



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 10 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

KEVIN LUNGAYA SENGHOR SHIKANGA.....ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGEMENT

Introduction

1. The accused person herein, Kevin Lung'aya Senghor Shikanga was charged with ***Murder contrary to section 203 as read with section 204 of the Penal Code***, the particulars of which are that on the 6th day of December 2014 at Kalamaywa Village Siyoi Location within West Pokot County, he murdered LOUISE WANJIRU KAMAU. The accused person pleaded not guilty to the charge. The prosecution called 7 witnesses in its effort to prove the charge against the accused person.

2. I must state at the outset that the entire prosecution evidence was taken by my brother Mr. Justice S. M. Githinji who was transferred to Eldoret High Court before he could hear the defence case. When the case eventually came before me, and after due compliance with the provisions of ***section 200(3) of the Criminal Procedure Code***, the accused person elected to proceed with the case from where Githinji J had left it. I therefore heard the defence case during which the accused person was the sole witness. I also heard the final submissions.

The Prosecution Case

3. Briefly, the accused person and the deceased had been friends for about 7 months before the events of the fateful night during which the deceased was attacked and killed. From the record too, the deceased was married to one BBR, who at the time was working as a prison warden at the Naivasha GK prison, and between them they had three children. The eldest child was K, PW1, the second was EK, PW3 while the youngest child was MN PW2. The family lived in a one bedroomed house in [particulars withheld] Village in Siyoi Location within West Pokot County. During the 7 months or so of their friendship, the accused person would eat and sleep at the deceased's house, occupying the only available bedroom with the deceased. PW1, who was either 16 or 18 years used to sleep at the home of one PETER PKIACH KOKITA, PW5, a neighbor, while PW2 and PW3 slept in the sitting room or table room of the deceased's house. PW5 also used to frequent the deceased's home, and on the material night, he was present. All these happenings went on behind the back of the deceased's husband who was said to be an infrequent visitor in his own home.

4. According to PW1, at about 9.00pm on 6th December 2014, he was at home with his two siblings as well as PW5 (Peter). The deceased was making ugali while Peter was holding the family torch to provide light for the deceased as she cooked the ugali. The deceased was using firewood to cook the ugali. At that moment, PW1 and PW3 had just returned from Siyoi market together with the accused person when they found Peter in the house with their mother the deceased.

5. Once the ugali was ready, the deceased served some of it to Peter and then to the children. When the accused who was popularly known as KEVO saw the deceased and Peter together in the house, he pulled the deceased out of the house into the moonlit night and started assaulting her. On seeing what was happening to his mother, PW1 picked one of the pieces of firewood from the fire place and threw it at the accused person, but the same fell down instead. The accused quickly picked the same piece of wood and hit the deceased three times on the head with it. The children began to scream and neighbours gathered as the deceased fell down. The deceased took to his heels and disappeared into the bushes.

6. Later a police vehicle came to the scene and took the deceased to Kapenguria Referral Hospital.

7. Peter confirmed he used to visit the deceased and that he was at the deceased's home on the material evening and that the accused person found him in his house with the deceased. During cross examination, Peter denied being found by the accused person having sex with the deceased. Peter also confirmed, as PW1 did that there was full moon on the night in question.

8. Dr. Jotham Mukhola of Kapenguria County Referral Hospital testified as PW6. He did so on behalf of his colleague, Dr. Ibrahim Limo who conducted the post mortem examination on the body of the deceased, and who had since been transferred from Kapenguria. According to the post mortem examination report, Pexhibit 2, the post mortem examination was done on 11th December 2014 at 11.30am. From the examination, the following injuries were noted on the deceased's body: 3 large lacerations, right maxillary and right periorbital areas (around the eyes) with bone exposed (approximately 3 x 3cm each). There was also a large right frontal laceration with loss of scalp and bone exposed approximately 6 x 5cm, with a resultant deformation of the head following fractures. There were multiple injuries involving right maxillae, bilateral angle of mandible with obvious crepitus (air under skin). Right eye socket was completely destroyed following multiple fractures or crush. There was also a large scalp haematoma right maxillary and frontal area of the brain about 8 x 3cm, in addition to transverse brain lacerations on the frontal area of the brain 4cm long and 2cm deep. All other systems were found to be normal.

9. In the doctor's opinion, the cause of death was cardio-respiratory arrest, due to brain trauma after severe head injury. In response to a question from defence counsel, Dr. Mukhola agreed that a blunt object and even stones could have caused the kind of injuries found on the body of the deceased.

10. Number 47928 PC Bonface Wayongo testified as PW7. He took over investigations from CPL Ochieng who had since died. The case had been reported to Kapenguria Police Station on 6th December 2014. PC Wayongo only recorded a statement from PW4 and also took the accused person to the hospital for mental check-up. He produced the P3 form which confirmed that the accused person was fit to stand trial. He also produced the alleged murder weapon – Pexhibit 1.

The Defence Case

11. The accused person gave sworn evidence and denied committing the offence, but admitted that he and the deceased had become lovers in April 2014 and that whenever the deceased wanted them to meet, she could call him. They could meet at his place, at her place or at the market centre. He testified that on the fateful evening he was at the centre with both PW1 and PW3 and eventually accompanied them to the deceased's house. According to the accused the deceased had sent for him. On arrival at the deceased's home, he found the deceased and Peter together in the bedroom, with Peter trying to force the deceased to have sex with him.

12. On seeing what was happening the accused asked the deceased why she had called him when she already had another man in the house and the answer from the deceased was that Peter wanted her to have sex with her as payment for the lunch he had brought for her. The accused stated further that he also spoke to Peter whom he referred to as a friend and asked him why he was turning against him by sleeping with the deceased. That is when Peter got hold of a 'fimbo' and aimed it at the accused, but instead it hit the deceased and she fell down. The deceased stood up, got hold of Peter and told the accused to flee because his life was in danger. Though reluctantly, he ran away as instructed by the deceased, leaving the deceased and Peter still holding each other. On the following morning, he learnt from Peter that the deceased had died.

13. During cross examination, the deceased confirmed that when he found Peter with the deceased in the deceased's house, he was not happy, but he denied dragging the deceased out of the house. The accused person also said there was sufficient light both inside and outside the house for one person to see another. The accused person did not call any witnesses.

Issues for Determination

14. **Sections 203 and 206** define the offence of murder. In this regard, the prosecution must prove the following:-

a. that there was a death which occurred as a result of an unlawful act or omission on the part of the accused person;

b. the cause of such death and

c. that in causing the death, the accused person acted with malice aforethought.

The Undisputed Facts

15. From the evidence, it is not in dispute that, the deceased died and that she died from injuries inflicted upon her on the night the accused found her in an apparently compromising position with Peter. It is also not in dispute that the deceased and the accused person had been friends for about 7 months before the fateful day, and that they spent time together either at the accused' place, or the deceased's place and sometimes at the market centre. PW1, PW2 and PW3, all children of the deceased testified to that fact, and especially to the fact that the accused person regularly slept with the deceased in the deceased's bedroom. It is also not disputed that on the fateful night, both the accused and Peter came face to face with each other in the deceased's home, something that made the accused person unhappy.

16. The medical evidence also shows that the deceased suffered serious injuries on her head and face, with fractures that deformed the head, resulting into cardio-respiratory arrest due to brain trauma following severe head injury. Those injuries were the cause of the deceased's death.

17. It is also not in dispute that whoever caused the injuries suffered by the deceased did so unlawfully, since every person's right to life is sacrosanct. Under **Article 26 of the Constitution of Kenya 2010**, no person is allowed to intentionally deprive another person of his/her life except to the extent authorized by the Constitution. No evidence has been placed before this court showing that the deceased deserved to lose

her life under the law.

Analysis and Determination of the Undisputed Facts

18. What appears as a disputed fact is whether it was the accused person who inflicted the injuries upon the deceased and whether he did so with malice aforethought. From an analysis of the evidence, I am satisfied that it is the accused person who inflicted those injuries on the deceased. Though I did not hear PW1, PW2 and PW3 testify, I am satisfied that when the accused found Peter in the deceased’s house, which he referred to as his home, he was clearly not amused. He told the court he was unhappy when he found deceased and Peter together. It does not matter whether the deceased and Peter were having sex or simply enjoying each other’s company as the deceased served Peter with ugali. The accused appeared slighted and asked Peter what he was doing in that house and also asked the deceased why she had called him when she had another man with her. I believe PW1, PW2 and PW3 that once the accused got the deceased out of the house, he first assaulted her with fists and later hit her on the head thrice using the plank of wood PW1 had thrown at the accused person in an attempt to stop him (accused) from further assaulting the deceased.

19. The medical evidence clearly corroborates the testimonies of PW1, PW2 and PW3 as to what happened that night. All the three witnesses knew the accused person as their mother’s man friend. There was torchlight as well as moonlight. They had known the accused person for well over 5 months and on that night both PW1 and PW3 arrived home together with the accused person and found Peter enjoying the deceased’s company as the latter cooked a meal of ugali with Peter providing light from a torch.

20. The final question that begs an answer is whether what the accused person did was a premeditated action or whether it is something that occurred on the spur of the moment? In my considered view, the actions of the accused person on the fateful night were not pre-meditated. There is evidence that the deceased had sent PW1 and PW3 to the centre to ask the accused person to buy some provisions for the family and to also accompany the children home. The accused did so only to find and intruder into what he called his home on arrival. He did what any normal human being would do in the heat of passion and betrayal. The accused person had a choice to either attack Peter or the deceased, both of whom were involved in this love triangle. The accused person chose to deal with the deceased who in my humble view was eating from both the accused person and Peter.

21. With the above findings in mind, I conclude that though the accused person knew or ought to have known that the beating he inflicted upon the deceased could either cause death or grievous harm to the deceased, he inflicted those injuries in the heat of passion. That being the case, and pursuant to the provisions of **section 179 of the Criminal Procedure Code**, I find and hold that the prosecution has proved the lesser charge of manslaughter contrary to **section 202 as read with section 205 of the Penal Code**. I accordingly find the accused person guilty of the offence of manslaughter and convict him of the same under **section 322 of the Criminal Procedure Code**.

22. It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 27th day of March 2019

RUTH N. SITATI

JUDGE

In the Presence of:

..... **for prosecution**

..... **for Accused**

..... **Court Assistant**