



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 45 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

DESMOND ASHIOYA KATIBI.....ACCUSED

JUDGMENT

1. The accused person-Desmond Ashioya Katibi, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that the accused person on unknown dates and time at Kaa Chonjo slums within Tudoe area in Mombasa City within Mombasa County murdered Margaret Awino.
3. The prosecution's case was that the accused and the deceased-who introduced themselves as husband and wife, rented a house from PW 1 on 5th of September, 2017. When they paid rent, the receipt was issued in the name of the accused as the tenant.
4. That on the night of 3rd of November, 2017, PW 1 heard the sound of a heavy object falling on the ground and it sounded like the said object had hit some plates after which there was silence.
5. When enquired the next day, the accused said it was the roof leaking and some rain drops were falling on their bed. PW 1 promised to repair the leaking roof after the rains subsided. On the evening of the same date, PW 1 saw the accused carrying some 2 sticks of incense.
6. On the 5th of November, PW 1 woke up to go and repair the accused person's roof but he was told by a neighbour-Cosmas Ndoloka's wife, that the accused person's room was locked from outside. Later at 5:00 pm, Cosmas Ndoloka asked PW 1 if he could move into the accused person's house as the accused had been seen carrying his bed on a tuk tuk.
7. When he went to enquire, the accused person told him he had taken his bed for painting. PW 1 noticed that the accused had fixed 3 sticks of incense on the wall of the house.
8. On 6th of November, 2017 when PW 1 returned from work at 1:00 pm, Cosmas Ndoloka's wife told him that she had not seen their neighbours and that there was a foul smell emanating from that room. When they went to check, they found the door was not locked and when he pushed the door, he saw some brownish liquid on the floor that looked like dirty water and a person was lying on the floor of the room, covered within a white bedsheet and the body was swollen.
9. PW 1 called a neighbour-Omondi, who confirmed that it was a dead body. When he lifted the bedsheet, he saw that the body and identified that it was that of Margaret Awino.
10. A report was made to the village elder who in turn reported to Makupa Police Station. The police visited the scene and collected the body to Coast General Hospital Mortuary.
11. The accused person was arrested on 8th of November, 2017 and PW 1 went to identify him and record a statement.
12. PW 2- the brother to the deceased, testified that the last time he saw the deceased was on 3rd of November, 2017 when she accompanied his wife to church as usual but the following Friday, she failed to turn up and as she did not have a phone, he did not call her. When PW 2's wife came back from church, she reported that the deceased was not in church.

13. PW 2 testified that he reported on night duty on Sunday and on Monday morning, went back to the house and at 5:00 pm his sister's friend called him and informed him to proceed to Kaa Chonjo Village as his sister had been killed.

14. He mobilized his brothers and proceeded to the deceased's house and found her body in the one-roomed house. He said the body had started decomposing. The police collected the body and identified the same for post-mortem examination.

15. PW 2 testified that prior to his sister's death, the accused person went to him and introduced himself and said that he wanted to stay with his sister. That before he could get time to have a proper discussion with the accused, his sister had died.

16. PW 3 was also a brother to the deceased. He got a report from PW 2 that his kid sister-the deceased herein, had been killed and he reiterated what PW 2 said in his testimony.

17. Dr. Fatma Ahmed-PW 4, produced the post-mortem report prepared by Dr. Umme of Coast Provincial General Hospital on 10th of November, 2017 where it was established that the cause of death was blunt head trauma.

18. PW 5- PC Silvester Opaté, investigated the case and preferred the charge herein against the accused person.

19. When the accused person was placed on defence, he gave an unsworn statement and said that the deceased left to go to church on Sunday and came back late at 9:00 pm and when he asked her why she came back late, she became angry and refused to talk to him. That a scuffle ensued and because she was angry, he pushed her and he hit her head on the wall and he did not know what happened thereafter. When the accused talked to PW 1 on his arrest, he told him that the deceased had slapped him and he slapped her back. That the deceased tried to strangle him and he strangled her until she died.

20. Upon consideration of the evidence on record by the prosecution witnesses and the unsworn statement of the accused, the issues for determination are whether the prosecution have proved the ingredients of the offence of murder which were spelt out by the in **Anthony Ndegwa Ngarivs Republic [2014] eKLR**, as being:

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

21. It is not in dispute that the deceased died and the pathologist-in exhibit P1, established the cause of death as blunt head trauma.

22. The deceased and the accused cohabited as husband and wife in a room leased to them by PW 1, adjacent to PW 1's residence. It was the evidence of PW 1 that on the 3rd of November, 2017, he heard the sound of something heavy falling in the accused person's house but on enquiry, the accused explained it away as rain drops from the leaking roof. Henceforth the deceased was not seen and the accused behaved suspiciously and finally, sneaked out of the one-roomed house without the knowledge of PW 1 and other neighbours.

23. It was the smell of the decomposing body of the deceased that made PW 1 and other neighbours to discover that the deceased had been killed. The accused told PW 1 that the deceased slapped him and he returned the slap and then he strangled the deceased until she died. In his unsworn statement, the accused claimed that the deceased made him angry by coming home late and refusing to talk to him and he pushed her against the wall. The act of pushing the deceased against the wall was an unlawful act and the conduct of the accused in concealing for several days that he had killed the deceased in the view of this court is proof that malice aforethought on his part.

24. In the circumstances, this court finds that the prosecution has proved their case beyond all reasonable doubt. The accused person is found guilty and is accordingly convicted under Section 322 (1) of the Criminal Procedure Code.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF OCTOBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – Court Assistant

Accused – present in person

Ms. Odhiang hold brief for Ms. Matara Advocate for Accused

Mr. Mulauma for State

HON. LADY JUSTICE A. ONG'INJO

JUDGE

MR. MULAMULA

We don't have accused person's records.

MS. ODHIANG

We request for Pre-sentence Report before we proceed with mitigation.

ORDER

Mention – 11/11/2021 for Pre-sentence Report & Victim Impact Statement. Accused remanded in custody.

HON. LADY JUSTICE A. ONG'INJO

JUDGE