REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 8 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK NJERU.....ACCUSED

JUDGEMENT

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 10th July 2018 at Jua Kali area in Nyamira Township within Nyamira County the accused murdered EMMA NYANCHAMA.

The accused pleaded not guilty to the charge whereupon a trial in which the prosecution called eight witnesses ensued.

Briefly the facts of the case are that the accused and the deceased were cohabiting and that because they both used to drink their union was characterized by domestic violence. The accused was working at Kenya Power while the deceased operated a hair salon at Jua Kali area. On the material day at around 8.30am the accused and a man called Wenga were seen heading to the salon while holding the deceased on either side. According to Churchill Omaiyo Matara (Pw5), the witness who claimed to have seen them, the deceased was wearing a short black dress and when they arrived at the salon the accused opened it and left the deceased there and went to the bar (Pw5's bar). Pw5 testified that the accused told him that he would go to work first then return to check on her. He also stated that the accused mentioned to him that the deceased had not spent the night at their home and that he had been called to get her from a street where she had been found. Pw5 further testified that the accused returned from work at about 10 or 11am and found him outside his bar and that the accused opened the salon, went inside, closed the door and remained there for about 5 or 10 minutes then went and called him. Pw5 stated that when he entered the salon he saw the deceased lying on her belly while half dressed with a pair of jeans. He stated that the accused must have tried to dress her because earlier he had seen the deceased in a short black dress. Pw5 stated that he saw a lot of blood flowing from between the deceased's buttocks. It was then that he called one Morara Achoki who went into the salon and who then made a call to the mother of the deceased. The deceased's mother immediately sent her son Ongeta Okerio Simon (Pw4) to the salon. Pw4 testified that upon arrival he found the accused had locked the salon and gone to Pw5's bar. He went there and found the accused drinking with another man. He prevailed upon the accused and they went to the salon. Pw4 stated that he saw the deceased lying on the floor. He stated that she was wearing a trench coat which was wet with her trousers pulled to the knees and she was bleeding from her private parts. He stated that they carried her to the road to take her to hospital but the driver they approached declined to carry her because of the state she was in. He stated that they called the OCS Nyamira Police Station who immediately went to the scene with a team of officers. One of the officers touched the deceased and informed him (Pw4) that she was dead. The officers then carried the body to the mortuary and arrested the accused and subsequently charged him with this offence. Pw4 stated that the accused used to physically abuse the deceased and that their mother (Pw3) had on one occasion lodged a complaint with the police but it was later withdrawn. Their mother (Pw3) testified that as a matter of fact the deceased had just the day prior to her death told her that the accused had gone to the salon and damaged the mirrors, television, radio, shaving machine and blow dry. Pw1 and Pw5 also confirmed that the two used to fight a lot.

Dr. Ombati Timothy Mokua (Pw6) a medical officer working at Bosiango Hospital testified that at the material time he was working at Nyamira County Hospital and that it was him who performed a post-mortem on the body of the deceased. He stated that the deceased had bruises on the frontal and parietal aspect of the head; lacerations on the labia minor and labia majora; lacerations on the left wrist; blood clots (about 2 litres) in the digestive system and injuries to the anterior and posterior peritorium. He stated that she also had injuries to the large intestines and the pancreas. As a result of the examination he formed the opinion that the cause of death was peritorium haemorrhage. He opined that the likely weapon used was a blunt object. In cross examination he was of the view that a drunken fall was a high possibility of the cause of such injuries.

In addition to the post-mortem report the prosecution produced photographs of the body and the scene. The same were taken by Inspector Daniel Marucha (Pw7) on 10th July 2018. Sergeant Rebecca Kathoka (Pw8) the officer tasked with the investigations testified that in the course of her investigations she learnt that the accused and the deceased used to fight a lot and that the day prior to the deceased's death the two had quarrelled and the accused had kicked the deceased. She stated that on that day one of the witnesses (Pw5) who had a bar next to the salon heard the fight in the salon but when he tried to open the door he found it was locked. She stated that it was Pw5 who called the brother of the deceased. She testified that when she visited the salon, there were pieces of broken mirrors which was evidence of a struggle between the accused and the deceased. She also stated that there were buckets of water which looked bloody and some pieces of cloth and a mop which appeared to have been used to mop (wipe) blood. She came to the conclusion that the accused had tried to wipe the blood so as to

cover up what he had done and for that reason, she concluded he had committed this offence and charged him.

In his defence the accused confirmed that he used to cohabit with the deceased and that they used to fight a lot. He blamed those fights on her drinking which would lead to her selling their household goods and vehemently denied that he killed her. He testified that on 9th July 2018 he went to the salon from work and found the deceased drunk. He stated that he threatened to shut it down and her mother (Pw3), who he called, agreed with him but beseeched him not to assault her. He stated that he took two shaving machines and confided in Pw5 before going home. He testified that the deceased did not go home that night but that the next morning on his way to work he went via the salon only to find it locked and was heading to work when Pw5 told him he had seen the deceased behind his bar and she was very drunk. He stated that he then met a man who pleaded with him not to leave her where she was. He went there and found her very drunk and she seemed to have fallen in some mud. He stated that she was wearing a black dress and that he was assisted to carry her to the salon by one Wenga. He confirmed that after putting her inside he locked the salon and went to work. He stated that he called her mother (Pw3) who promised to send someone to check on her. He stated that at around 10am he received a call from Pw4 telling him to go to the salon immediately. He immediately went there and saw people peeping into the salon through a window. Pw4 ordered him to open and when he did they saw the deceased lying prostrate and she appeared to have tried to put on a pair of trousers and was bleeding from her private parts. Pw4 accused him of killing her and it was at that stage that the deceased's sister (Pw1) arrived at the scene and tried to awaken the deceased. He stated that by then a crowd had gathered and was baying for his blood had it not been for the arrival of village elder one George Mosigisi. Police officers soon arrived and arrested him and also carried the body of the deceased.

In summing up, Mr. Okemwa, Learned Advocate for the accused submitted and urged this court to find that the prosecution had not proved its case beyond reasonable doubt and the accused ought to be acquitted. Counsel relied on the cases of: -

- **Republic v Andrew Omwenga [2009] Eklr;**
- **R v Tubere s/o Ochen [1945] EACA 63;**
- **Woolmington Versus DPP [1935] AC 462.**
- **Miller Versus Minister of Pensions [1942] AC.**
- **Republic v Ismail Hussein Ibrahim [2018] eKLR.**

There was no summing up on the prosecution's part.

The ingredients of murder which the prosecution is required to prove beyond reasonable doubt are: -

(a) The death of the deceased and the cause of the death.

(b) That the accused committed the unlawful act which caused that death.

(c) That the accused acted of malice aforethought – ***(see Section 203 of the Penal Code and also Republic v Andrew Omwenga [2009] eKLR).***

The death of the deceased and the cause of that death are neither in doubt nor are they disputed. From the findings of the post-mortem she had both external and internal injuries. The doctor (Pw6) who performed the post-mortem testified that although she had several injuries what killed her was peritoneal haemorrhage. The doctor (Pw6), told the court that he found about two litres of blood clots in the deceased's digestive system and there were injuries to the anterior and posterior peritoneum (membrane lining the cavity of the abdomen and covering the abdominal organs). It is evident that the death occurred in the premises where the deceased carried on a salon business.

The issues that remain for determination are **whether the cause of death was by an unlawful act** and **if it was whether it was an unlawful act of the accused and also whether it was of malice aforethought.**

I have considered the evidence and submissions before me carefully and I find myself doubting that the accused killed the deceased. Whereas there is evidence that the accused was often times violent towards the deceased which raises strong suspicion that he could have caused the injuries culminating in her death, there is no direct evidence that he killed her. While even circumstantial evidence may suffice in this case the defence mounted the defence mounted by the accused person sounded plausible and consistent with the evidence of the prosecution hence was to a large extent casting doubt upon the prosecution case. His evidence that the deceased did not spend that night at their house and that he was only called to go for her in a street was confirmed by Churchill (Pw5) who testified that he saw the accused and a man called Wenga holding the deceased on either side and that after they took her to the salon the accused left immediately. It was also confirmed by Sgt. Rebecca Kathoka (Pw8) when she stated that in the course of her investigations she confirmed that the deceased did not go home on that night and that she was carried to the salon by two men. Had she carried out investigations as to who those two men were she would have discovered that they were the accused and the man called Wenga. It is also my finding that contrary to the evidence of the investigating officer (Pw8) there was no fight in the salon on that day. The man she alleges told her he heard a fight in the salon behind his bar was Churchill (Pw5). However, in his testimony Pw5 did not mention that he heard any fight in the bar. His evidence was that when the accused returned to the salon at about 10am he went into the salon and stayed there for ten minutes then came out and went to the bar. Churchill did not allude to any fight, struggle or commotion at all during the time the accused was inside the salon. In that case it is not very clear as to how the deceased sustained the injuries that culminated in her death. According to Dr. Mokua (Pw6) even a drunken fall had a high possibility of occasioning those kind of injuries. Proper investigations should have been done to establish how old those injuries were. Could they have been inflicted during the night and in the street where it is alleged the deceased spent the nigh? How long had she stayed with the two litres of clotted blood in her belly and could she have been raped and if so by who? All these are questions that could have been answered through thorough investigations.

I must, with due respect express my disappointment on the standard of investigations in this case. The same were very shoddy. The investigating officer (Pw8) should have gone further to find out where the deceased had spent the night and whether indeed it was true that

she was found lying in a street in a drunken stupor. She should also have made it a point to interrogate Wenga (mentioned by the accused and Pw5) as the person who helped him to carry her from the street). She should also have ensured that he recorded a statement and attended court to testify as his having not done so has left a big gap in the prosecution's case and one can also draw an adverse inference that had he attended then his evidence would not have favoured the prosecution. As it is, it appears that Pw8 shifted the burden to the accused to prove his innocence. That is not permissible. It was upon her as the investigating officer to carry out thorough investigations. It was not in my view sufficient to just record statements of witnesses and take photographs. Pw8 should have gone deeper to establish the condition the deceased was in when she was found by the accused and the said Wenga. Suspicion no matter how strong cannot support a conviction and that is the only thing that the prosecution had against the accused as the co-existing circumstances of this case clearly weaken or destroy the inference that the accused committed this offence and his defence poked holes in the case for the prosecution. Accordingly, I find him not guilty of the offence of murder and acquit him and unless he is otherwise lawfully held he shall be set at liberty forthwith.

Dated and delivered in Nyamira this 30th day of January 2020.

E. N. MAINA

JUDGE