



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 16 OF 2019

THE REPUBLIC.....PROSECUTOR

VERSUS

MATHA KWAMBOKA MOGORI.....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 the night of 2nd July 2019 at Irande village of Nyamira South Sub-county within Nyamira County in the Republic of Kenya the accused murdered Henry Mongare Moenga.

The accused pleaded not guilty to the charge. In the ensuing trial she was represented by Mr. Mainga Advocate.

The prosecution called seven witnesses.

Briefly the facts of this case are that the accused and the deceased were husband and wife who lived together but spent the night in different rooms in separate houses. According to their children Debra Kerubo Mongare (Pw1) and Douglas Moenga (Pw2), the deceased used to sleep in the main house while the accused slept in a separate house with her daughter (Pw1). Debra Kerubo (Pw1), testified that on the fateful night the accused left their sleeping quarters in the wee hours and shortly after that she heard noises outside. Pw2 clarified that the noise was that of their mother's screams. They both testified that on going outside they saw the house in which their father was sleeping on fire. Pw1 and Pw2 testified that as they were screaming for help, the door of the house opened and their father came out with burns all over his body. Pw1 told this court that the deceased asked for water and he was given some and after drinking it he asked for milk which he was also given. He then sent Pw2 to call their uncle (deceased's brother). The accused wrapped the deceased in a leso and led him to a place where they would meet with his brother and when the deceased's brother Shem Nyaroro (Pw3) arrived he took the deceased to hospital on a motor cycle. Pw1, Pw2 and the accused were left behind. Pw1 and Pw2 stated that angry relatives of the deceased who claimed the accused was responsible for what had befallen him roughed her up and threw her into a well. She was however soon pulled out and taken to hospital.

The court heard that the deceased suffered severe burns. Shem Nyaroro (Pw3), testified that at the scene he asked the deceased, who was walking on his own feet what had transpired but he did not respond. He testified that it was much later when he was taking him to Moi Teaching and Referral Hospital Eldoret that the deceased narrated to him that his wife, (the accused) woke him up at 3.00am on the guise that she wanted the milk cans so she could milk the cows as she needed to go somewhere. That although he initially refused to open for her she insisted and he opened. He then went to answer a call of nature then went back to bed. About ten minutes later he heard something being splashed on the house and after that the fire started. Pw3 alleged that the deceased also told him that the accused had locked him inside the house and would not open even when he pleaded with her to do so. The deceased died three days later as he was undergoing treatment at the Eldoret Moi Teaching and Referral Hospital and the accused who was already in police custody was charged with this offence.

A post mortem report produced as exhibit P1 indicates that the cause of death was severe dehydration due to burns. Dr. David Chumba (Pw7) testified that he performed a post mortem on the body of the deceased on 9th July. He observed that the deceased had burns covering 91% of his body and only the pelvis, pubic area and the neck were not burnt. The heat had affected the respiratory system and there was soot in the airways and carbon dioxide poisoning.

In her defence, the accused testified that on the material day she worked in her shamba from morning till evening after which she went to the market for groceries then went home and prepared dinner which they all took in the house where the deceased used to sleep. She stated that after that she retired to bed in a room she used to share with her daughter Zipporah Nyakerario. She confirmed that the deceased used to sleep alone. She stated that at 5 o'clock she was awakened by the alarm and she went to milk the cows about 20 meters from the main house and it was after she had finished that she heard her husband shouting that he was burning. She described the house he had slept in as mud-walled with a tin roof. She stated that she ran to the house and joined her children and together they hit the door and the deceased came out.

When he asked for water they gave him and he drunk. She confirmed that she covered him with a leso and that he sent their son to call his brothers one of who accompanied him to hospital. She testified that after the deceased left for the hospital his brothers roughed her up. She stated that she did not know how she ended up in the well or who removed her. It was also her evidence that it was she who raised the alarm on noticing the fire and that there was smoke at the corner where the deceased used to sleep. She stated that the relationship between her and her husband was cordial and she had no reason to kill him. She contended that had she been the one who burnt him she would not have escorted him to the road. In cross examination, she asserted that her twenty-two-year marriage to the deceased was happy and that it was him who made the decision to be sleeping alone. She also disputed Pw3's testimony that she threw herself in the well so as to commit suicide saying that had she intended to kill herself she would not have screamed from the deep of the well.

Mr. Mainga, Learned Counsel for the accused elected to sum up by way of written submissions but by the time of writing this judgement those submissions had not been received as the submissions on record were those filed at the stage of case to answer. This court will therefore determine the case without the benefit of closing arguments.

As the death of the deceased is not disputed, the issues for determination are: -

- (a) Whether that death was caused by an unlawful act of the accused. If so;**
- (b) Whether the unlawful act that caused the death of deceased was with malice aforethought.**

The deceased was alone when the incident leading to his death occurred and because none of the witnesses alleges to have seen the accused starting the fire or setting the house on fire the evidence against her is circumstantial. The case against her depends firstly on evidence that in the wee hours of that fateful morning she left the house in which she had spent the night with her daughter and went to the house in which the deceased was sleeping and soon thereafter a fire broke out. Secondly, evidence by Pw3 that she attempted to commit suicide by throwing herself in a well and later at the hospital pretended to faint and that she had a rocky marriage with the deceased. Thirdly, the case rests on an alleged dying declaration made by the deceased to his brother Shem (Pw3) as he was taking him to Moi Teaching & Referral Hospital in Eldoret.

I have carefully analysed the evidence by both sides from all the above angles and my finding is that none conclusively points to the guilt of the accused person. The onus always lies upon the prosecution to prove its case beyond reasonable doubt but it is my finding that the evidence adduced in this case fell short of that standard.

There is cogent evidence that the accused and the deceased slept in different quarters and whereas the accused herself admitted that she indeed woke up in the wee hours of the morning she gave a plausible explanation for so doing hence watering down any suspicion that could arise from that fact. It is also instructive that the evidence of the two key witnesses (Pw1 and Pw2) tends to absolve the accused rather than point to her guilt. While Pw3 alleged that the deceased told him that the accused locked him in the house, Pw1 and Pw2 were categorical that it is their father who opened the door from inside. Pw3's evidence that the door was bolted on the outside was not cogent as he was not at the scene and it cannot therefore dispel that of Pw1, Pw2 and the accused. The foregoing fact was a crucial element in the case and proper investigations should have been carried out to establish whether the door of the house was in fact bolted on the outside by someone else or whether it was locked on the inside by the deceased. No such investigation seems to have been conducted hence creating a gap in the prosecution's case.

Pw3 also implicated the accused by stating that she attempted to commit suicide by throwing herself into a well. This however was also discounted by Pw1 and Pw2 who testified that she was thrown there by her in-laws. At the time this was happening Pw3 had left to take the deceased to hospital but Pw1 and Pw2 were present and witnessed the happenings and therefore their evidence is more plausible. Pw4 who helped the accused out of the well testified that he did not know how the accused fell into the well so it does not support Pw3's evidence that she threw herself there and neither does it discredit Pw1 and Pw3's allegation that she was thrown into the well.

In respect to the relationship between the accused and the deceased, the two key witnesses told this court that although their parents used to quarrel, it was nothing out of the ordinary. Conflict in marriages is not unexpected and this alone cannot form the basis for a conviction. It was for the prosecution to prove that there was so much conflict as to motivate the accused to kill the deceased. This was not proved.

As regards the dying declaration, there was evidence from the investigating officer (Pw6) that when he, together with other officers visited the deceased at the hospital, the deceased could not talk and they were therefore not able to extract any information from him. It is therefore curious that the deceased could have made the dying declaration to Pw3. If the deceased could not talk when the officers visited him, it is improbable that he could do so when his condition had deteriorated hence necessitating his transfer to Moi Teaching & Referral Hospital. This coupled with the fact that there was no investigation done to establish that the fire was caused by an inflammable substance leads me to the conclusion that although there may be strong suspicion that the accused started the fire that led to the death of the deceased, there is nothing at all to translate that into evidence. Suspicion no matter how strong can never be the basis for a conviction and there being no evidence to prove that the accused caused the death of the deceased, this court has no alternative but to give her the benefit of doubt and enter a verdict of not guilty and to acquit her of the charge of murder. I need not therefore go into the questions of whether there was malice aforethought.

Signed, dated and delivered in Nyamira this 18th day of June 2020.

E. N. MAINA

JUDGE