



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 26 OF 2018

REPUBLIC

VERSUS

AMOS MUSIEBE Alias JACKSON NGONYA.....ACCUSED

JUDGMENT

1. The accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the offence are that on the 30th June, 2018 at Emabuye village, Emuhaya Sub-county within Vihiga County, he murdered Tariya Owinya (herein referred to as the deceased).

Prosecution Case -

2. The case for the prosecution was that the deceased and the accused were living together as husband and wife at the home of the accused. Wilson Tunya Otieno PW1 was their neighbour at a distance of about 200 m away.

3. That on the 29/5/18 at 10 p.m. **Mr. Otieno PW1** was sleeping in his house when he heard screams on the road that passes outside his home. He took a torch and went to check. He found that it is the accused who was beating the deceased. The deceased was lying on the ground naked while the accused was stepping on her head with one foot. Otieno pleaded with the accused to stop beating her. He asked him to take her home. The accused carried her and went towards his (accused's) home. Otieno went back to sleep.

4. That on the following day Mr. Otieno rang the mother to the deceased **PW2** and informed her that the deceased had seriously been beaten by her husband. He asked her to go and check on her condition. **PW2** and her son **PW5** went to the home of the accused. They found the deceased dead in the house of the accused. The body was lying on a bed in the house. The accused was nowhere to be seen. They reported to the area **Assistant Chief PW3** who went to the place and confirmed the death. She called the police. **C.I. Dedan Kamotho PW7** of Luanda Police Station went to the home. He collected the body and took it to Coptic Hospital Mortuary. On the 2/6/18 the accused was arrested by members of the public and taken to Bukura Police Patrol Base. C. I. Dedan went and picked him. On the 5/6/18 **Dr. Mchana PW8** conducted a postmortem on the body. He found it with a deep laceration on the left side of the head, minor bruises on the right forehead and an extensive bruise on the right side of the hip. Internally the brain was swollen with bleeding below the covering of the brain. The doctor formed the opinion that the cause of death was due to severe head injury secondary to fixed force trauma following assault.

6. Cpl. Gilbert Cheruiyot PW9 investigated the case and charged the accused with the offence. During the hearing Dr. Mchana produced the postmortem report as exhibit, P.Ex.1.

7. Upon considering the evidence adduced before court by the prosecution I made a ruling that the accused had a case to answer and placed him on his defence. The accused opted to give an unsworn testimony. He did not call any witness.

Defence Case -

8. The accused stated in his defence that the deceased was his wife. That he had lived with her for 3 years. That on the material day the deceased left their home and said that she was going to her parents' home to assist her brother with some work. He, the accused, went to work. He returned home at 2 p.m. After some time he heard a person cutting down his maize stalks in his shamba. He found it was Otieno who was doing so. He quarrelled with him over the issue after which PW1 went away.

9. That his wife returned home at 5 p.m. in the company of a friend called Mary. She was drunk and Mary was supporting her. She entered into their house and slept. Mary went away. At 4 a.m. the deceased woke him up and told him to fetch him some water. He did so. She said that her heart was running fast. She went back to sleep.

10. That at 6 a.m. he went to work in the shamba. He returned home at 2 p.m. He found people at his home. They told him that his wife had died and that the body had been taken to the mortuary. That on the following day he was on the way to inform his aunt when he was arrested by Mr. Otieno PW1 and a brother to the deceased. He was taken to Bukura Police Patrol Base. He was locked up there for 2 days. Policemen then went there and picked him.

11. The accused denied that he had gone drinking with his wife. He denied that he beat her up. He stated that her clothes were dirty when she came back with Mary. He denied that she was naked. He denied that he escaped after she died. He said that he had no reason of killing her.

Submissions –

12. The advocate for the accused **Mr. Matete** submitted that the evidence adduced before the court did not prove an offence of murder. That *mens rea* was not proved. He urged the court to acquit the accused.

13. The state did not make any submissions in the case.

Analysis and Determination –

14. 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.”

15. The ingredients of the offence of murder are:-

(a) The fact of the death of the deceased.

(b) The cause of such death.

(c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, with malice aforethought - See Anthony Ndegwa Ngari –Vs- Republic (2014) eKLR.

16. The death of the deceased was proved by the witnesses who saw the body of the deceased lying dead on a bed in the house of the accused. Those who saw the body were the deceased’s mother PW2, the assistant Chief PW3, the deceased’s brother PW5 and PC Dedan Kamotho PW7. The doctor who performed the postmortem on the body formed the opinion that the cause of death was due to head injury following assault. I have no reason to doubt the evidence of the doctor on his findings. It was therefore proved that the deceased died and that the cause of death was due to head injury as a result of assault.

17. It was the evidence of Mr. Otieno PW1 that he went to the road outside his home where there were some shouts and found the accused beating the deceased. That he flashed a torch at them and saw the accused stepping on the head of the deceased who at the time was lying naked on the ground on her abdomen. That he talked to the accused who told him that they were coming from a drinking den. That the deceased was drunk and could not walk. He saw her bleeding but could not know where the blood was coming from. He asked the accused to carry her to their house which was distance away. He did so.

18. The deceased’s mother PW2 and the deceased’s brother PW5 stated that they went to the house of the accused on the following day after receiving a report from PW1 of the assault on the deceased and found the deceased dead in the house of the accused. The accused was nowhere to be seen.

19. The prosecution is relying on circumstantial evidence and the evidence of Mr. Otieno to connect the accused with the death of the deceased. For the court to convict on circumstantial evidence the evidence must unerringly point at the accused as the person who committed the offence. Such evidence has to meet three tests as was stated in the case of **Abanga Alias Onyango –Vs- Republic, Cr. Appeal No. 32 of 1990 (UR)**, that:-

“1. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

3. The circumstances taken circumstantively, 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.”

20. In **Republic –Vs- Kipkering Arap Koskei & Another 16 EACA 135** it was held that:-

“In order to justify inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

21. I have no doubt that Mr. Otieno PW1 saw the accused beating the deceased on the night of 29/30th June, 2018. Mr. Otieno was a neighbour to the accused. When he testified in court there was no question put to him that he had had any differences with the accused. I

therefore find that the witness had no grudge against the accused. The statement by the accused in his unsworn testimony that he had quarrelled with the witness over some maize stalks is an afterthought that cannot in any way be true. I do not believe that the witness would have fabricated such serious evidence against the accused over some differences over maize stalks. It would appear that the witness rang the deceased's mother and informed her of the assault early in the morning way before the time the accused alleges that he quarrelled with him. The quarrel then cannot have been the cause of Mr. Otieno's evidence that he had seen the accused beating his wife on the previous night. There is therefore no iota of truth in the accused's defence on the issue.

22. The deceased was found dead on the accused's bed on the following day after Mr. Otieno left him carrying the deceased towards his house. The accused was therefore the last person to be seen with the deceased when she was alive. He was duty bound to explain how the deceased met her death after he carried her to his house.

23. I do not believe that the deceased slept at 5 p.m. on the day preceding her death. If that was the case Mr. Otieno would not have seen her and the accused returning to their house at 10 p.m. on that night. The accused's statement on the issue is therefore dismissed.

24. More so, there is no truth that the accused returned home on the day the deceased was found dead and found her having died. It is apparent that the accused was the suspect after the death of the deceased. I have no doubt that if he had returned home on the day the deceased died he would have been arrested by villagers and the Assistant Chief.

25. PC Marwa PW6 of Bukura Police Patrol Base stated that the accused was taken to the base by members of the public on 2/6/2018. This was 3 days later after the deceased was found dead. I have no doubt that the accused had disappeared from his home after the death of the deceased.

26. There is overwhelming evidence that the accused is the person who killed the deceased. He was the last person to be seen with her when she was alive. He was seen by Mr. Otieno PW1 beating her on the night preceding her death. Mr. Otieno saw the accused stepping on her head and saw the deceased bleeding from her body. The deceased was found with an injury on the head that resulted to her death. The fact that the accused disappeared from his home after the death of the deceased proves that he escaped due to guilt consciousness on his part. The evidence of Mr. Otieno and the circumstantial evidence adduced before the court unerringly points at the accused as the person who killed the deceased and no one else. There are no exculpatory circumstances to exonerate the accused from the conclusion that he is the one who did so.

27. Section 206 of the Penal Code provides that malice aforethought is deemed to be established when any of the following circumstances are proved:-

“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 intention 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.”

28. In **Republic V Silas Magongo Onzere Alias Fredrick Namema [2017] eKLR** Nyakundi J. considered the circumstances under which malice aforethought can be inferred and held that:-

“The state through the prosecution must establish facts that are consistent with existence of malice aforethought on the part of the accused. This leads to the question when can a court infer malice aforethought in the crime of murder?

The Eastern Court of Appeal favoured this approach in the case of Republic v Tubere S/O Ochen [1945] 12 EACA 63. The court held and acknowledged that in determining whether malice aforethought has been established the following elements should be considered:

(1) The nature of the weapon used.

(2) The manner in which it was used.

(3) The part of the body targeted.

(4) The nature of the injuries inflicted either a single stab/wound or multiple injuries.

(5) The conduct of the accused before, during and after the incident.

I am satisfied that the Tubere test case continue to be the guide even in the latest cases in interpreting the circumstances and definition of malice aforethought under section 206 of the Penal Code i.e. George Ngotho Mutiso v Republic [2010] eKLR, Republic v Ernest Asami Bwire, Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990, Karani & 3 Others v Republic

[1991] KLR 622.”

29. The accused occasioned the deceased a serious injury on her head that led to her death. The assault aimed at the deceased's head meant that the accused intended to cause a fatal blow to the deceased with the intention of killing her. Malice aforethought was therefore proved.

30. The upshot is that the prosecution has proved beyond all reasonable doubt that the accused murdered Tariya Owinya. He is found guilty of the offence and convicted accordingly under the provisions of Section 322 (2) of the Criminal Procedure Code.

Delivered, dated and signed in open court at Kakamega this 31st day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omondi for accused

Mr. Matete for State

Accused - present

Court Assistant – George

14 days right of appeal.