



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO.9 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD MWALIA KALITI.....ACCUSED

JUDGEMENT

1. The accused herein **BERNARD MWALIA KALITI** was charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code Act. It is alleged that on the 28th Day of February, 2013 he murdered **FELISTUS MUNEE MWALIA**. He denied the charge.

2. The accused was represented by Mr Mulei whilst the State was represented by Mr Machogu and later Mr Mwangera.

3. The prosecution called a total of six (6) witnesses in support of its case. **Pw1** was **David Kaliti** who testified that he was at the mortuary when the post mortem was conducted on the body of the deceased and that he identified the body to the doctor.

4. **Pw2** was **Kaliti Robinson**. A voir dire was conducted on the witness who was aged twelve years. The court was satisfied that he was possessed with sufficient intelligence to justify the reception of his evidence. As he did not know the meaning of an oath he was directed to tender unsworn evidence. He testified that he did not know how his mother died and that he did not know why his father was in court. The prosecution sought to have him declared a hostile witness and was duly declared as such. On cross examination by the learned prosecutor, he testified that his mother had earlier broken into the store and took beans to an unknown place and that as soon as his father arrived they briefed him about the incident. He testified that on 28.2.2013 he saw his father and mother arrive home and that his father was then armed with a stone while his mother carried beans and had injuries on her head. He added that he saw his parents lock themselves inside the house. He told the court that his father informed him that the deceased had hung herself and he actually saw the deceased hung on a rope. He told the court that his father removed the deceased from the rope then the police came and took the body and arrested his father who happens to be the accused.

5. **Pw3** was **SSgt Isaac Kimani** who testified that on 1.3.2013 he received a call from the accused that the deceased had committed suicide. He went to the scene and saw the body of the deceased placed on the bed and covered with a blanket. He further testified that he recovered a hoe stick, a piece of sisal rope and one bloodstained black khaki jacket. He also noticed bloodstains on the walls and floor of the house. On cross examination, he stated that he couldn't tell if the body of the deceased hit the floor and that the deceased's legs had been broken as bones were protruding.

6. **Pw4** was **Dr Muli Simon Kioko** who testified of the post mortem examination carried out on the deceased on 14.3.2013. He stated that the body had bleeding in the brain and he formed the opinion that the cause of death was cardiopulmonary arrest due to intracranial haemorrhage leading to severe brain contusion. The post mortem report was tendered in court. According to the said doctor, the injuries had been caused by some heavy force blunt trauma and could not have been caused by a fall. On cross examination, he further stated that he examined the lungs and did not establish any signs of asphyxiation as the injuries were not self-inflicted.

7. **PW5** was **Kipnetich Bernard**, the Government Chemist who testified that he received a piece of wood, a rope, a brown jacket, sand, blood sample of the deceased and the accused on 18.3.2013 that he analysed and came to the conclusion that the blood on the items matched that of the deceased.

8. **Pw6** was **Pc Edwin Metto** who testified that on 2.3.2013 he received instructions to investigate the instant matter that had been reported as a suicide. He told the court that he received items from the scene and was later led to the home of the accused whom he interrogated. He told the court that he forwarded the items that he received to the Government Chemist for analysis and upon conclusion of the analysis he received back the items and which he produced in court as exhibits. On cross-examination, he confirmed that the blood samples from the accused did not match with that on the exhibits.

9. The court vide ruling delivered on 12.5.2020 established that a prima facie case had been made against the accused person and who was placed on his defence. He elected to tender an unsworn statement. His evidence was taken via Skype owing to the Covid-19 pandemic and which arrangement was okayed by the defence.
10. It was his testimony that the deceased was his wife who had slight mental health issues. He testified that the deceased had strange behaviour that he had got used to. He admitted that he was with the deceased on 28.2.2013. It was his testimony that on 1.3.2013 he went to his father's place at 5.00 am and returned at 4.00 pm to find his wife hanging by a rope. He told the court that he checked and found that the deceased had already died and so he reported the matter. He informed the court that the deceased's body had injuries that were sustained when she fell after the rope that was on her neck was cut. He reiterated that he was not at home at the time of the incident; he denied killing the deceased. The defence closed their case.
11. Learned counsels filed final submissions. Learned counsel for the accused in appreciating the case of **Ali Bonea Barisa v R (2009) eKLR** submitted that the accused was not identified as the perpetrator. It was submitted that whereas there is proof of death, there was no murder weapon that was recovered. Reliance was placed on the case of **R v Silas Magongo Onzere alias Fredrick Namema (2017) eKLR**. The court was urged to acquit the accused as there was no direct link between the accused and the offence.
12. The state in response submitted that the testimony of Pw2 placed the accused at the deceased's house. On the element of malice aforethought, it was submitted that the accused knew that in beating his wife, he had malice. It was submitted that the accused was identified by Pw2 and that the cause of death was proven by the post mortem report. According to counsel, the unsworn statement of the accused had no probative value. It was therefore the submission of counsel that the prosecution had proved beyond reasonable doubt that the accused committed the offence and thus a conviction is warranted.
13. Having considered the evidence on record and the submissions of the parties, the issue for determination is whether the prosecution proved its case to the required standard. The burden to prove all ingredients of the offence of murder beyond reasonable doubt falls on the prosecution in all circumstances save a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour (See **Miller v Minister of Pensions [1947] All. E.R 372**. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.
14. The prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. As per the elements provided for under section 203 as read with section 204 of the Penal Code, prosecution must prove beyond reasonable doubt that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person.
15. The post-mortem report on the examination of the body of the deceased as tendered by Pw4 has not been objected to nor controverted. This ingredient of the offence was duly proved by the prosecution. The cause of the death was established by the said Pw4 as cardiopulmonary arrest due to intracranial haemorrhage due to blunt force trauma leading to severe brain contusion.
16. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held:
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”***
17. The deceased in this case was found to have died from cardiopulmonary arrest due to intracranial haemorrhage leading to severe brain contusion. Counsel for the accused submitted that there was no direct evidence that pointed to the accused as the person who killed the deceased. It was upon the prosecution to ensure that the allegation that the accused killed deceased was backed by supporting evidence. At this stage, I find it safe to presume that the death was unlawful.
18. Malice aforethought is the intention to cause death as is provided under section 206 of the Penal Code. It is an element of the mind which can only be inferred from the circumstances in which the death occurred. Courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is used on the victim and the conduct of the assailant before, during and after the attack.
19. None of the prosecution witnesses gave direct evidence as to witnessing the attack on the deceased. However, there is certainty as to what caused the death. Given the nature of injuries suffered by the deceased that resulted in her death as indicated in the post mortem report, it can safely be inferred that death was the desired outcome of whoever the assailant was.
20. There was no direct evidence in form of eye witness accounts to the fact that the accused was seen attacking the deceased and therefore the evidence linking him to the crime must be circumstantial in nature. Suffice to add that the account of Pw2 in my view placed the accused to the scene of crime when he stated that the accused arrived home with the deceased on 28.2.2013 and that the deceased then had some injuries on the head and that the duo entered their house and locked themselves inside. The witness further added that the accused later on informed him and the other children that their mother had committed suicide and he allowed them into the house and he removed the body from the rope and placed the body on a bed.
21. In the case of **Republic v Kipkering Arap Koske and Another (1949)16 EACA 135**, regarding circumstantial evidence the court held that: -

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt.”

In order for circumstantial evidence to be accepted by the court, it must be shown that there are no co-existing circumstances which could weaken the inference of guilt on the accused person.

22. The prosecution case suggests that the accused was the one who had an opportunity to kill the deceased because they were seen together and that the accused was armed with a stone. The accused testified that he was not at the scene on the material day because he had left at 5.00 am and returned at 4.00 pm. Section 111 of the Evidence Act, Cap. 80 of the laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. I find difficulty believing his version of events to enable me make out what exactly ensued. However, one thing is not in dispute namely that the accused himself admits to having been with the deceased on the 28.2.2013 at their home. However, the version given by the accused is shattered by the evidence of his son Robinson Kaliti (Pw2) who upon being declared hostile and being cross examined by the prosecution counsel confirmed that the accused and the deceased arrived home together on the 28.2.2013 and he noticed that the deceased had some injuries on her head and was then carrying beans that she had earlier stolen from the store while the accused was armed with a stone and that the two locked themselves in the house. The witness further stated that the accused later emerged from the house and informed them that their mother had committed suicide. The witness went on to add that he entered the house and found the deceased hanging on a rope and that the accused removed the deceased and placed her on the bed. Even though the accused claims to have visited his father and later came to find the body of the deceased hanging on a rope inside his house, what is not in dispute is that he was the last person seen in company of the deceased on the 28.2.2013 when they locked themselves in their house. It had transpired from the evidence of Pw2 that the accused was looking for the deceased who had stolen beans from the store and had spent the night at a neighbour's house which angered the accused. The witness added that the accused went looking for her and later the two came home and that he noticed the injuries on the deceased. The last seen doctrine was stated in the Nigerian Supreme Court in the case of **Tajudeen Iliyasu V. The State SC 241 of 2013 (2015) LCN 4388** where it stated as follows;

“The last seen doctrine creates a rebuttable presumption to the effect that the person last seen with a deceased person bears full responsibility for his or her death. Thus where an accused person was the last person to be seen in the company of the deceased person, they have the duty to give an explanation relating to how the latter met his or her death. In the absence of such explanation, a trial court will be justified in drawing the inference that the accused person killed the deceased person.”

The last seen doctrine can be applied in the circumstances of this case since the accused was the last person seen in the company of the deceased when they locked themselves in their house. Pw2 confirmed that the accused later informed him and his siblings that their mother had hanged herself and led them into the house where he saw the body hanging on a rope and that the accused placed the body on a bed. The version given by the accused that the body fell onto the ground and led to the injuries is watered down by Pw4 who conducted the post mortem examination and who established that the said injuries could not have been caused by a fall. Pw4 also stated on cross examination that he examined the lungs and did not establish any signs of asphyxiation. The said doctor maintained that the injuries were neither due to hanging nor through a fall. From the version of the accused, it emerges that the alibi that he had gone to visit his father and came back on 1.3.2013 only to find the deceased had hanged herself does not tally with the injuries sustained by the deceased. Indeed, it was the accused who removed the body and placed it on the bed before alerting the authorities. The question is ‘**why did he interfere with the body by removing it instead of leaving it to await the police to do it themselves?**’ The only irresistible conclusion that can be made is that the accused had killed the deceased and wanted to make it appear like she had committed suicide so as to escape from any kind of blame. The evidence of Pw2, Pw3, Pw4, Pw5 and Pw6 clearly established that something took place inside the house where the body of the deceased was found and that the same must be attributed to the accused. The accused was thus placed at the scene of crime. I am not persuaded by the alibi proffered by the accused since the evidence shows that he had the opportunity to kill the deceased whom he had earlier gone to look for after she had stolen beans and spent the night away from home and was therefore in an angry mood. In fact, Pw2 saw the deceased already injured on the head when the parents arrived home on 28.2.2013. I have no doubt in my mind that the accused did commit the offence herein and then attempted to cover it up by bringing up the suicide story. The Government analyst (Pw5) analysed the blood sample on a jacket recovered from the accused and it was established that the same contained the blood belonging to the deceased. If this was the case, then the question to ask is **“how did the blood of the deceased end up on the accused's clothes yet the deceased had only hanged herself without injuries?”** Again, the irresistible conclusion one comes to is that the accused killed the deceased and then hoisted the body on a rope attached to the ceiling then later raised alarm to the effect that he had stumbled upon the body hanging on a rope and attempted to induce his children to believe the same. The accused's attempts to cover up his tracks have been unmasked by the evidence of the prosecution's witnesses.

23. I have considered the injuries occasioned to the deceased. The post mortem was conducted by Dr Muli Simon Kioko (Pw4) who noticed scalp wound on occipital region on the head. He also noted an open fracture over the right leg as well as bruise wound on the buttock and right thigh. According to the doctor, the injuries were not as a result of a fall and he formed the opinion that the cause of death was cardiopulmonary arrest due to intracranial haemorrhage leading to severe brain contusion. Looking at the injuries inflicted, it is clear that the same were intended to cause the death of the deceased. The same supports the view that the attacker had malice aforethought. It transpired from the evidence that the deceased had stolen some beans and had spent the night in a neighbour's house and which angered the accused who went looking for her and later killing her. I find the accused had the requisite malice to kill the deceased. There is no evidence to the effect that the accused had been provoked or attacked by the deceased so as to justify him to retaliate. The accused in his evidence confirmed that he loved the deceased despite her mental challenges. His alibi is not convincing and did not dislodge the prosecution's case which is quite overwhelming against him.

24. In the result, it is my finding that the prosecution has proved its case against the accused beyond any reasonable doubt. I find **Benard Mwalia Kaliti** guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and is convicted accordingly.

It is so ordered.

Dated and delivered at Machakos this 25th day of November, 2020.

D. K. Kemei

Judge