



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL CASE NO.61 OF 2014**

**REPUBLIC .....PROSECUTOR**

**VERSES**

**KENNEDY BARASA MAKOKHA....ACCUSED**

**J U D G M E N T**

1. The accused has been charged with **the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence was that on the 23<sup>rd</sup> day of December, 2014 at Nasianda village, Lunyu farm within Trans Nzoia County murdered Linet Nakhumicha.**

2. The accused denied the offence and the prosecution called several witnesses to prove its case and whose evidence can be summarised as hereunder.

**3. PW1 JOYCE KAKHULA** testified that she was a neighbour to the accused as well as the deceased. Both were husband and wife. She said that on the 23<sup>rd</sup> December, 2014 at 5 am she was awakened by some shouts while asleep in her house. She opened the door and it was the deceased who was shouting and she felt down. She was half naked and shouting that the accused was killing her and she was in pain.

4. In the meantime the accused arrived and upon talking to him he said that it was because of the prostitution by the deceased. The deceased died at her house and the police arrived and took the body. She said that she had known them for three years and they were not known to have any issues.

**5. PW2 PETER MUKWANA** testified that he knew the deceased and the accused who were both the members of his church. He said that on the material morning he was alerted of the incident by some children from the neighbourhood including one of the accused children. He went to pw1 home and found the deceased dead already and the accused was nowhere. He called him over the phone and he told him that he was in kitale and would come back later. He told him that he had quarrelled with the deceased and had disciplined her. He then went to Kwanza police station and reported the incident.

6. The police came and picked the body. He was called by the parents of the accused who told him that the deceased was at the verge of committing suicide. He called him and told him to surrender to the police at kitale. He later escorted him to the said police station.

**7. PW 3 KEVIN BARASA** the son to the accused testified halfway and was stood down by the prosecution. He did not complete his evidence since he was not recalled.

**8. PW4 DR. FAUSTIN SHITOTE** from kitale county referral hospital produced the post-mortem report on behalf of **DR. ODHIAMBO** who was unable to establish the cause of death as the body had already decomposed. There was evidence though of abrasions on the thighs and the face.

**9. PW5 CORPORAL JOHN KAMAU** now retired testified that he was the investigating officer in the matter. He said that they went to the scene and the body of the deceased was at the home of PW1. He then recorded statements from the witnesses and preferred charges against the accused. He also produced weapons namely sticks and tyre lever used to assault the deceased which were collected from the deceased house. He said that the accused children told him that their parents had fought that night.

10. When placed on his defence the accused gave unsworn evidence denying the charge. He said that he deals with charcoal business and that morning he had left his house at around 5 am and went to kitale. On the way his bicycle developed some problems and he was forced to come back.

11. As he arrived home he was shocked to find another man who landed on him as he opened the door. Meanwhile the deceased went through the window and went to the home of PW1. He followed her to PW1's home and he told her that it was because of adultery that she came to her house. He left her there and went on with his business and at 8am he received a phone call from pw2 that she had died. They went with him to the police station where he was incarcerated and told that he would assist in the investigation.

12. In his evidence the accused questioned why the cause of death was not established and whether in the light of the murder weapons produced he could use the same to kill the deceased almost at the same time.

### **ANALYSIS AND DETERMINATION**

13. The court has heard the parties and read the entire proceedings and the submissions on record by the counsels on record and there is no point of reproducing the same here. The question at hand is whether in the light of the evidence presented on board can it be said that the accused indeed murdered his wife?

14. The only eye witness so to speak is PW1 whom the deceased sought refuge in her house that morning. According to her the deceased told her that it was the accused who was killing her. While she was talking to her the accused came and told her that the deceased was prostituting or committing adultery.

15. The unsworn evidence by the accused though of not much probative value points towards the line taken by pw1. Indeed he confirmed that he went to the home of PW 1 in pursuit of the deceased.

16. Did the deceased sustain any injuries elsewhere apart from her home? I do not think so. This conclusion is based on the dying testimony of the deceased and the fact that it was the accused that followed her to PW1's home almost at the same time. Although there was no direct evidence that the accused said that he injured the deceased I do not find any other reason why she would zero in on the accused. In any case why would the accused follow her to the home of PW1? Why would he disappear from the scene thereafter if he did not have a guilty mind?

17. The evidence of pw3, his child was in my view curtailed by the accused or other third parties and despite the efforts by the counsellors to have him testify the same was fruitless. Nonetheless the evidence by the rest of the witnesses was sufficient since at any rate there is no limit to the number of witnesses required to prove a charge (See the **Provision of Section 143 of the Evidence Act.**)

18. There was no other known place where the deceased is alleged to have sustained the injuries. She came straight from her house to the home of PW1 and hot on her heels was the accused. Again in the unsworn evidence the accused stated that when he encountered another man at the door, he was floored and his wife went through the small window. He seemed to suggest that she sustained the injuries through the process of her escape.

19. Though the post-mortem report was not conclusive on the cause of the injuries since the body had decomposed I have no doubt in my mind that the injuries were caused by the accused as the deceased went to the home of PW1 in great pain and told her that the accused was killing her. She did not suggest that she sustained the injuries elsewhere.

20. In the case of **Chogo V. Republic (1985) KLR 1**, the Court of Appeal stated as follows on the question of a dying declaration,

**“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being at the time of making it, in a hopeless expectation of imminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of the deceased person”.**

21. Taking cue from the above authority, can it be said what the deceased told pw1 was, so to speak, a dying declaration. In some sense yes but the fact that the accused was hot on her heels fortifies it more. Immediately after that she died at the home of PW1.

22. In the premises, I find that the evidence of pw1 even in the absence of the evidence by PW3 was sufficient to sustain the charge facing the accused.

23. I do therefore hold that the prosecution has proved its case against the accused and he is hereby convicted for the murder of the deceased herein pursuant to the provision of Section 203 of the Penal Code.

**Dated, signed and delivered this 19<sup>th</sup> day of June, 2019.**

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**H.K CHEMITEI**

**JUDGE**

**19/6/19**

**In the presence of:**

**Mr Omoria fro State**

**Mr Ingosi for Accused**

**Accused – present**

**Court Assistant – Kirong**

**Judgment read in open court.**