



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CR. MURDER NO. 8 OF 2017

REPUBLIC.....PROSECUTOR

V E R S U S

HARRISON KINYUA MAGU.....ACCUSED

JUDGMENT

1. The accused Harrison Kinyua Magu is charged with Murder contrary to Section 203 as read with **Section 204 of the Penal Code**. It is alleged in the information dated 3/7/17 that on 12/7/2017 at Kiarukungui village within Kirinyaga County, unlawfully murdered Margaret Kanini Njoroge.

The accused person denied the charge.

2. The facts of the case are that the deceased in this case was the wife of the accused. On 12/7/2017 one Joseph Githaka (PW-3-) heard screams which were emanating from Kiarukungu Shopping Centre (Ndegwa's Place). He decided to find out and went to where the screams were coming from. He found the accused trying to lift the deceased. According to PW-3- the accused and the deceased were drunk. The accused could not lift the deceased. PW-3- left the accused and the deceased at the scene. He went back to the scene after Fifteen minutes and found the two at the scene with the accused trying to lift the deceased but all in vain. PW-3- advised the accused to call for a motor bike to carry his wife.

3. PW-3- left the scene and after 30 minutes he heard screams and was informed that the accused's wife had died.

4. The matter was reported to the police. PW-5- P.C Thomas Wangenyi visited the scene and found the body of the deceased. The body had visible injuries on the head and she was bleeding from the mouth and ears. A Village In-charge Michael Kinyua informed him that the deceased was killed by her husband. PW-3- informed him that the accused was lifting the deceased then drop her on the ground and kick her. PW-5- removed the body from the scene and escorted it to Karira Mission. He arrested the accused and charged.

5. A postmortem was done on the body of the deceased. The Doctor Douglas Njau Chira (PW-6-) found that the body had soil on the head, hair, both hands, both legs and feet. There were bruises on the head. There was a cut and splitting of the left ear lobe. The doctor found that the cause of death was acute hematoma and brain contusion. That is severe head injury. The postmortem form was produced as **Exhibit - 2-**

6. The accused was examined by Dr. Joseph Thuo, PW-1- who found that he was fit to stand trial. The accused was then charged with this offence.

7. The accused in a sworn defence testified that the deceased was his wife and on the material day they had spent the day doing casual jobs and later went to the bar to drink Keg beer. At about 7.00 Pm they decided to go home. On the way the deceased slipped and a fell at the place where there were stones and murrum. He tried to lift her but could not. He had not realized that the deceased was injured. He told the court that the deceased was hit by a stone when he fell down. He denied that he assaulted the deceased.

8. I have considered the evidence on record. I have also considered the submissions which were filed by the parties at the close of the defence case. The issue for determination is whether it is the accused who caused the death of the deceased with malice aforethought.

9. The accused is charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code**.

Section 203 provides:-

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

Section 204 provides: _

“Any person convicted of murder shall be sentenced to death.”

10. The prosecution had a duty to prove that the deceased death was caused by the unlawful act or omission on the part of the accused. The prosecution must also prove that the accused killed the deceased with malice aforethought as provided under **Section 206 of the Penal Code**.

11. In this case the only eye witness was PW-3- Joseph Kefa Githaka. His testimony was that he saw the accused and his wife together. He testified that they were both drunk. He also testified that he saw the accused assisting the deceased who had fallen down so that she would stand and walk. According to PW-3- the deceased fell down on several occasions and the accused was trying to assist her to stand up but in vain.

12. PW-3- never witnessed the accused lifting the deceased and hitting her head on the road. He never witnessed the accused beating the deceased. Of importance is that the PW-3- did not see the accused using any weapon to beat the deceased. The defence of the accused is that the deceased was injured when she fell down. He had not realized she had been injured.

13. The evidence of PW-3- who was the only eye witness confirmed the defence of the accused that the deceased had indeed fallen down and the accused was trying to assist her to stand on her feet.

14. On the other hand the Doctor who performed the postmortem testified that the deceased died as a result of head injuries. In Cross-examination the Doctor testified that the injuries were caused by a blunt object as there was no penetration. He admitted that it could be possible to have the injury after a fall. As such the Doctor did not rule out the possibility that the injury on the deceased was as a result of a fall.

15. I find that the prosecution has failed to tender evidence to prove that the death of the deceased was caused by the unlawful acts of omission by the accused. The accused in his sworn statement stated that where deceased fell there was a trench and there were stones. That it was a murrum road. This was not disapproved by the prosecution as no photographs of the scene were taken. It is possible that there were stones in view of the injuries sustained.

16. Although PW-5- the Investigating Officer testified that he was informed by PW-3- that the accused was lifting the deceased and dropping her on the ground and beating her using kicks, PW-3- did not adduce such evidence in this court. If indeed PW-3- had witnessed that it would mean that either he did not tell the Investigating Officer the truth or he did not tell this court the truth. PW-3- in Cross-examination testified that he did not see the accused beating his wife. The evidence by PW-5- that the accused was beating the deceased is not confirmed and has not been corroborated.

17. The prosecution through Mr. Obiri Assistant Director of Public Prosecution submitted that the injuries which caused bleeding from the nostrils and ears is intense and require some force applied on the head. I do agree that blunt force could cause the injury. However, the pathologist PW-6- confirmed that the injury could have been caused by falling. His assertion that the accused ought to have known that the lifting and dropping could have caused grievous harm cannot hold because the evidence we have is that the deceased fell and accused went to assist. She could have sustained the injury when she fell down the first time. The prosecution failed to prove that the accused committed an unlawful act.

18. I agree with the submissions by Mr. Ndana that the prosecution has not proved the offence of murder against the accused. There was no prove of malice aforethought established by the prosecution. The prosecution did not establish the grounds which are required to prove malice aforethought. **Section 206 of the Penal Code** provides:-

“malice aforethought shall be deemed to be established by the evidence proving any one or more of the following circumstances:-

a) An intention to cause death of or to do grievous harm to any person whether the person is the person actually killed or not.

b) Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is cause or not or by wish that it may not be cause.

an intent to commit a felony -----“

19. The evidence adduced by the prosecution has not met this threshold. There was no evidence that the accused planned to kill his wife.

20. The Court of Appeal in the case of **Ephantus Mugo King’athia –v- R Cr. Appeal No. 74/1997** stated:-

“Both the appellant and the deceased were drunk and no dangerous weapon was involved. In these circumstances a life sentence was not justified and was clearly harsh and excessive.”

21. In **Isaac Onyango Mugoma & Another –v- R Cr. Appeal No. 83/2003** in the Court of Appeal, it was held that the burden was on the

prosecution to prove malice aforethought and the burden was not discharged, the conviction of murder cannot stand.

22. In this case the prosecution failed to prove that the accused caused the death through an unlawful act or mission. The prosecution also failed to discharge the burden to prove malice aforethought. What was presented before this court is that the accused and deceased who are husband and wife were very drunk, the deceased fell and injured her head and efforts by the accused to assist her stand up came to naught.

23. I find that the charge of murder has not been proved beyond any reasonable doubts. The accused is therefore entitled to an acquittal. I acquit him under **Section 322 of the Criminal Procedure Code**. He will be set at liberty unless otherwise lawful held.

Dated at Kerugoya this 25th day of February 2020.

L. W. GITARI

JUDGE