



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 75 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOHNSON WAMALWA SIMIYU.....ACCUSED

JUDGMENT

The accused person, one *JOHNSON WAMALWA SIMIYU*, is 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 that on the 22nd day of September, 2013 at Ex-Gallan Jarun, Moi's Bridge location in Eldoret West District within Uasin Gishu County, the accused murdered Elizabeth Eroto Ereng.

The prosecution case is that prior to the deceased's death, she was unofficially married to PW-2 for a period of about 2 months. On 22nd September 2013 in the morning, PW-2 left the deceased in the house and went for work at about 7.00 a.m. When he went back to the house at about 7.00 p.m the deceased was not in the house. At about 8.00 p.m the deceased got into the house. She had her own phone and that of PW-2. She handed both phones to PW-2 who was already in bed. The deceased then left and when PW-2 asked her where she was going, she did not respond. The two were living at Ex-Gallan Farm, near Moi's Bridge.

The accused herein was a guard at a posho mill which was about 100 metres from PW-2's house and about 10 metres from PW-1's house. The accused was also living within his place of work. On the material night, at about 9 p.m, PW-1 heard two bang sounds emanating from the accused's house. She then heard the voice of the accused saying in Swahili, "Nimeua", meaning, "I have killed." She went and woke up a neighbour by the name of Charlie, and reported to him what she had heard. The two decided to go to the accused's house and find out what had happened. Upon arrival, outside the accused's house, near the door, they saw the deceased lying down with blood oozing from her mouth and ears. She had also blood on her head. The house door was locked. Charlie told PW-1 to remain there as he went to alert other neighbours. He left and returned to the scene with his wife Maureen, Vanala and Maina Lee.

PW-2 heard screams 30 minutes after his wife had left. He got out of the house and followed the direction the screams were emanating from. Outside the door of the poshomill he found his wife's body lying down. She had injuries on the back of her head and she was not breathing. He went to the home of the village elder, one *James Lopode*, to call him. They went together to the scene. Mama Lee had her motorbike at the scene. They placed the deceased on it to be rushed to the hospital. However, she died before the motorbike had covered a distance of 2 metres. The body was laid on the grass beside the road.

The accused had locked himself inside the house. PW-4, the village elder, called him and told him to open. He opened. He was asked what he used to cause deceased's death. He responded that he had used a piece of wood. The village elder, together with Ben Simiyu, arrested him. They took him to Moi's Bridge police station. The police accompanied them back to the scene. They picked the body and took it to Kitale district mortuary.

On 26th September 2013, PW-3 and Pw-5 identified the body of the deceased to PW-6 for post mortem. The doctor noted that the head had a compound fracture of the skull. It was measuring about 15 cms over the occipital parietal bone, with huge scalp heamatoma. The spinal code had increased flexibility of cervical spine. He concluded that the cause of death was severe head injury due to trauma. He thus filled, signed and stamped the postmortem report, of which he produced in court as exhibit -1.

Upon the closure of the prosecution case, this court found that the accused had a case to answer and accordingly placed him on his defence. The accused gave unsworn testimony in his defence and called no witness.

His defence is that he lived at Moi's Bridge and was a farmer though at night he was working as a watchman. He denied having killed the deceased. He alleged that on the material night he reported on duty at 7.00 p.m. There were people taking beer in a neighboring home. They

quarreled. One of them was a woman who had two lovers. They fought and went towards his place of work. He tried to separate them. Her husband claimed that he had left her with children and should be left to do whatever he wished, to her. The second man fought the husband. The two men were living with her in the same house. It's like she had two husbands. The deceased was injured as well as the accused. He called his employer and reported to him about the fight, also that he had been injured. The employer went to the scene with the village elder. The accused was taken to the hospital for treatment and later to the police station. At the station the OCS said his issue was easy but had to part with 30,000/- to be set free. He had no money and was then charged.

I have weighed the available evidence and the submissions by the defence. The available evidence against the accused's person is circumstantial, in that there is no eye witness who saw the accused person attacking the deceased. The available circumstantial evidence is that PW-1 alleged to have heard the accused saying in Swahili, "Nimeua", of which in English means "I have killed". When she went to the accused's house, outside the door she saw the deceased lying down with blood oozing from her mouth and ears. The other circumstantial evidence is that the accused had locked himself in his house and when PW-4 told him to open he opened. When he was asked what he had used to cause the deceased's death, he said he had used a piece of wood. A proper evaluation of the said circumstantial evidence shows that:-

(i) Though PW-1 said she had lived with the accused as a close neighbour for a period of about six months, she never revealed that they used to talk or had heard him talk prior to the material time, and was therefore conversant with his voice and was able to recognize it properly as the one that said "Nimeua." She never stated how many times the word was repeated or whether it was uttered only once. No other witness, inclusive of PW-2, the husband to the deceased, who claimed to have heard screams, corroborated the evidence that the scream was by the accused who said "Nimeua". Other neighbours who were allegedly called by *Charlie*, inclusive of *Charlie* himself, were not called as witnesses to corroborate the said evidence. It is therefore doubtful as to whether there was a scream that said "Nimeua," and if there was, whether it was by the accused person.

(ii) The deceased died outside the accused's house and accused had locked himself in his house. According to the evidence of PW-1, the accused's house was near the road. They alleged the deceased was placed on the motorcycle of Mama Lee, and before it moved 2 metres, she died. The body was laid on the grass, off the road. Accused house having been near the road, it was easy for an injured person to find herself in the compound. The prosecution did not also call for evidence on the source of light which enabled witnesses to see whatever they alleged to have witnessed at the scene. It was at night, at 9 p.m; whatever they alleged to have seen is therefore doubtful.

(iii) Accused is alleged to have been asked by PW-4 what he had used to kill the deceased and said he used a piece of wood. This evidence which came from PW-4 is not corroborated by other witnesses who at the time were at the scene. PW-1 and PW-2 did not allude to it. It is also an odd question as PW-4 had not first confirmed from the accused that he is the one who had killed the deceased, so as to ask him what he had used in doing it. Though PW-1 stated that as the accused was being taken to the police station she saw the village elder carrying from the house a piece of wood, the village elder himself said in his evidence in chief that he never saw any weapon anywhere near her. Upon cross examination he said there was no piece of wood in court which the accused claimed was the murder weapon. This raises doubts as to whether the accused was actually asked what he used to kill the deceased and whether he said it was a piece of wood. If he had said so he would have been asked where it was for it is recovery as an exhibit, otherwise the question had no relevance.

The accused denied having killed the deceased. There is no motive as to why he should have done it. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts, must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypotheses than that of his guilt; it must point irresistibly to the guilt of the accused person.

The available circumstantial evidence in this case was not firmly established. It is itself doubtful and does not also point irresistibly to the guilt of the accused person. I therefore find that the prosecution have failed to establish the offence of murder, against the accused, beyond reasonable doubt. He is accordingly acquitted of it.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF SEPTEMBER, 2019

In the presence of:-

Mr. Chepkwony for the accused

Mr. Chacha for the state

Ms Abigail and Ms Sarah – Court assistants