



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CRIMINAL CASE 21 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

ELIZABETH KATHINI MUVEA.....ACCUSED

J U D G E M E N T

1. **Elizabeth Kathini Muvea**, the Accused herein is charged with the offence of murder Contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars are that on 4th August 2016, at Ngamui village, Malatani sub-location Mutitu within Kitui County, she murdered Munyithya Muvea (hereinafter to be referred to as the deceased).

2. The Accused person denied committing the offence and the prosecution called a total of nine (9) witnesses to prove their case against the Accused.

3. A brief summary of the case presented before this court is that the Accused was married to the deceased and were blessed with six children.

The Accused person is a peasant farmer while the facts emanating from the evidence indicates that the deceased used to sell traditional albeit illicit alcohol from their home. The evidence adduced further, indicated that the Accused and the deceased had frequent disagreements over domestic issues and the same saw the two have frequent quarrels in their matrimonial home. The prosecution's case is built around this background and is majorly hinged on circumstantial evidence particularly the events of the morning of 4th August, 2016 when the two were seen and heard quarreling.

4. **Sammy Munyithya (PW1)** a brother and a neighbour to the deceased testified that, on the material day, (4th June, 2016) at around 10 am, the Accused went to his home crying and that as he asked her what the matter was, he saw his brother the deceased herein following her from behind. The witness stated that he asked the two to go back to their house and resolve their differences. The two then left.

5. The witness (**PW1**) further told this court that the same day at around 9:00 PM, he overheard the two quarreling again from their house which was barely 30 metres away from where he (PW 1) himself lived. He told this court that, he suspected that his brother was drunk and that he heard him say that he was going to sleep in the kitchen. The witness told this court that the following day, the Accused called him to report that his brother was dead. He testified that he went to check and upon reaching the kitchen where brother had spent the night, he found him lying dead with injuries on the head and on his chest. He further saw blood stains on the clothes with an iron bar near the body. He testified that he called the Assistant Chief and reported the incident. The witness added that the deceased used to sell illicit alcohol but had not majorly disagreed with anyone and that small agreements were always resolved.

6. **Mulwa Munyithya, (PW 2)**, another brother to the deceased who says he lives approximately 50 metres away from where accused herein, testified and corroborated the evidence from P W1 mainly on account of events of 4th August, 2016. He recalled that on that date in the morning, he heard the Accused and deceased quarrelling. He further added that he did not intervene because the two had frequent quarrels. He further testified that the deceased had also at one time quarreled with him after pouring hot tea on his wife, adding that, he even reported the incident at the Police Station.

7. The witness further testified on 5th August, 2017 he heard screams from the Accused person and when he went to inquire what was happening, he found his brother (deceased) lying dead in the kitchen with an injury on his head.

8. **Mwende Mutua (PW 3)**, a sister to the deceased testified too and told this court that, she just received a call from her younger brother (PW 1) informing her that her brother (deceased herein) was dead.

9. **Simon Wambua (PW 4)**, testified informing this court that he was a boda boda rider. He told this this court that on 4th August, 2016 at around 1:00PM, the deceased called him on his mobile phone asking him to transport him to a witchdoctor with a view to getting a solution

regarding constant disagreements with his wife, the Accused herein. The witness told this court that he took the deceased and dropped him at a home of a witchdoctor adding that, the deceased at the time appeared drunk. He added that he later received a call from the deceased and that he went and picked him and dropped him at his house adding that he found the wife lying down outside the house when he dropped the deceased and that he thereafter left the deceased and went on with his business.

10. **Muteti Muvea (PW5)**, an eleven-year child to the deceased testified that his father (deceased) went home on the material date at around 5:00pm. He confirmed that (Prosecution Witness 4) dropped him. He further told this court that his father slept in the kitchen and that the following morning, he found his father lying down there with blood stains on his head. The child further testified that there was an iron bar next to where his father lay and that his clothes were dusty and soiled. He further stated that when they went to sleep the previous night, they had left their mother (Accused herein) outside. He further stated that, when he found his father lying down with blood on his head, he told his mother who told him to go to school, which he did.

11. **Reuben Mutinda Kisau (PW 6)**, the Area Chief, Zombe Location testified and told this court on 5th May, 2019 at around 7am, he received a call from Mulwa Munyithya (Prosecution Witness 2), informing him of the demise of the deceased. The Area Chief stated that he proceeded to Zombe Police Station and reported the matter before accompanying the police to the scene-home of the deceased. He testified that the deceased was lying in the kitchen with a lot of blood from a visible head injury. He added that the police took some photographs and later removed the body. He recalled seeing an iron bar next to the body of the deceased.

12. **Dr. Edward Kiatu (PW 6)**, on his part, testified that he examined the body of the deceased herein, and noted some lacerations on the head and neck with deep lacerations on the occipital region. He further noted partial skull fracture and opined that the deceased died due to severe head injury which caused subdural hemorrhage. He tendered the post mortem report as Prosecution Exhibits 2 and added that he issued a death certificate Number 719080.

13. **Ngayamu Muvea (PW 8)**, another child to the deceased testified and majorly corroborated the evidence tendered by his sibling Muteti Muvea (PW 5).

14. **Maurice Situma (PW 9)** the Investigating Officer in the case also testified and recalled that on 5th August, 2016, the Area Chief Zombe Location (Prosecution Witness 6), reported a murder incident in his location and that he and other officer accompanied the Chief to the scene of crime where he found the deceased lying down with visible injuries on the head. He also observed a lot of blood next to where the deceased lay. He recovered a piece of metal bar and a grinding stone which he tendered as Prosecution Exhibit 2 and 3 respectively.

15. When placed on her defence, the Accused denied on oath that she was responsible for the murder. According to the Accused, on the material date of 4th August, 2016, she prepared her children for school and after they had left for school, her husband took the animals for water and went back home for lunch. She testified that after lunch, her husband (deceased) called a boda boda who took him out. She further testified that her husband went back at around 8pm and found her sleeping outside the house. She added that she offered food to her husband and the boda boda guy but they declined saying they had already taken dinner. She told this court that her husband changed his shoes and put on “akala” shoes going out with his cousin known as Kithikii Kilonzo without saying where they were headed to. She added that after cleaning utensils, she slept at around 9:30 pm and that, the following day she woke up at 5:00 am to prepare breakfast for her kids only to discover that her husband was lying dead on the Kitchen floor. She denied killing him and denied knowledge of who killed him adding that she had a toothache the previous day.

16. In her written submissions through learned counsel, Joan Mati advocate, the Accused submitted that, apart from the few disagreements she had with the deceased, there was nothing unusual about their domestic issues pointing out that the testimonies of Prosecution Witness 1 and Prosecution Witness 2 both brothers to the deceased showed that they also had in the past had disagreements with the deceased.

17. The defence contends that, the prosecution assumed that because the Accused was close to the proximity of the scene of crime, she must have been responsible. The defence submits that the house of the deceased was porous and anyone could have gained access and committed the crime.

18. She submits that, the prosecution has not discharged the burden of proof adding that the crucial elements of *Actus Reus* and *Mens Rea* are missing in this case. It is her contention that the circumstantial evidence tendered is weak and cannot found a conviction. She relies on the case of *Musili Tulo versus Republic 2014 eKLR and Joan Chebii Sawe versus Republic 2003 eKLR* where the courts gave set out guidelines or principles to be considered when circumstantial evidence can sustain a conviction.

19. This court has considered the case and the evidence placed before court. I have also considered the defence put forward and the written submissions including the cited authorities by defence.

20. It is true that, in a case of murder, the prosecution has the burden of establishing and proving beyond reasonable doubt three crucial elements namely: -

- (i) The fact of death of the deceased and the cause of the death.
- (ii) **Actus Reus**-that the Accused committed the unlawful act which caused the death of the deceased.
- (iii) **Mens rea**- that the Accused had malice aforethought or harboured ill motive against the deceased.

I will consider the crucial elements one by one.

21. a) **The fact of death.**

There is no doubt that the prosecution's case has established and proved beyond doubt that the deceased died. The evidence of PW 1, PW 2, PW 3 and PW 9 established that fact. The medical evidence (post mortem report Prosecution Exhibit 1) tendered by PW 9 indicates the nature of injuries suffered by the deceased which clearly shows that the injuries were unlawfully inflicted upon him. The deceased suffered multiple injuries but the doctor opined that the severe injury to the head caused a subdural hematoma which caused the death of the deceased. The doctor further testified that he issued **Death Certificate Number 719080**. The fact of death was therefore well established and proven by the prosecution.

22. (ii) **Actus Reus**

The prosecution's case on this score is reliant on circumstantial evidence and the only circumstantial evidence obtained from the evidence presented to this court indicates that the Accused and the deceased had marital disputes that often escalated to quarrels but that is it. There is no evidence of violence between the Accused and the deceased prior to the incident.

23. The testimony of PW 1 indicates that the Accused and the deceased quarreled on 4th August, 2016 in the morning and also at around 9:00 pm. He saw the Accused in the morning running towards his house crying and when he saw his brother (deceased) following her, he told them to go back and resolve their differences. At 10:00 pm, the same day, the witness heard the two quarrel the second time and when he went to the fence to observe he just saw the Accused go into her room and going out. He did not hear anything else until the following day when he heard the Accused screaming and when he went to check out what was happening he found his brother lying down dead with visible injuries to the head.

24. PW 2 also testified that he had some disagreements with his brother (the deceased) after the deceased poured hot tea on his wife. It was his testimony that his late brother had also differed with many people posing the question who caused the death of the deceased? The testimonies of close family members of the deceased, depicts the deceased as someone who had a temperament that saw him from time to time, engaging in arguments with not only his wife (the Accused but other people as well.

25. This court has considered the circumstantial evidence relied by the prosecution to connect the Accused with the murder of her husband and I find that, the only factor connecting her with the murder is that, she had quarreled with the deceased earlier that day. This inference in my considered view, is weakened by the evidence of PW 2-Mulwa Muniyithya who testified, his relationship with the deceased was anything but cordial and that at one time, the deceased poured hot tea on his wife which made him report the incident at the police. There was no evidence tendered to show if any action was taken against the deceased for the assault. It was the evidence of Prosecution Witness 2 that;

“There was a time he (deceased) wanted to cut me with a hoe. It was on the same day. I defended myself by hitting the hoe with a stick.... the relationship with him was not cordial. He used to differ with family members.....”

26. In light of the above, it is evident that, the circumstantial evidence against the Accused on account of the quarrels between her and the deceased on that day, certainly is not the only inference that can be used to connect the murder with the Accused herein.

In the case of **Musili Tulo versus Republic 2014, eKLR** the court of Appeal stated that circumstantial evidence can positively link an accused person to the offence where;

“(i) The circumstances from which an inference of guilt is sought to be drawn must be cogent and firmly established.

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the Accused.

(iii) The circumstances taken cumulatively 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.”

The court cited in approval the decision in **Republic –versus- Kipkering Arap Koskei and Another 16 EACA 135**, where the court held as follows: -

“In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke versus Republic (1958) EA citing with approval Teper versus Republic (1952) AL 480, thus:”

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

27. The above position was evident in the case of **Mwangi and Another versus Republic 2004 eKLR** where the Court of Appeal held as follows: -

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge.”

The same position was evident in **Sawe versus Republic 2003 eKLR**, where the Court of Appeal also observed;

“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.”

28. The evidence of **PW 1 and PW2**, as observed above showed that the deceased was known to engage in squabbles with other people apart from his wife, of course the hypothesis that the squabbles between the Accused and her husband (deceased) on the material day, may have led her into killing him is not far-fetched. That is a possibility but there are other possibilities which I find also obtained as I have observed above, there is no denying, going by the evidence tendered that the compound of the home of the deceased was porous and anyone could gain access to it and given that he was sleeping alone in the kitchen which we are told was not lockable, the possibility of any other intruder in the dead of the night cannot be ruled out.

29. The Prosecution’s case is further compounded by the fact that the suspected murder weapons recovered from the scene, that is the metal bar (P Exhibit 1) and a stone (P Exhibit 3) were not secured and taken for forensic analysis and dusted for finger prints to establish if the finger prints matched those of the Accused or if there was any blood residue or DNA that could provide a positive link between the murder weapon and the Accused person herein.

30. The legal position is that, the burden of proofing a particular fact lies on the person who wishes the court to believe in its existence (**Section 107 of the Evidence Act Cap 180 Laws of Kenya**). The prosecution in this case is relying on the circumstantial evidence that, owing to the fact that the Accused had prior to the incident had quarreled with the deceased, an inference be drawn that she was responsible for the murder.

But as I have observed above the inference is weakened by the other circumstances obtaining. There is no evidence that the quarrels degenerated into violence or that the Accused person had exhibited some violent tendencies that could predispose her into some violence against her husband. The only factor remaining is mere suspicion and a mere suspicion alone, cannot found a conviction.

That that extent, this court finds that the Prosecution has failed to prove the crucial element of *actus reus* and link it with the Accused person.

31. (iii) **Malice Aforethought.**

The Prosecution’s Case, in its entirety lacked this crucial element. In any event, this court’s finding that the element of *Actus reus* was not established leaves the motive of murder hanging. The Prosecution Case is silent on this aspect. The facts or evidence presented does not even suggest that the Accused herein harbored ill motives against her late husband. Of course, there is no doubt that whoever inflicted the injuries had ill intentions but the same has not been connected or linked with the Accused herein.

The long and short of this is that, this court finds that the Prosecution Case against the Accused has not met the threshold. The case is weak to sustain a conviction. In the premises, this court is left with no other option but to acquit the Accused. She is hereby acquitted of the charge facing her and shall be released forthwith, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 21ST DAY OF JUNE, 2021.

HON. JUSTICE R. K. LIMO

JUDGE