



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: D.S. MAJANJA J.)

CRIMINAL CASE NO. 39 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

DENNIS KIMORI NYAMBOGA.....ACCUSED

JUDGMENT

1. On 12th November 2018, this court was informed that **DENNIS KIMORI NYAMBOGA** (“the accused”) had murdered his wife, **EMILY NYAKERARIO MAKORI** on 2nd November 2018 at Jogoo Village, Township Sub-location within Kisii County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. After the accused denied the charge against him, the prosecution called 4 witnesses and produced a confession to prove that the accused murdered the deceased. The accused elected to remain silent in his defence.

2. The accused’s sister, Brenda Bosibori Motanya (PW 1), recalled that on 2nd November 2018, the deceased came to see her at her place of work to complain to her that the accused had sold a bag of cement that she had bought resulting in a quarrel between them. PW 1 called her aunt and informed her of the incident. Her aunt told her that she would come on Sunday to discuss the issue. PW 1 recalled that the accused came to her place of work on the next day. When she asked him about the deceased, he told her that they had issues. She told him that she had spoken to their aunt who had informed her that she was coming to discuss the matter on Sunday. At about 6.30pm, the accused called and informed her that he was at the police station and that he had quarrelled with the deceased and found her dead.

3. The accused’s aunt, Jerian Moraa (PW 3) testified that on 2nd November 2018, the deceased called and told her that she wanted to move to Kisii Town from Jogoo where she lived with the accused. She complained to her that the accused was selling things from the house. PW 3 told her she would call her uncle and they would come and resolve the issue the following Sunday. On Saturday night, she received information that the accused and deceased had fought.

4. The deceased’s uncle, John Nyambuti Makori (PW 2), told the court that PW 3 had called him and told him that the accused and deceased had quarrelled and that they needed to go and visit them on Sunday to assist them resolve the issue. Both PW 2 and PW 3 met on early Sunday morning and proceeded to the accused’s home at Jogoo. When they reached the home, the found people had gathered and the deceased’s body had been taken to the mortuary.

5. The Investigating Officer (PW 5) told the court that he was on duty on the evening of 3rd November 2018 when he was informed by the Commanding Officer, Chief Inspector Kimwele, that a suspect had come to the police station and reported that he had killed his wife. He interrogated the suspect and they proceeded to Jogoo Estate where they found the deceased lying on the bed. He observed that the deceased had injuries on the neck. He organised for the body to be taken to Kisii Teaching and Referral Hospital where the post mortem was conducted by Dr Brian Ayaro on 8th November 2018. He also produced the accused’s statement recorded under caution by Chief Inspector Washington Mwiti in the company of the accused’s aunt, Dorothy Kerubo Nyamboga.

6. The post mortem report was produced by Dr Leah Obosi Okworo (PW 4). The key observations by Dr Ayaro were that the deceased’s eyeballs were bulging with cyanosis indicating that there was deprivation of oxygen. There was generalised bruising on the right cheek areas and upper arm and what appeared to be a bite mark on the right shoulder. The deceased was also bleeding from the nose and mouth. Internal examination revealed that there were was bleeding under the skin on the head and the brain was swollen due to intra-cranial pressure. Dr Ayaro concluded that the cause of death was asphyxia due to ligature strangulation.

7. Although the accused elected to remain silent, the accused statement under inquiry was produced by PW 4 in which he stated as follows:

I am the above named Gusii male adult aged thirty-two (32) years and a constructor of sites within Kisii Township. I am married to the late Emily Nyakerario Makori and we were blessed with two children. I remember on Friday 2nd November 2018 I was at a construction site owned by Maina and arrived at home at 1800 hours. I found nobody in the house. I stayed in the house up to 2200hrs when my wife arrived home drunk.

She said she had found a house elsewhere where she wanted to rent. She carried away the gas cooker and sufurias. She stayed for about thirty (30) minutes and came back. I noticed that she was armed with our kitchen knife which she had put on her skirt on the waist. I asked her why she was carrying a kitchen knife and she rushed to the cupboard, returned it and picked a bigger and sharper.

I tried to snatch the knife from her but she resisted and in the process I was cut on my fingers. She also bit me on the ribs. I managed to take the knife away from her and threw it under the cupboard. She rushed to another and picked a manila rope which she did a knot and tried to throw it on my neck but she failed. I wrestled her and took possession of the manila rope and put it around her neck with an intention of calming her down.

I pulled the rope which tightened the knot around her neck and she finally died. I wish to state that I had no intention of killing her. I removed the rope from her neck and put on the floor of our bedroom. I placed the body on our bed and slept on the same bed because I was not sure if she had died. The electricity light was on and at about 0300hrs I noticed foam on her mouth. I also touched the neck and felt that there was no pulse. That is when I was sure that she had died. I then moved to the sitting room and slept on the sofa set. I woke up at around 0500hrs and checked on the body. I stayed around upto 1000hrs on Saturday 3rd November, 2018. I picked the white manila rope from the floor of our bedroom and went and threw it to the Nyankongo river and went to my sister's Brenda Bosibori at Daraja Mbili and told her what had happened. She advised me to report to police at Kisii police station where I arrived at 1700hrs.

I wish to state that before leaving our house, I had locked the house from outside using a padlock and carried the key. After reporting, police went to the scene with my sister and removed the body to Kisii Teaching and Referral Hospital. Today I have recorded my statement to that effect. That's all I have to state for now.

8. The offence of murder is defined in **section 203** of the **Penal Code** 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 is therefore required to prove first, the fact of death of the deceased and the cause of that death; second, that the accused committed the unlawful act or omission that led to that death; and third, that the accused committed the unlawful act or omission with malice aforethought.

9. The fact and cause of death is not in dispute and is supported independently of the accused's statement and is confirmed by PW 1 who went to the home where the deceased body was after she was informed by the accused of the incident and the testimony of PW 4 who collected the body and organised for the post mortem. The Post Mortem form produced by PW 4 established the cause of death as strangulation.

10. The only direct evidence of the manner, who and how the deceased was killed is set out in the accused's statement which was admitted without objection. **Section 25A(1)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** (“the Act”) provides that:

25A(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

11. Notwithstanding the provisions of **section 25A** aforesaid, **section 26** of the **Act** renders confessions that are procured by inducement, threat or promise inadmissible and provides as follows:

26. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

12. Although counsel for the accused did not object to production of the statement, I am satisfied that it meets the definition of a confession because it proves the fact that the accused caused the death of the deceased. The statement also complies with the procedural requirements of **section 25A(1)** of the **Evidence Act** as it was recorded by a Chief Inspector and in the presence of the accused's aunt. Counsel for the appellant did not suggest to the investigating officer or any other witness that the statement was in fact procured by inducement, threat or promise. The evidence was that in fact the accused presented himself to the police reported that he had killed his wife and the formal confession which was the logical consequence of his admission.

13. I find and hold that the accused statement is a confession. The accused implicated himself and admits that he killed the deceased by strangulation. The cause of death is clearly corroborated by the finding in the post mortem report that the deceased died following strangulation. I therefore find and hold that the accused killed the deceased by strangulation.

14. The last issue for determination is whether the accused killed the deceased with malice aforethought. Counsel for the accused submitted that the accused's confession points to self-defence and it was the duty of the prosecution to prove the lack of the defence beyond reasonable doubt. The law in regard to self-defence is to be found in **section 17** of the **Penal Code** which provides:

17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force

in the defence of person or property shall be determined according to the principles of English Common Law.

15. The Common Law position was elucidated by the Court of Appeal in **Ahmed Mohammed Omar & 5 Others v Republic, NRB CA CRIMINAL APPEAL NO. 414 OF 2012 [2014]eKLR** where the Court accepted the position in the case of **DPP v Morgan, [1975] 2 ALL ER 347** that the essential element of self-defence is that the accused believed that he was being attacked or in imminent danger of being attacked. The Court stated that;

The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP v Morgan [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v Morgan (Supra) it was held that:

...if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.

16. In this case, we have the accused's confession and circumstantial evidence pointing to the death of the deceased. PW 1 and PW 3 alluded to a disagreement between the accused and deceased which supports the fact that the accused and deceased had a disagreement on the fateful night. However, I disagree that the deceased attacked the accused with a knife and cut him. He did not report to the police that he had suffered any injuries. Further, it is only the deceased who had generalized bruising on the right cheek and upper arms which support that fact that the accused held her down and proceeded to strangle her until she could no longer breath.

17. Even if I accept the accused's position that the deceased had tried to attack him with a knife then tried to throw a rope on his neck, the fact that he turned around took the rope, put it on her neck, forced her down as she struggled, inflicted a bite on the right shoulder, pulled the rope with such force as to cause her eyes to bulge and cause her to bleed from the mouth and nose while she continued to struggle displaces any belief on his part that he was being attacked with a knife or with the rope. Strangulation is a deliberate act whose intention is clearly to cause death. At the time he strangled the deceased, the accused was not laboring under any belief that he was being attacked by the deceased. He had already disarmed her by taking the knife and throwing it away. He had also taken the rope from her and she was not longer a danger. Instead he took the rope put it on her neck and proceeded to strangle her. The fact that the accused proceeded to the police station to report the death does not negate my finding that the accused's action was intended to cause grievous harm or indeed death. It only shows that the accused became remorseful after realizing what he had done. I therefore find and hold the prosecution proved malice aforethought under **section 206** of the *Penal Code*.

18. The prosecution has proved its case against the accused beyond any reasonable doubt. I therefore find **DENNIS KIMORI NYAMBOGA** guilty of the murder of **EMILY NYAKERARIO MAKORI** and I convict him.

DATED and DELIVERED at KISII this 15th day of MARCH 2019.

D.S. MAJANJA

JUDGE

Mr Nyangacha, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.