



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 8 OF 2018 (MURDER)

REPUBLIC.....PROSECUTION

VERSUS

JARED ONTWEKA NYAYIEMI.....ACCUSED

JUDGMENT

1. By an information dated the 6th March 2018 **Jared Ontweka Nyayiemi** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are, on the night of 4th March 2018 at Bogitacha village Bomokora sub location in Suneka Division within Kisii County the accused murdered **EK**.

2. The prosecution called five witnesses. D O (PW1) a minor 9 years of age was taken through a *voire dire* examination before he testified. After being satisfied that he was intelligent enough to offer evidence, and that he was also understood the nature and the meaning of an oath, the court allowed him to give sworn evidence. He testified that the accused is his father. He currently stays with his grandmother. That on the material night he was in their house. He woke up at about 7pm and found their father beating their mother using a stick. He took away his brother who was being carried by his mother on her back. His father continued to beat their mother on the head both hands and the legs. The first stick he used broke and he got another stick he used it to continue beating her. The 2nd stick too broke and then strangled her with a wire which he got from the chicken house. He continued to beat and abuse her telling her, “*we kitu ume ni tesa*”. His mother could not walk. She lay there as their father went to sleep. She crawled to the toilet and came back to the house. He went to sleep at 9pm. The next morning his father asked him for 500/- telling him that he was going to buy diazanol so that he can take it and die and he left. By this time his mother was dead. His grandmother came and put dawa in his mother’s mouth. She wanted to throw his mother in the kisima but she did not do so.

3. During cross-examination he testified that his mother used to drink and at times return home at night. That his parents used to quarrel over his mother drinking liquor. That his father had warned the mother not to go drinking with the child. That he woke up and found his father beating his mother he does not know the reason why his parents had a fight on the material night. That his sister called Felista told him that his grandmother smeared dawa on his mother.

4. F M (PW2) a minor 10 years of age was taken through a *voire dire* examination before she testified. After being satisfied that she possessed enough intelligence to offer evidence, and that she also understood the nature and the meaning of an oath, she was sworn. She testified that the accused is their father. Before going to stay with her auntie she used to stay with her parents at Bondere. She testified that on the material day she saw her father beat their mother. PW1 was in the house asleep. Her father beat her mother with a stick. He pulled her and she fell. Daniel took the child their mother had on her back and thereafter their father continued to beat her. She left to go call neighbours. She met Mwombe and Kanini, they declined to enter the house saying their father was harsh and that they could not assist the mother. She went back home she found her father still beating her mother using a stick on the legs and hands. Her father sent her to go cook. By then her mother was lying outside the house and she could help herself. She made a place for her to sleep in the sitting room. The next morning her father asked Daniel money to go buy dawa. Their grandmother came and began screaming. By then her mother had died. She saw her grandmother put dawa on her mother’s mouth.

5. During cross-examination she testified that she did not see her father strangle her mother. That she heard her father say he was going to kill himself. That her grandmother smeared the dawa on her mother so that it could be said that she drunk dawa. That her mother was smelling alcohol.

6. James Otumwa (PW3) testified that the deceased is known to him. He is a clan elder at Suneka. The accused is also known to him. On the 5/3/2018 he heard people crying at the accused person’s place. He heard that the accused had killed his wife. He entered their house and found her lying on the ground. She had injuries all over. The accused was not at his home. He called his fellow clan elder Evans Onduso told him what had happened and requested him to arrest the accused. The accused was running away to South Mugirango. The accused was arrested and they took him to the chief’s office.

7. PW4 Doctor Marebu Peter Momanyi testified that he knows Doctor Omari who was away in Nairobi. They work together and he is familiar with his handwriting. That Doctor Omari filled a post mortem report of the deceased Edna Kemunto on the 7/3/2018. The deceased was a female of African origin. On her external appearance there was multiple bruises and abrasions on the face. There was a deep ligature mark on the anterior aspect of the neck. On internal appearance her lungs had oedematous and cyanosed. There was multiple fractures to the tracheal rings with multiple haematomas on the neck muscles. On the cardio vascular system there was a compression on the nerves and blood vessels at the neck at the level of the ligature mark. On the spinal cord there was a deep haematomas at the cervical vertebrae. He concluded that the deceased succumbed to asphyxia secondary to strangulation.

8. PW5 No. 101313 P.C Gilbert Chesidiai testified that on the 4/3/2018 he visited the scene and found the deceased's body. It had bruises on the face and neck and blood oozing from the nose. They took the body to Nyangena Mortuary. The accused had been arrested by members of public later the accused was assessed and found to be mentally fit.

9. When put on his defence the accused elected to give an unsworn statement. He testified that the deceased was his wife. He did not murder her. On the 4/3/2018 he was at his home. His wife woke up early and left. She returned at 8pm she was very drunk. He asked her where she had been. He entered the bedroom and slept. She slept in the sitting room. The next day he woke up and found she was dead. They did not fight that night. They only quarrelled.

10. The provisions of Sections 203 and 206 of the Penal Code, Cap 63 Laws of Kenya require that the prosecution must prove each of the following ingredients if the case of murder is to succeed:-

- a. The fact of death of the deceased.
- b. The cause of such death
- c. The fact that the death resulted from an unlawful act or omission on the part of the accused person;
- d. That in causing the death of the deceased, the accused person acted with malice aforethought.

11. There is no dispute that the deceased died. PW1 and PW3 found their mother dead the next morning after they woke up. The accused too testified that he woke up and found the deceased dead. A post mortem done on the deceased's body thereafter by Dr. Omari.

12. According to PW4 the deceased succumbed to asphyxia secondary to strangulation. The deceased's body also had multiple fractures to the tracheal rings with multiple haematomas on the neck muscles. On the cardio vascular system there was a compression on the nerves and blood vessels at the neck at the level of the ligature mark. On the spinal cord there was a deep haematomas at the cervical vertebrae. I am satisfied that the deceased was strangled as evidenced by the deep ligature mark that was on the anterior aspect of the neck region with a swollen base of neck. The medical evidence has displaced the evidence by the accused that he just found her dead.

13. On whether the deceased died as a result of an unlawful act or omission on the part of the accused person. The evidence of PW1 and PW2 was that the accused beat up the deceased. They witnessed this before they went to bed. PW1 also saw the accused strangled the deceased with a wire, this left the ligature mark on the deceased's neck. This was confirmed by the post mortem done, the body had multiple bruises and marks of strangulation at the neck area. It is my view that by strangling the deceased the accused person committed an unlawful act which resulted in the death of the deceased.

14. Section 206 of the Penal Code sets out the circumstances which constitute malice aforethought. The accused strangled the deceased he must have known that such an act would probably cause the death of or grievous harm to some person whether the person is the person actually killed or not. He beat her .She sustained multiple bruises, he also strangled her with a wire, in my view the accused person intended to cause the death of the deceased or to do grievous harm to her. The accused's action on the material night was to do away with his wife to kill her. He knew what he was doing and there was no excuse for his action even if she had come home drunk. The accused was responsible for the death of the deceased.

15. From all the above analysis, am satisfied beyond any doubt that the accused person herein murdered the deceased. Accordingly the court finds Jared Ontweka Nyayiemi guilty of the murder of EK and convicts him accordingly under **section 322(1) of the Criminal Procedure Code**.

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

R.E.OUGO

JUDGE

In the presence of;

Accused Present

Mr. Nyangacha For the accused present

Mr. Otieno Senior Prosecution Counsel office of the DPP

