



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO.5 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

SAMWEL KAMANGARA KIRAGU.....ACCUSED PERSON

CORAM: Hon. Justice R. Nyakundi

Mr Mwangi for the State

Tonia for the Accused

J U D G M E N T

The accused stood charged with the offence of murder contrary to section 203 and 204 of the Penal Code in brief particulars of the charge were that on the 26/1/2019, at Mukondoni area, Lamu west, accused murdered Margaret Wanjiku Njoroge. He pleaded not guilty.

The state's case was basically based on the evidence of the following witnesses; -Johnson Kiragu stated on the material day, the deceased came home being in possession of oil and flour and after a while she went out in company of Pauline. It did not take long before he heard screams. On rushing out he saw the accused slap the deceased. It was followed by a stab wounds on the head and neck.

Further the witness told the court that accused also used a jembe which he was able to positively identify as an exhibit before court. The witness fearing for his life from threats to kill from the accused he took flight to a neighbouring house where he spent a night.

Magdalene Muthoni, testified that on 26/1/2019 she was informed by Erick that something unusual had happened at home. She therefore took a boda boda to confirm for herself on the issue conveyed by the neighbours. That is the time on entry to the homestead there were many people including police officers. He was only to be informed that the deceased had been cut.

Hassan Chonde testified that he resides at Hindi village he recalled that on 26/1/2019 he received a telephone call on the murder incident which had occurred within the village. As a village elder, he travelled to the scene on arrival he confirmed that the accused had stabbed his wife to death. Thereafter upon passing information to the chief arrangements were made to collect the body from the scene.

Fredrick Mwangi also a resident of Hindi testified that on 26/1/2019 in company of others he heard screams from the home of the deceased. As it was normal for them to fight, it did not bother him until further screams raged in the air indicating the deceased has been assaulted by the accused. As a result, he rushed to the home where he saw the body of the deceased lying on the ground with physical injuries.

Joseph Maweu who is a Pastor with a Apostolic Ministry in Mukondoni, testified as having heard screams from the house of the accused he approached the house only to hear the voice of the children state that "**Baba Kiragu amepiga mama**". As he entered the house, the witnesses told the court that he saw the deceased body lying in a pool of blood.

Caleb Gitari also a neighbour testified to the effect that he was informed by Fredrick of the murder incident which had occurred at the home of the accused. Therefore, he had also to travel to the scene only to confirm the incident as alleged.

John Mwangi told the court that on the date in question he was informed of the murder incidence involving the accused and his wife the deceased. He left for the home where he found the deceased to have suffered multiple fatal injuries. On being shown the photographs taken to document the scene they reflected what he saw on the that material day.

Corporal Abdalla a police officer attached to Lamu West DCIO's office testified that on receipt of the murder report made on 26.1.2019 he left for the scene on arrival he saw the body of the deceased with injuries lying in a pool of blood. He recorded statements from the witnesses who had information about the crime. Thereafter the body was collected from the scene purposely to have it subjected to postmortem examination.

As a result of the postmortem, it was opined by **Dr Fawazi** that the deceased cause of death was severe head injury and hemorrhage secondary to deep cut wounds on the skull and neck. The witness presented the postmortem as exhibit 3.

At the close of the state case, accused was called upon to state his defence. In his sworn statement he denied the charge of killing his wife as alleged by the witnesses. In the accused narrative much of the hours of the material day were spent in a club, in company of the deceased. Both of them left the club for their respective houses. He was only to hear screams from the house of the deceased but did not even manage to walk there because of intoxication. Essentially, the accused raised an alibi defence.

Analysis And Determination

The charge of murder contrary to section 203 is punishable under section 204 of the Penal Code is stated to be proved when the state proves the following elements beyond reasonable doubts; -

a) The death of the alleged human being

b) That his or her death was unlawfully caused

c) That in causing death the killer has malice aforethought

d) That the accused person before court directly or indirectly was involved in the act of killing the deceased

As indicated in the landmark judgements of *Woolmington V DPP (1935) A.C 462*, *Alied Nuter v Minister of Persons [1947] 2 ALL ER at 373*. The state has the burden of proof in criminal cases and in a standard of proof beyond reasonable doubts. In this regard, the state must prove both the unlawful acts of murder and the *mensrea* of the offence. It is grounded on the reasons espoused under section 107(1) of the Evidence Act. That he who alleges existence of nonexistence of a fact must prove it in order to secure judgement in his favour. The rule is thus never a burden on the accused to disapprove the charges (see *Kioko V R [1983] KLR 289*).

The elements in section 203 of the penal code and relevant to the question at hand are expressed in the testimonies of the witnesses summoned by the state.

In the present case upon examination of the evidence as a whole it demonstrates that accused and the deceased were cohabitating together as husband and wife. On the material day of 26/1/2019 a quarrel ensued between them which was later escalated to a full-blown attack by the accused against the deceased.

The infliction of the grievous harm was witnessed by Joshua Kiragu and Magdalene Muthoni alluded to the fact on the commencement of the conflict. It was their evidence, that the deceased came home with oil and flour. It was at that moment accused also came to the homestead. It was emphasized in their evidence that when the deceased stepped out she was violently attacked by the accused who armed himself with a panga. The screams which came from the home attracted the attention of neighbours whose homes were just within the vicinity.

In their recollection of evidence to wit Pw5, Pw6, Pw7 and Pw8 the deceased was killed at her house and she was physically injured to the head and neck. Their evidence was consistent and unshaken. In cross-examination that it was the accused person who contributed to the murder. The accused person in his defence stated he passed ways with the deceased.

Normally whenever any unlawful act having taken place failed to contravene both the direct evidence from Kiragu and Magdalene. The admissibility of the evidence from Kiragu and Magdalene founded in the favour of the state. That the certain acts and omissions of inflicting fatal injuries came from the accused. This was inconsistent with the accused defence. The ordeal as explained by Kiragu and Magdalene was to be corroborated by the circumstantial evidence from Pw 1 – Pw 10 to establish the case against the accused beyond reasonable doubts. The issue here also raised the burden of proof of certain explicating facts admitted by the accused in his defence. It followed that the accused testified on oath that he was the last person to part with the deceased in the night of 26.1.2019.

According to section 111 of the evidence Act it places the burden of proof on the accused person in this case to explain the existence or non-existence of these circumstances bringing the case within the exemption demanding a rebuttal on that fact within his knowledge.

Murder is one of the most serious criminal offences in our jurisdiction for reasons that it is tied with right to life under Article 26 of the Constitution. The *actus reus* elements required for the offence are the dangerous acts of assault, poisoning, strangulation, etc whose consequences is death.

In the present case the cause of death happened to be the fatal injuries inflicted to the head and neck. There is no evidence from any quarter that the injuries were naturally or accidentally caused to make the offence excusable. The death in this instant case was caused by the immediate acts of grievous harm as defined in section 4 of the Penal Code. As alluded by Kiragu and Magdalene the accused at the time of violent attack was armed with a panga being the means used to target the head and the neck of the deceased.

It is clear therefore that the deceased is dead and unfortunately so, from the unlawful acts or and omission which became a connecting factor

of the deceased death. It is safe to conclude that the elements on the death of the deceased and for it being unlawful as having been proved beyond reasonable doubt.

The next ingredient is that of malice aforethought as defined in section 206 of the penal code. The case of *Rep v Tubere s/o Ochen [1945] 12 EACA 63* emphasizes that; - **“in arriving at the manifestation as to proof malice aforethought the Court has to consider the weapon used, the manner in which it is used, the part of the body targeted, the gravity of the injuries inflicted, the conduct of the accused before, during and after the murder”**. See also *Ernest Asami Bwire Abanga alias Onyango V R CACRA No. 32 of 1990*. *Morris Aluoch V R CACRA No.47 of 1996 Karani V R [1991] eKLR 622*).

In the present case, Kiragu and Magdaline referred to the attack by the accused while armed with a panga as he set out to inflict physical bodily harm. Thereafter a postmortem examination report revealed that the deceased sustained deep cut on the left parietal part of the head, penetrating wound to the skull, 3 deep cut wound parallel to each other on the left side of the neck measuring 10 cm, small cut wound on the right forearm.

The cause of death as already observed elsewhere in this judgement was severe head injury and hemorrhage due to the deep cut wounds on the skull and neck.

The prosecution witnesses both in their direct and circumstantial evidence pointed to the fact of injuries to the head and neck. The body also lay in a pool of blood at the scene. The intention to kill can be inferred from the brutality of the killing carried out by the accused and the manipulated deadly weapon, a panga which was used to repeatedly hit the head and neck. Further, the accused on inflicting the fatal injuries did nothing to mitigate the loss by making any attempts to call for assistance for the deceased to be escorted to the hospital. There was therefore clear elements of malice aforethought that the execution of the deceased was in cold blood with no justification or excuse.

This killing went on in the presence of the children of the deceased who had to call out the neighbours for psycho-social support. The acts of assaulting the deceased with panga targeting the vulnerable parts of the body was inhumane and the consequences foreseeable by the accused. The resultant outcome was to kill the deceased. The intention having been proved to excuse for this offence therefore discharges the burden which rests with the prosecution beyond reasonable doubt.

The final ingredient is whether the witnesses positively identified the accused person. Relevant and directly to the point on identification are the cases of; *-R V Turnbull & Others[1976] 3 All ER 549, Simiyu V R [2005]1KLR 192 Wamunga V R [1989]eKLR 424*.

The implication of the prosecution evidence is that Kiragu and Magdaline personally recognized the accused at the scene as he went about inflicting serious harm against the deceased. The test to be applied in determining whether or not there was sufficient evidence to plainly place the accused at the scene has been fully answered for over purposes in the unchallenged testimonies of Kiragu and Magdaline. Prior knowledge of the accused as their father foreclosed any irregularity mistake or error that may be associated with a failed identification.

However, it is unconceivable that in the given instance the two witnesses who had an interest in the security and safety of their mother put up credible evidence on identification. The more supporting evidence came from the accused admitted fact that he had parted ways with the deceased in close proximity when the alleged assault took effect. There is therefore no doubt that the accused person single handedly designed the plan, which he executed with precision to murder the deceased who also happened to be his wife.

The essence of all that is non-proof of alibi defence to mischaracterize and label the prosecution case as dispensable in proving the charge of murder against the accused beyond reasonable doubt.

The upshot of the foregoing is that I find the accused guilty of the offence of murder contrary to section 203 of the Penal Code. It follows therefore that he be convicted and sentenced of the offence as required by law established. In this respect, the alibi defence is dismissed for lack of merit.

Verdict on Sentence

Briefly the Samuel Kiragu has been convicted of murder contrary to section 203 as punishable under 204 of the penal code. The evidence showed that he intended to kill the deceased. That is apparent from the prosecution evidence adduced against him at the trial.

In Kiragu's case, there are mitigating factors that may be applied to influence the decision on the type of sentence to be implored. The obvious factors that stated out are in respect of the intention to cause death of the deceased. The provisions of section 204 provide for the death penalty as the maximum sentence but in Kiragu's case I consider that the appropriate minimum term is one of 30 years imprisonment with effect from 1st February, 2019.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20th DAY OF MAY, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

In the presence of Ruttoh for Tonia for the accused

Mwangi for the State present