the accused on the deceased and vice versa. There was no evidence led that the accused and his wife had issue that would have led to that assault, since the accused was not a stranger to the deceased's drinking. Her own friend PW4 told the court as much. What is evident is that the accused was the immediate suspect. Upon his arrest the investigators did nothing else. This is evident from the I.O's testimony. That they rescued accused from the mob, took him to hospital for treatment then returned him to the police station where they charged him with this offence. It is evident that the police laid capital on the circumstantial evidence.

Regarding circumstantial evidence the court in ***Republic vs Kipkering Arap Koske and Another (1949)16 EACA 135***, held that:-

*"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt."*

And in ***Sawe vs Republic [2003] eKLR*** that the court set out the parameters upon which circumstantial evidence can form the basis of a conviction. The Court of Appeal said:-

*"As we have already pointed out, the evidence in this case was entirely circumstantial. 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 chain 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."*

The accused person gave an unsworn statement of defence. The statement he made was corroborated by the prosecution case especially regarding his demeanor and where he went that morning, his place of work. The two PW1 and PW4 did not notice anything untoward when the accused stopped to greet them, and the hypothesis that he had fled has no bearing.

The immediate neighbours who heard the deceased arriving home did not hear any commotion from their house

Is there any other reasonable hypothesis to the facts in this case other than that of the accused's guilt? Are there other co-existing circumstances weakening the chain of circumstances relied on by the prosecution?

The prosecution did not make any effort to investigate where the deceased was between 10:30pm and 2:00am. They said she could have sustained the injuries during that unexplained time. Neither was there any effort to find out who these persons she left the pub with were. They would have cleared the air as what went on during those hours; whether the deceased could have sustained the injuries out there. Can the injuries on the deceased's body be explained otherwise? That possibility is a gap in the case for the prosecution. The evidence against the accused only raises suspicion against him. However strong that suspicion may be it cannot form the basis for the inference of guilt. Guilt must be proved by evidence to the standard of beyond any reasonable doubt. See ***Neema Mwandoro Ndurya vs Republic [2008] eKLR***.

The accused person denied the offence. He told the court what happened that night and did not know what killed his wife. He left for work as was normal. He met and spoke to the deceased's friends that morning. They did not say they noticed anything unusual about him. PW1 who allegedly heard the accused and the deceased outside her door the previous night did not even mention it or inquire anything about the events of early that morning yet she was talking to the accused and the deceased friend PW4. It appears to me that it would only have been natural for her to ask or comment on what had transpired that morning between the accused and the deceased who was PW4's friend. The fact that it came up could suggest that her testimony about the early morning events was exaggerated.

It is not disputed by the prosecution that the accused was found at his place of work and the allegations that he had fled were unfounded.

Has the prosecution placed before court evidence that point the whole hand of the accused? I say that, one finger points at the accused while the other four point at the prosecution's failure to tie up their case. The possibility that the deceased came home with injuries on her body still remains as there are people out there whom the police did not pick and may know what happened.

Having heard the accused's statement of defence and his explanation of the events of the fateful day, and holding that against the evidence of the prosecution's star witness PW1, sufficient doubts hangs in the air as to whether it is the accused person herein killed his wife. I find therefor that the prosecution had not established to the required standard that the accused unlawfully caused the death of the deceased.

He therefore gets the benefit of doubt and is acquitted of the offence of Murder Contrary to Section 203 as read with 204 of the Penal Code.

Unless otherwise legally held, he is to be set free.

**DATED and DELIVERED via ZOOM 21<sup>st</sup> May 2021.**

**MUMBUA T. MATHEKA**

**JUDGE**

**In the presence of:**

Accused: Ms. Murunga for state

Ms. Kabalika holding brief for Mr. Orege

Court Assistant Edna