



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 14 OF 2017

REPUBLIC.....STATE

VERSUS

ECK.....ACCUSED

JUDGMENT

1. The Accused Person, ECK, is charged with murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars are that on the 31st day of January, 2017 at Bluegum Village in Marioshoni Location, Molo sub-County within Nakuru County, it is alleged that she murdered PKK("Deceased").
2. The Prosecution called seven witnesses in its bid to prove its case against the two Accused Persons. The general theory of the Prosecution is that the Accused Person quarreled with the Deceased, who was her husband, and who was drunk at the time. The Accused Person, then, allegedly picked up a wooden stick and used it to clobber the Deceased to death.
3. The evidence adduced was equally straightforward. WC is fifteen (15) years old. She is a daughter to the Deceased and the Accused Person. After voire dire confirming that she is intelligent enough to understand the nature and meaning of oath, she gave sworn testimony as PW4. She said that she was at home on 31/01/2017. At around 7:00pm, a boda boda came and brought her father, the Deceased home. He was visibly drunk. He went to the kitchen. The Accused Person went to the kitchen also after a short time. W says she saw her mother angrily pushing her father. Her mother then picked up a cypress tree plank of wood and hit the Deceased on the head. She then hit him again on the chin with a stool; then the hand. According to W, the Accused Person kept hitting the Deceased with the stool until it broke into pieces. Among other places, she saw the Accused Person hitting the Deceased on the ribs and abdomen. She kept hitting him even after the Deceased crawled under a table – this time using a cooking stick.
4. W testified that after she saw the Accused Person beating her father with such brutality, she began screaming and pleading with the Accused Person to stop. Instead, the Accused Person threatened to beat her up also. All the while, W testified, the Accused Person was demanding the money the Deceased had been paid after he sold potatoes. According to W, the Deceased kept screaming: "Wacha itoshe! Nitakurudishia pesa!" (Let it (the beating) be enough! I will refund the money!).
5. W testified that after she administered the beating and apparently after noticing that the Deceased was badly injured, the Accused Person requested W to accompany her to the neighbour's house. The neighbour is Mercy and there they borrowed a D-light lamp which they used to go to the Village Elder since it was already dark. They went back home accompanied by Mercy, K and Julius. On getting there, the Deceased asked for some water but could only drink a little. The village elder said that the Deceased was in a bad shape and called neighbours. Julius instructed that they bring some milk for him but by the time it was brought, he had died.
6. On cross-examination, W insisted that she stood outside the door to the kitchen and witnessed everything that happened on that day. She confirmed that the Deceased and the Accused Person used to fight often. She resisted suggestions that she was telling lies to please her father's elder brother who was now taking care of her.

7. One of the neighbours who accompanied W and the Accused Person to the Village Elder's house on that night was a young man by the name GK. He is 16 years old. He testified as PW5. He recalled that on 31/01/2017 at around 10:00pm he was at his home studying when the Accused Person went to their house and asked for help to get to the Village Elder's house. She was accompanied by W (PW4). G accompanied them to the Village Elder's house carrying the D-light lamp. The Village Elder at first said he would go in the morning but when the Accused Person insisted, he accompanied them back to the Deceased's house. They found the Deceased lying on the floor in the kitchen. In his assessment, he was in a bad state. He had severe injuries. He could see injuries on the chin and left arm and blood was oozing from the wounds.

8. The Village Elder is Julius Tangu. He testified as PW2. He confirmed that he received the Accused Person, her daughter and G on 31/01/2017 and, at the insistence of the Accused Person, accompanied them back to the Deceased's house. They found the Deceased in a bad state and he decided to call neighbours to come and render assistance. However, the Deceased died in the process. He reported that the Accused Person told him that she had fought with her husband (the Deceased) over Kshs. 500/- and that he had been hurt in the process.

9. The neighbour who came to offer assistance was Collins Rotich Kibet. He testified as PW1. He corroborated the narratives by Julius, G and W about what happened when they returned to the house and found the Deceased lying on the ground in the kitchen. He said he asked the Accused Person what had happened and she said that she had hit the Deceased with a cooking stick as they were fighting. He conceded that the Accused Person and the Deceased had a problematic relationship and they often had violent quarrels. The biggest problem, he said, was drunkenness by both of them.

10. It was Dr. George Biketi who performed autopsy on the body of the Deceased. He testified as PW4. The body was identified by Peter Kiploman, a son to the Deceased, who testified as PW3 and confirmed as much. Dr. Biketi produced the Post-mortem form as an exhibit. He found that the body had multiple cut wounds on the hands and legs. It had a fractured left mid-shaft radius and ulnar as well as the left elbow and right distal radius and ulnar. The head had a deep cut wound. The left lung had collapsed and he also had fractured his 6th and 8th left ribs. The head had also had an occipital skull fracture. The doctor concluded that the cause of death was severe head injury and blunt chest trauma due to massive blunt force trauma secondary to an assault.

11. The final witness was the Investigating Officer, Inspector Mutia Mutinda. He testified about receiving a call from Collins Kibet (PW1) about the incident on 31/01/2017 and went to the scene where they recovered the piece of wood – which he produced as Exhibit 2. He conducted his investigations and recommended the charging of the Accused Person.

12. Put on her defence, the Accused Person gave an unsworn statement and did not call any witnesses. She said that on 31/01/2017, both her husband (the Deceased) and her were drunk. He found her in the kitchen cooking. She said that the Deceased grabbed the cooking stick from her and started beating her. The Accused Person said that in reaction, she grabbed the Deceased and made him sit down. After a short time, he again grabbed the cooking stick and started beating him with it. She again grabbed him and this time pushed him away in self-defence. She said that the Deceased fell on a table and a log of firewood. She said that she ran away and started screaming and that is when W (PW4) went into the kitchen. The Accused Person's narrative after that is exactly the same as told by W, G, Julius and Collins.

13. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

14. To successfully obtain a guilty verdict in a murder charge, the Prosecution, therefore, is required to tender sufficient proof of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by *malice aforethought*.

15. On the other hand, under section 206 of the Penal Code, *malice aforethought* is established, when there is evidence of:

- i. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not;
- ii. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not;
- iii. Intent to commit a felony; or

iv. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

16. The task of the Court here is to determine if on the evidence adduced, the Prosecution has established the three elements of the offence of murder. Each element must be proved beyond reasonable doubt.

17. In this case, it is not contested that the Deceased died. All the Prosecution witnesses said as much; and so did the Accused Person. Dr. Biketi produced a Post-mortem Report after conducting the autopsy. He concluded that the cause of death was severe head injury and blunt chest trauma due to massive blunt force trauma secondary to an assault.

18. The only two questions to be established are whether it was the Accused Person who killed the Deceased; and whether she had the requisite *mens rea* in doing so. The Prosecution and Defence narratives are remarkably similar. They only differ on what exactly happened when the Deceased entered the kitchen on that fateful 31/01/2017 in the evening. According to the Accused Person, it was the Deceased who grabbed a cooking stick and started hitting her and then the Accused Person pushed him in self defence. The Accused Person says that it was the push that caused the Deceased to hit his head on the table and wood hence sustaining injuries.

19. However, we have on record the evidence of W, the Accused Person's daughter (PW4). She gave straight-forward evidence about what she saw on that evening. She said she saw the Accused Person grab, first a piece of wood and hitting the Deceased severally with it. Second, she grabbed a cooking stick and assaulted the Deceased; and lastly, she used a stool to severally hit the Deceased. All the while, W testified, the Deceased was pleading with her to stop the beating.

20. I found the testimony of W straightforward and candid. She had no reason whatsoever to concoct such a story against her own mother. The attempts by the Defence to discredit her because she was being taken care by her uncle were unsuccessful: she proved a reliable and honest witness. In any event, her testimony closely mirrored what she recorded with the Police immediately after the incident.

21. W's testimony is somewhat corroborated by the evidence by Dr. Biketi. The post-mortem Report reveals injuries which are inconsistent with a fall as claimed by the Accused Person. On the contrary, the Pathologist found many injuries on the body all consistent with blunt force trauma secondary to an assault.

22. I therefore explicitly believe the narrative by W (PW4) and find the narrative by the Accused Person so implausible that there is no inherent possibility that it could be true. While the Defence is not required to demonstrate that its defence theory or narrative is reasonably plausible or probable but it is only required to demonstrate that its version of events or its theory of the case is reasonably possibly true in substance, in this case, the Defence narrative does not meet even this low threshold in order to raise reasonable doubt. The correct test is whether it can be said that the Defence narrative is so improbable that it cannot reasonably possibly be true. (See *S v Shackell (4) SA 1 (SCA)*). In my view, it is not possible to say that the Accused's Person's version of events has any reasonable inherent probability that it is true.

23. As for malice aforethought, this is supplied by the fact that the Accused Person attacked the Deceased so savagely and brutally that it is clear that, at a minimum, she intended to inflict grievous injury to him. By the eye witness account, the Accused Person assaulted the Deceased first with a piece of firewood; then with a cooking stick; and lastly with a wooden stool. She hit him on the head causing a skull fracture; on the hands causing ulna fracture; and on the ribs causing ribs fracture. That kind of assault undoubtedly evince malice aforethought for murder.

24. On the basis of the existing record, there is little doubt that all the elements of murder have been established against the Accused Person. Consequently, I find and hold that the Accused Person, ECK, is guilty of the murder of **PKK contrary to section 203 as read together with section 204 of the Penal Code and I hereby convict him accordingly.**

25. Orders accordingly.

Dated and delivered at Nakuru this 30th day of April, 2020

.....

JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Rita Rotich, and the Court Assistant were in attendance by video-

conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.