



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA.**

**CRIMINAL CASE NO. 17 OF 2019.**

**REPUBLIC.....DPP**

**VERSUS**

**ERICK MUKUI MABUKHA.....ACCUSED**

**J U D G M E N T**

The accused **ERICK MUKUI MABUKHA** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence that on the night of 31<sup>st</sup> March, and 1<sup>st</sup> April, 2019 at Teremi village of Mukuyuni location of Bungoma Central Sub-County within Bungoma County murdered **BEATRICE NEKESA**.

The prosecution case is that the deceased is the wife of the accused. On 31.3.2019 PW 1 Dorcas Mukhawan Nanjala the granddaughter of the accused who was staying with accused and deceased was in their house at around 4. Pm. While in the main house she heard deceased screaming from the kitchen house. She went there. She found accused holding the deceased on the neck and pushed her to the wall. She saw the deceased bit accused on the lips. Accused then hit her with fists and a cooking stick, she screamed for help but there was no response. She ran out to seek help. When she came back she found accused hitting the deceased with an iron bar. The accused then threatened Dorcas who she escaped to the house of one Emily. She was later called from house of Emily and found deceased had been taken to hospital where she died while undergoing treatment.

On being cross-examined by Olonyi for accused, she stated that accused beat the deceased using cooking stick and iron bar. She stated that she came and found them fighting and did not know who had started the fight. She confirmed the deceased used to drink and accused used to smoke bhang. (cannabis sativa).

PW 2 KENNEDY NABUONI MUTONYI the brother of accused was in his house when accused went there and informed him that the deceased had bit him on the lip. He accompanied accused to his home. He found the deceased in the kitchen. The accused asked him to take him to hospital. He got a boda boda rider and he took accused and deceased to Cheptais Mission hospital. The accused was treated but deceased died while undergoing treatment.

On being cross-examined, he testified that both accused and deceased used to drink chang'aa and also brewed it.

PW 3 Emily Wekesa a neighbor of the accused was at her house when she heard people quarrelling. She did not go to the scene. PW 4 Milton Nanjala a boda boda rider was only called and took the accused and deceased to hospital. PW 5 Dr. Wanambisi Caleb Watta performed a post mortem on the body of deceased and found she had multiple bruises on the face, upper limbs and legs. She had a cut wound on sides of the head and blood oozing from the nose, ear and mouth. He also found there was swelling beneath the brain tissue. He formed opinion that cause of death was due to severe head injury secondary to blunt and sharp trauma.

PW 6 sister Sarah a nurse at Cheptais Health Centre was at the Health Centre when both accused and deceased were taken there. She saw accused was bleeding from the mouth. She attended to the accused and deceased who was complaining of stomach pain.

The accused gave sworn evidence in his defence. He testified that the deceased was his wife. On 31.3.2019 at 800 pm he came home and found deceased complaining of stomach ache. He noticed she had taken chang'aa. She had been diagnosed with cervical cancer and had been advised to stop taking chang'aa.

They had a long standing quarrel from the time he advised her that he had been infected with a venereal disease. On the material day she bit his lips and he fell down. He screamed and Dorcas (PW 1) came and removed deceased who was lying on him. He then locked her in the

house and went to call his brother Kennedy. They came and opened the door. They found her seated. She then hit herself against the wall and was injured on the head and back. They both were taken to hospital. He was stitched but deceased died while waiting for treatment.

On being cross-examined by Thuo for the state, the accused confirmed that he used to drink chang'aa and smoke bhang and they used to quarrel with the deceased. He also confirmed that it is Dorcas (PW 1) only who witnessed the fight and helped him. He explained the injuries the deceased sustained as arising from when she hit herself on the wall and were not inflicted by him.

The accused is charged with the offence of murder contrary to section 203 of the Penal Code.

Section 203 of Penal Code provides;

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

The ingredients of the offence which the prosecution must prove beyond reasonable doubt on a charge of murder are:-

- 1. The fact and cause of death.***
- 2. The unlawful act or omission causing death.***
- 3. That it is accused who committed the unlawful act or omission.***
- 4. That there was malice afterthought.***

The death of the deceased is not in dispute. PW 5 Dr. Wanambisi Caleb Wata performed the post-mortem report on the body of deceased. He found that the deceased had multiple bruises on upper limbs and legs, . The face was swollen, cut wound on sides of head and blood oozing from nose, ear and mouth. There was hematoma beneath the scalp and brain tissue. He formed opinion that cause of death was due to severe head injury. Did the accused inflict the severe head injury which led to the death of deceased?

The accused in his evidence testified that there were only 3 people in the house, himself, deceased and their granddaughter Dorcas (PW 1). Dorcas testified that there was a fight between the accused and the deceased. The deceased bit the accused on the lip. The accused then hit her back using a cooking stick and iron bar. The accused in explaining what happened that fateful night stated.

***The deceased came to the kitchen and complained that she was having abdomen pains as of a woman giving birth. I moved closer and my mouth touched hers. She bit me on the lip. She then fell down. We only quarreled about her drinking chang'aa. I also fell down. I screamed and Dorcas came. She removed her from me. Dorcas then left me and the deceased. I locked her in the house and went to call my brother Kennedy Nabugoni. I came with him to my house. We opened the door and found her seated. She hit herself on the wall and had injuries on the head and back. That day I had not drunk any chang'aa.***

The accused defence is that even after being beaten on the lips he did not do anything on the deceased, he however admits that both fell down. He readily admits that there was a fight between him and deceased. It is in the course of the fight that she fell down. He admits that she died the same day at the hospital where he was also treated. Considering this evidence I find that the accused explanation as to how the deceased sustained injuries is unbelievable as it is not true.

I do find that the accused and the deceased fought on the material night. The deceased inflicted injuries on the accused's lip and accused did inflict injuries on the deceased head, upper lip and legs. It is from these injuries what the deceased died.

From the evidence adduced there appears to have been unending dispute between the deceased and accused over the discovery that the accused was having a venereal disease. The deceased blamed the accused of infecting her with the venereal disease leading to frequent fights which were known to all the neighbours. This was made worse by the couples brewing selling and drinking chang'aa with the accused topping up with smoking of bhang. No wonder their frequent fights did not elicit proper response from neighbours.

From the evidence adduced I find that the accused did inflict injuries on the deceased in the cause of the fight from which injuries she died.

Section 208 provides; 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 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.

Section 207 provides.;

***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 certain provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.***

I therefore find that the prosecution has proved an offence of manslaughter against accused. I therefore find the accused Erick Mukui

Mabukha guilty of the offence of manslaughter contrary to Section 202 of the Penal Code and convict him accordingly.

Dated and delivered at Bungoma this 29<sup>th</sup> day of October, 2021.

**S.N. RIECHI**

**J U D G E.**