



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 25 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

DAVID ABRAHAM AYUMBA.....ACCUSED

JUDGMENT

1. David Abraham Ayumba is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the night of 13th and 14th day of November 2019, at Mukhobola area, in Bunyala Sub County, of Busia County, murdered Violet Nabwire Weke.
3. The accused and the deceased were a husband and wife. It was not established by the prosecution what led to the unfortunate incident. However, the accused went and surrendered himself to the police in the morning. The deceased was found dead in their house and had a cut wound.
4. David Abraham Ayumba, the accused, contended that when he returned to his house drunk, he knocked severely but the door was not opened for him promptly. When it was finally opened, a man emerged from therein and on asking his wife who he was, she told him he was a man just like him. She pushed him and he fell down where there was a machete. He picked it and “slapped” her with it. He went to bed and on the following morning he found her dead.
5. The issues for determination are:
 - a. Whether the defence of intoxication is available to the accused;
 - b. Whether the accused caused the death of the deceased; and
 - c. Whether the offence of murder was proved.
6. This is a case where there were no eye witnesses. We shall therefore piece together the circumstantial evidence in order to arrive at a conclusion. Circumstantial evidence was restated in the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

In the case of **Sawe vs. Republic [2003] KLR 354**, the Court of Appeal held as follows:

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.
2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.
3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts

to the accused.

In the instant case, I will be guided by these authorities.

7. The accused in his evidence contended that on the material night he was drunk having taken some changáa. Section 13 (2) of the Penal Code provides:

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

8. In addition, section 13 (4) of the Penal Code provides that the state of intoxication shall be taken into account in determining whether or not an accused person had the necessary *mens rea* in committing a crime. That section provides that:

4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

9. The accused went to imbibe changáa on his own volition. Secondly, the description he made of the entire incident shows that his faculties were not affected by the changáa he had taken. This defence is therefore not available to him.

10. For an offence of murder to be proved, the prosecution has the onus of proving the following ingredients beyond any reasonable doubt:

a. The death of the deceased;

b. That the accused committed the unlawful act or omission which caused the death of the deceased; and

c. That the accused had the malice aforethought.

11. In the case of **Republic vs. Andrew Mueche Omwenga [2009] eKLR**, D. K. Maraga J, as he then was, spelled out the ingredients as follows:

There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.

12. The accused raised the defence of provocation. Section 208 (1) of the Penal Code defines the term provocation as follows:

The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

13. In order for the defence of provocation to be available certain conditions must be met. In the case of **Kato vs. Uganda [2002] 1 E A 92** at page **108** the Court of Appeal stated:

The former Supreme Court has interpreted two sections thereof meaning that before a charge of murder can be reduced to manslaughter on ground of provocation, the following conditions must be satisfied;

a) the death must have been caused in the heat of passion before there is time cool;

b) the provocation must be sudden;

c) the provocation must be caused by a wrongful act or insult

d) The wrongful act or insult must be in such a nature as would likely to deprive an ordinary person of the class to which the Appellant belongs the power of self-control. It is obvious from this that any individual idiosyncrasy, such as for instance as that the accused is a person who is more readily provoked to passion than the ordinary person, is of no avail; and

e) Finally, the provocation must be such as to induce the person provoked to assault the person by whom the act or insult was done or offered.

This last provision in our opinion means (provided, of course, that all the other conditions referred are present) that if the

provocation is such as to be likely to induce an assault of any kind, then the accused should be found guilty of manslaughter and not murder irrespective of whether the assault was carried out with a deadly weapon, or by other means calculated to kill. See Rex v Hussein s/o Mohamed 9 EACA 152; Yovan v Uganda [1970 EA 405; Chacha s/o Wamburu v Republic [1953] 20 EACA 339.

14. The explanation by the accused of the circumstances that led to the death of his wife was not displaced by any evidence on record. The only issue that was displaced was the manner in which he contended the deceased sustained the injuries. The flat side of a machete cannot inflict a cut wound. The circumstances that he said led to the unfortunate incident could have deprived any person the power of self- control. I therefore find that the prosecution has not proved the offence of murder. I accordingly acquit him of the offence of murder. I however find that the prosecution has proved the lesser offence of manslaughter contrary to section 202 of the Penal Code. I find him guilty and accordingly convict him.

DELIVERED and SIGNED at BUSIA this 22nd day of July, 2020

KIARIE WAWERU KIARIE

JUDGE