



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 10 OF 2017 (MURDER)

REPUBLIC.....PROSECUTOR

VERSUS

CNN.....ACCUSED

JUDGMENT

1. On 17th May 2017, this court was informed that CNN (the accused) had committed the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It was alleged that on 11th April 2017, at Gatenga sub-location in Sameta Sub-County within Kisii County, the accused murdered SMK(the deceased).

2. The prosecution called 7 witnesses were to prove its case while the accused gave sworn testimony to support her defense.

3. The evidence was as follows. KR (Pw1) testified that the deceased was her son aged one year and 2 months, and the accused her sister in law. That on 11th April 2017 at 9.00a.m. she went to the *shamba* and left her 5 year old child AK and the deceased playing with C and M. After 20 minutes she heard Pw4 say the child is dead. She went back home she found the deceased outside Pw4's house lying facing the ground with a cut on the neck. She took the deceased and ran towards the road, she found A near the gate he also had cuts on his head and the upper part of his body. The children were rushed to Kisii General Hospital and she was told that the deceased had died.

4. Pw2, PKB testified that on 11th April 2017 at about 7.30 a.m. he left for work and got a call at about 9.20 a.m. telling him to go to General hospital. On arrival at the said hospital he found A injured on the head and was told by his wife that deceased had been cut and died. The accused was found by the police and arrested. Pw2 identified the body of the deceased before the postmortem.

5. James Moracha Nyatta (Pw3) recalled that on 11th April 2017 he got a call from the area assistant Mr. Francis Nyabuto informing him that a child had been beaten so he proceeded to the *boma*. He found a crowd of people. He began to look for the accused and found she had been beaten and was lying on the ground. He made a call to the O.C.S. and the accused arrested and taken to hospital.

6. EB (Pw4) testified that the deceased was her grandson. She recalled that on 11th April 2017 Pw1's children came to her home. She left them home and headed to the tea farm. She then heard A crying saying "*baba help me shosho help me.*" She ran to the *boma* and saw A was running towards her, he was cut on the head and was bleeding. She saw the accused with a panga chasing A. She raised an alarm, she held A after he fell down. The accused tried to hit her. She asked the accused why she had beat the child and why she wanted to attack her. People came and found the accused with the panga. C told the people she could kill them. She then saw Pw1 carrying the deceased and observed that the deceased had been cut at the neck and the neck was hanging. The deceased was taken to hospital.

7. Doctor Morebo Momanyi (Pw5) a senior medical officer based at Kisii Referral Hospital produced the postmortem report of the deceased. He testified that the deceased had a cut wound measuring about 12cms on the back of the neck which extended to the cervical bones with a fracture of the 3rd and 4th cervical bone. He told the court that there was conjecture, the eyes were pale and the palms and soles of the feet were also pale. He concluded that the cause of death was the severe hemorrhage secondary to deep wound on the neck.

8. Polycarp Lutta Kweyu (Pw6) No.2012024565 a Government analyst/Senior Chemist at Kisumu testified that they received the following: a blood stained panga marked 'A'; a blood sample of the deceased marked letter 'B'; a blood sample of the accused indicated as 'accused' 'C'; a blood stained skirt marked 'D1'; a blood stained T-shirt marked 'D2'; blood sample of AK marked as 'E1'; and a buccal swap of AK marked 'E2'. The skirt and T-shirt belonged to the accused person. The exhibits were given a reference No.A51/2017. He testified that by using physical and chemical instrumental methods of analysis the exhibits were analyzed and report prepared. The panga item A was stained with human blood. The T-shirt the skirt were heavily stained with blood. After analysis and generating the relevant profiles the blood on the panga, skirt and the blood on the T-shirt have a mixed DNA profile which was matched to the deceased SM and AK but no genetic relationship with the accused's DNA profile.

9. Pw7, Paul Okumu No.67838 CPI attached to Sameta Sub-County DCIO offices testified that he was the investigating officer. He recalled

that he on 11th April 2017 after receiving a call from the OCS Gitumbe Police station on a murder in Getaga Sub-location he mobilized his colleagues and proceeded to the scene. On arrival they found a middle aged woman lying unconscious in a maize plantation surrounded by villagers. The accused was escorted to Ogembo Sub-County Hospital for treatment. He marked the scene of crime. He went to hospital they found A being attended at the emergency unit and were informed that the deceased was pronounced dead on arrival and found the body at the mortuary. The deceased had deep cut on the back of his head. He visited the scene and recovered the panga the murder weapon. He prepared an instigative file and preferred the charge of murder. He could not establish the motive as the 2 victims are nephews to the accused person. He prepared the exhibit memo form marking the exhibits which he forwarded to the government chemist for DNA analysis.

10. When placed on her defense, the accused denied the offence. She gave a sworn testimony and testified that she did not know Pw1 and her two children. That she was inside the house when people came and chased her. She maintained that she did not know what was going on.

11. **Section 203** of the **Penal Code** defines the offence of murder as follows, “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The prosecution must first prove that the death of the deceased and the cause of that death; secondly, that the accused committed the unlawful act that led to the death; and thirdly, that the accused committed the unlawful act with malice aforethought. The standard of proof for the prosecution is beyond reasonable doubt.

12. The fact and cause of death of the deceased is not in dispute. The postmortem was conducted by Dr. Morebu who confirmed that the deceased died as a result of severe hemorrhage secondary to deep wound on the neck. Pw1, Pw4 and Pw5 all testified that the deceased had a cut on the neck.

13. I now turn to determine whether the accused committed the unlawful act or omission which led to the deceased’s death. There was no single witness who testified that they saw the accused cut the deceased neck. The court is therefore invited to consider circumstantial evidence given that the prosecution did not avail a direct witness who saw the accused kill the deceased. The guiding principle in considering circumstantial evidence was summarized by the Court of Appeal in the case of **Abanga alias Onyango v Republic CR. A No. 32 of 1990 (UR)** as follows;

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (I) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

14. Pw4 gave evidence that she heard A cry and when she went to see what had transpired she saw him run towards her while the accused chased him with a panga. Pw7 gave evidence that they recovered a panga from the scene of crime and submitted it along with the accused person’s clothing to the government chemist for analysis. Pw6 gave evidence that DNA results indicate that the panga, the accused persons skirt and T-shirt had blood of the deceased and that of A. When examined by the court PW4 testified that the accused was the only in the boma and that L was at the shamba. L testified too that she left her 2 children playing with the accused’s daughter and after 20 minutes she heard her mother –in- law say the child was dead, she ran back and found S cut at the neck. There is no room that the offence would have been committed by any other person other than the accused and I find that prosecution proved beyond reasonable doubt that the accused used the panga to kill the deceased.

15. I now turn to the final issue and it is whether the prosecution established the element of malice aforethought. **Section 206** of the **Penal Code** provides that malice aforethought includes-

a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b. 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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c. an intent to commit a felony;

d. an 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 accused cut the neck of the deceased with a panga with full knowledge that the act of cutting the deceased with a sharp panga would cause death or grievous harm to the victim within the meaning of **section 206 of the Penal Code**. Her defense that she was in the house and then arrested cannot stand against the prosecution’s strong case.

17. The prosecution has proved its case against the accused beyond any reasonable doubt. I therefore find **CNN** guilty of the murder of **SMK** and I convict her accordingly.

Dated, signed and delivered at Kisii this 28th day of March 2019.

R. E. OUGO

JUDGE

In the presence of;

Accused Present

Mr. Nyangacha h/b Mr. Nyagwencha For the Accused

Mr.Otieno Senior Prosecution Counsel Office of the DPP

Rael Court clerk