



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL CASE NUMBER 40 OF 2019**

**REPUBLIC .....ODPP**

**VERSUS**

**NNN .....ACCUSED**

**RULING**

1. On 4<sup>th</sup> August 2019 at 7.10 hours, a report was booked vide OB Number 3/4/8/19 Bondeni Police Station Nakuru by the Chief Free Area Location on Stephen Macharia Kihara that at 5.30 hours, one DNK was attacked by his wife one N, who inflicted multiple stab wounds on his head, fracture of the left thigh and a cut to his penis. That consequently his wife was attacked by members of the public and sustained chest injuries. That they were both rushed to Nakuru Provincial General Hospital where the husband was admitted in stable condition and the wife was treated and discharged. That police officers visited the scene, confirmed the incident, and booked the wife to appear before court on 5<sup>th</sup> August 2019 on a charge of assault. That the police established that the cause as domestic issues.

2. However on 4<sup>th</sup> August 2019 the husband died. The wife was charged with his **Murder Contrary to Section 203 as read with Section 204 of the Penal Code.**

3. The Plea was taken on 3<sup>rd</sup> August 2019 and she pleaded not guilty. The matter proceeded for hearing on 18<sup>th</sup> November 2019 and by close of prosecution case on 29<sup>th</sup> November 2021 the prosecution had called seven (7) witnesses.

4. At this point the issue for determination is whether the prosecution has established a prima facie case to warrant the accused to be placed on her defence as per **Section 306 of the Criminal Procedure Code.**

5. A Prima facie has been defined in **Ramanlal T. Bhatt vs Republic [1957] EA 332 at pages 334 – 335** as cited in numerous cases including **Republic vs Amos Gachuhi Kimena [2016]** where the court stated;

*“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if at the close of the prosecution the case is merely one – Which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made but raise hope the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is –Some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.*

*A mere scintilla of evidence can never be enough... the court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case” but at least it must mean one on which a reasonable tribunal properly, directing its mind to the law and the evidence could convict it no explanation is offered by the defence.”*

6. The case for the prosecution was that the accused person was the wife of the deceased. That the two (2) were living in rented premises at Kwa Muthoni. Both used to drink alcohol and engage in domestic quarrels. On the 3<sup>rd</sup> August 2019 it is alleged that they quarreled over the fact that the deceased was not providing for the family’s needs including rent, food etc. That out of that quarrel the accused hit her husband with a piece of timber, injured him and ran away, that she was arrested by a mob, which beat her up, but the piece of timber was not recovered.

7. **PW1 No. 241744 PC Lubanga David** from Free Area Police Patrol Base told the court he received the report from Stephen Macharia the area chief about 6.00 p.m., the chief told him what had happened, and that the suspect was already under arrest. He called and female officer who conducted the search on the suspect and placed her in cells. She appeared to be in pain, and he confirmed that angry members of the public had beaten her. He booked her for assault.

8. **PW2 JNM** testified that his house was about thirty (30) metres from the scene and he heard screams of *Ameniua, Ameniua!* ( s/he has killed me, s/he has killed me). He came out of his house, to the scene where he found that already crowd of about thirty (30) people was gathered around one DNG who was lying on the ground. According to this witness there was blood spouting from his head about two (2) metres high and his private parts were also bleeding. He said he was the one who rang the chief Stephen Macharia who came to the scene. He said he also witnessed the injured person being taken to hospital as well as the people getting hold of the accused wanting to beat her. He said he knew the accused and deceased very well, and he tried to protect her from the mob.

9. The chief was **PW3**. He said he was called about 6.00 p.m. on 3<sup>rd</sup> August 2019 and informed about the incident. When he reached the scene which was about forty (40) metres from his own place he found the deceased lying down, he was bleeding from his head and his trouser had been pulled down. The area was soaked with blood. He called him but he did not respond. He got assistance to take him to hospital. The accused was brought by the mob. He escorted her to the Police Station. He testified that she told him she had hit him with a piece of wood "*nimemgonga na kijiti*". The accused denied the offence. At no point did the prosecution place before the court a confession by the accused person.

10. **PW4 SKG** testified that deceased was his brother, and that he received a phone call on 3<sup>rd</sup> August 2019 about 5.00 p.m. The person who rang him told him that his brother had been injured by his wife had been taken to hospital. The next day he went to hospital but found that he had passed away. He said his brother had sustained a broken leg. He said he also went to the scene, and found some off cuts along the corridor. That he saw there was blood there, and he said he learnt that one of those off cuts had been used to hit his brother. He said it is the neighbours to accused and deceased who told him that the accused had beaten the deceased with an off cut. He said he knew that both of them took alcohol.

11. **Dr. Titus Ngulungu** the pathologist was **PW5**. He said on examining the body at post mortem he found features of blood loss, incision wounds made by sharp object on right side of the head, 100mm long which had been stitched, incision wound on the right cheek, 70mm stitched, fracture of the neck of the left femur, two (2) lacerations of the right leg, hematoma on the lower chest wall, fracture of 9<sup>th</sup> rib, incision wound of glans penis, 10mm. In his opinion the cause of death was massive blood loss secondary to sharp force trauma to the head and glans penis in keeping with fatal assault. He was categorical that the injuries could not have been caused by a piece of wood but by a sharp object.

6. **PW7 JKW** testified that on 3<sup>rd</sup> August 2019 about 5.30 p.m. he was at his place of business where he sold meat. He heard noise near his house. He checked and found the accused and deceased. He said the accused had a piece of timber, and the deceased was on the ground. That when the accused saw him, she took off.

7. In his own words he said he found when the accused *had just hit* the deceased with a piece of wood. That he found her with the piece of wood. That the deceased had a wound on the head, blood had fallen on the ground and clotted. He testified that the accused was arrested from the bar where she had entered and ordered for a drink, thinking that this was one of their usual quarrels.

8. On cross examination this eye witness told the court that most of what he had told the court was not in his statement to the police. There was nothing about him seeing the accused attack the deceased. In his statement he had told the police that he found the deceased lying on the ground with multiple injuries on the head and that his wife had fled, and was arrested by the people who gathered. He testified further that the accused had hit her husband with a piece of timber which was part of a chair.

9. The investigating officer was **No. 73527 Cpl Elly Ouma**. He accompanied the OCS and the police driver to Free Area Police Post where they found the accused had been placed in cells. They collected her and took her to hospital where her husband was admitted. She was treated and discharged while the husband remained in the ward. The following day he learnt that the husband had died. He confirmed that the accused had been beaten by a mob. He confirmed that when he went to hospital the husband was alive, but he never spoke to him because he was with the doctors. He said the husband could speak but police were not allowed to speak to him. Asked whether he did not think it necessary to ask him about the person who had assaulted him, he said that the history had already been given that he had been assaulted by his wife. He said he saw the accused's husband between 10.00p.m. to 10.30 p.m.

10. On 3<sup>rd</sup> August 2019, received phone call on 4<sup>th</sup> August 2019 about 1600 hours that he had died but was told he died about 1300 hours. He said he visited the scene of crime and saw blood stains. He said accused's house was about twenty (20) metres from the gate where the deceased was found and about ten (10) metres from the nearest house. He said he recorded the statement of the occupant of that house and that she had testified. He claimed that she was the one who witnessed the attack.

11. At the close of the case for the prosecution, Counsel made submissions, Ms. Murunga for state, oral submissions Ms  
Sabaya for the accused, Written Submissions.

12. I have carefully considered the evidence, the submissions on record. It is not in dispute that the deceased died, that the death was not natural and from the evidence of the pathologist, it was an unlawful death.

13. The issue for determination is whether there is *prima facie* evidence to place the accused on her defence.

14. The prosecution avers that there was an eye witness to the assault on the deceased. However, it is evident that the alleged eye witness says he arrived when the deceased had already been hit by the accused and that he found him lying on the ground, and when she saw him she fled. In the same breath he says that upon assaulting her husband, the accused just went into a bar, and ordered alcohol and that is where she was found. Evidently his evidence is not that he saw the accused hit the deceased, but that he got there when she had just hit him. That is his own deduction of what he saw. He was not an eye witness to the assault.

15. As it is from all the evidence that is on record, the prosecution have not been able to answer the questions as to who saw the accused attack the deceased? If she is the one who hit him, what did she use? Every one of the prosecution witnesses found the deceased on the

ground, already injured. Turns out what PW1 heard was “*ameuawa!*” literally ‘*he has been killed*’. Meaning that whoever was shouting that found the deceased already with the injuries. If the *shouter* had seen the person who had *killed* him, surely he would have shouted that as well. but no one saw the one who had “*killed*” the deceased. Taking into consideration that this was said to have happened about 5.00 p.m. during day light, anyone who would have seen the person of the deceased being attacked would have named the attacker. It is evident that no one saw actually saw what happened to the deceased.

16. No one saw what was used to attack the deceased. The alleged weapon; the chief alleged that the accused confessed having hit the deceased with a stick. The eye witness says he saw her with a piece of wood, which was part of a seat, deceased’s brother said he was shown some off cuts which were in the corridor near the scene of crime and that one of them had been used to hit the deceased. The pathologist ruled out a piece of wood. The investigating officer did not recover any weapon. He did not present any of the suspected weapons for forensic examination. That would have brought the issue of the weapon to some closure.

17. With regard to the weapon, the prosecution relied on **Criminal Appeal Number 379 of 2019 Geoffrey Wafula Simiyu vs Republic [2010] eKLR**, to the effect that it was not mandatory for the prosecution to produce the murder weapon. The Court said:

*“In as much as failure to recover a murder weapon is not fatal, the test is whether the court believes, on evidence before it, that such a weapon existed at the time of the offence. This position was upheld by the court in **Republic vs Patrick Ong’au Okioma [2021] eKLR** where the court quoted with approval the case of Kyalo Kalani also cited the case of **Karani vs Republic, (2010) 1 KLR 73** that:*

*“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.”*

18. Nevertheless, the evidence on the issue of the murder weapon was so inconsistent as to be incredible, the pathologist ruled out a piece of wood and said the injuries would only have been caused by a sharp weapon; This, considered together with the inconsistencies of the evidence of the alleged eye witness, bring this case within the purview of **Ahamed Abolfathi Mohammed & Another vs Republic [2018] eKLR** cited by the defence where it was held;

*“... This Court has consistently stated that because discrepancies are bound to occur in evidence; the critical question is always whether the discrepancies are minor and inconsequential or whether they are material so as to vitiate the prosecution case...*

*“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. **But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused.** If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt.” (emphasis added)*

19. This case is a classic example of the failure by the investigators to investigate the case and to proceed to charge the first and obvious suspect, without anything to clutch on. The mere fact that the accused and the husband had quarreled earlier (an allegation that was not even established) did not make the case open and shut. At least there ought to have been an attempt at investigations to establish whether it was actually the accused who had inflicted the fatal injuries. The incident happened in day time and the fact that accused had been heard quarrelling with deceased earlier over his failure to provide was taken as evidence that she had reason to kill him, the deceased was cut with a sharp object. If we are to believe PW7, the accused was found in a bar taking alcohol, the investigating officer did not investigate this part of PW7’s testimony to know what time she went to that bar, and if she left by the back gate as alleged by PW1, whether or not anyone else saw her. The immediate neighbour to the accused and deceased did not testify yet this was the person whose house was nearest the gate where the deceased was found.

20. In addition the best evidence was available to the investigators, there was every opportunity to speak to deceased while in hospital to learn from him what had happened to him. The investigating officer never bothered to do so. Clearly the prosecution proceeded on the basis of suspicion which is not sufficient to sustain a conviction. In **Ahamed Abolfathi Mohammed & Another vs Republic** the court stated;

*“Suspicion alone no matter how strong cannot form the basis for a conviction. In the case of **Sawe vs Republic (2003) KLR 364** the Court of Appeal held that “The suspicion may be strong but this is a game with clear and settled rules of engagements. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of **Mary Wanjiru vs Republic (Criminal Appeal No. 17 of 1988) (unreported)**. Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.”*

21. From the foregoing, it is evident that the prosecution established that there was a murder, but as for the person who committed it, the prosecution brought the accused to court on the basis of suspicion.

22. I can only reiterate what was said in **Bhatt vs Republic**. “A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence.” And find that the prosecution failed to establish a prima facie case against the accused person to warrant this court to place him on his defence. I proceed under **Section 306 (1) of the Criminal Prosecution Code** to record a finding of not guilty, dismiss the murder charge against the Accused Person, and acquit her accordingly.

23. The accused is to be set at liberty forthwith unless otherwise legally held.

**DATED, DELIVERED AND SIGNED AT NAKURU THIS 20TH DAY OF DECEMBER, 2021.**

**MUMBUA T. MATHEKA**

**JUDGE**

**In the presence of:-**

**COURT ASSISTANT LEPIKAS**

**FOR STATE: MS. MURUNGA**

**FOR ACCUSED: PRESENT MS. SABAYA**

**ACCUSED PRESENT: VIRTUALLY**