



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 9 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOEL MUTHUI NGESA.....ACCUSED

J U D G M E N T

1. **Joel Muthui Ngesa**, the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap 63) Laws of Kenya**. Particulars of the offence are that on the **31st day of January, 2009** at **Kavililo Village, Nzauni Sub-Location in Mwingi District** within **Eastern Province** murdered **Mueni Kyalo** (Deceased).

2. Facts of the case were that the Deceased quarreled with her brother-in-law, the Accused herein, who assaulted her. Ultimately she was rescued, taken to hospital but she died the following day. Investigations were carried out that resulted into the Accused being charged.

3. To prove the case, the Prosecution called eleven (11) witnesses. PW1 **James Muimi Peter** was herding goats near **Ngesa's** homestead on the **31st day of January, 2009** at about **4.30 p.m.** when he heard screams. He checked and saw the Deceased who was screaming being assaulted by the Accused. He witnessed as the Accused kicked her and hit her with fists. In particular, he hit her on the abdomen and chest. Some ladies, passersby went to rescue her but the Accused dragged her into the house, ordered people to leave and he locked her inside. Subsequently, he emerged from the house while armed with a panga. He declared that he could kill the Deceased and also kill himself. People who were outside scampered. All went silent.

4. PW2 **Kyalo Mutemi** was called by **Mukanda Kikava** who requested him to assist the Deceased. Upon arrival she found her not talking and she could not support herself. They took her to **Migwani Hospital**. They were required to make a report to the police station following the history given.

5. PW3, **Sabina Mukanda Kikava** the grandmother of the Deceased's husband and Accused herein testified that she was at home when the Deceased took her a two (2) months old baby. She requested her to babysit the baby and mentioned how she had disagreed with the Accused who had allegedly taken away her two (2) other children. As she instructed her on where to find the baby's clothing saliva started drooling from her mouth. PW3 sought assistance from PW2. They rushed her to the roadside and she started foaming at the mouth. They took her to **Migwani Hospital** but since there was no improvement, they later moved her to **Muthale Mission Hospital** where she died.

6. PW4, **Joseph Muia Tabitha** went to the scene on hearing screams. He left after the Accused warned people to leave.

7. PW5, **Martha Wanjiku Mugo**, a Kenya Registered Community Health Nurse was on duty at **Migwani Sub-District Hospital** when the Deceased was taken there. The Deceased could not express herself but an elderly woman who was one of the persons who had taken her there gave a history of the lady having ingested poison. She was admitted. The following morning her husband went and made a request for her to be referred to a Mission Hospital and she authorized the transfer.

8. PW6, **David Kyalo Ngesa**, got information regarding his wife (Deceased) having been admitted in hospital. He went to hospital the following day and found her undergoing treatment but she was not talking. They decided to move her to another hospital. Upon arrival at **Muthale Mission Hospital**, she was pronounced dead. From his observation her hand had a wound, the face and rear part of the head looked swollen. A postmortem was done. Ultimately, the body was released to him for burial which was done on the **7th February, 2009**,

9. Following investigations conducted his grandmother and brother (Accused) were arrested. His grandmother was however released while the Accused was charged. A week later the body was exhumed.

10. PW7, **Julius Ngesa** identified the grave in which the Deceased had been buried prior to being exhumed.

11. PW8, **Daniel Mwenda Mwendo** a brother of the Deceased was with PW6 when he received information in respect of what had befallen

the Deceased. The following day he got information about her passing on. At the mortuary, he noticed the injury on the right cheek, below the eye and the rear part of the neck. The Accused did allege that the Deceased took poison but PW3 said that the Deceased had been assaulted by the Accused. A postmortem was conducted, the body of the Deceased was released for burial. But later the DCIO informed him that the Deceased was not poisoned. Therefore, he got an order to have the body exhumed so that a government pathologist would perform another postmortem. This was done and the family of the Deceased had her body buried at her maiden home.

12. PW9, **Dr. Allan Balongo** performed a postmortem on the body of the Deceased on the **5th February, 2009**. According to the history he was given the Deceased had disagreed with her brother-in-law, got provoked and took a poisonous substance. On examination he did not see anything of substance therefore opined that it could have been a case of suspected poisoning. He submitted some organs – liver, kidneys, stomach, heart, lungs and intestines to the Government Chemist for analysis. It was his evidence that his report was therefore inconclusive. On cross examination, he stated that externally, the body did not have any injuries.

13. PW10, **Samuel Gachiri Njoroge**, a Government Analyst examined the kidney, liver, heart, lungs, intestines and stomach that were submitted. Following the examination carried out the specimens did not have any chemically toxic substances.

14. PW11, **Dr. Okemwa Minda**, a Consultant Pathologist at **Kenyatta National Hospital** performed a second postmortem on **23rd February, 2009** after exhumation. The body had a surgical incision from a previous postmortem. There were superficial bruises on the neck and puncture marks all over the skin that he attributed to preservation. The brain had internal bleeding that was predominantly on the back of the head which was associated with brain swelling. According to him the brain had not been opened and examined. The only organs that were present after others were taken for toxicology were one lung and one kidney. He concluded that the cause of death was severe head injury due to blunt trauma to the head.

15. On cross examination he stated that he did the postmortem in the presence of the police and relatives of the Deceased. The doctor who performed the previous postmortem was not present but he argued that the allegation of suspected poisoning was invalidated by toxicology results and the fact of the body having been in the grave for twelve days could not affect the outcome of the results.

16. Upon being put on his defence, the Accused stated that on the fateful date he went to the farm to cultivate as usual. He returned home at **1.00 p.m.** and found the Deceased who ought to have travelled to her maiden home with his brother. She called him and requested if he could mind her two (2) children aged 4 and 2 years respectively so that she could go with the two (2) months old baby. He declined following other commitments therefore they disagreed. In the meantime, her eldest child went to play outside and dirtied herself. She went outside and stated beating her. He decided to take the children and went with them to his house and stayed with them. At about **3.30 p.m.** a minor went and told him that he had been sent by his grandmother (PW3) and grandfather, **Kikomo Kilungu** to inform him that the Deceased had taken poison and had been taken to hospital. He rang his brother **Bernard Mwangi** and sister **Mukanda** relaying the message. The following day he got information from **Bernard** that the Deceased was taken to hospital and had died. Funeral arrangements were done and the burial was on Saturday. On Sunday he was required to record a statement with the police. Later he learnt that the police were looking for him. Later on he was arrested and at the police station he found his grandmother (PW3) and aunt **Kavuthu Mulewa** in custody. They were however released three (3) days later while he was arraigned in Court to answer charges.

17. At the close of the case it was submitted by the defence that evidence of the defence witness was not controverted. That the evidence of PW1 was not supported by that of PW4 who only heard screams and linked them to the Deceased. That the Deceased walked to her grandmother's house and said that she had taken poison and she said that she would die and there was evidence that she was foaming at the mouth as she was being taken to hospital.

18. That the Prosecution failed to link the Accused to the act of causing death of the Deceased. It was pointed out that PW1 claimed to have been in company of PW4 but their evidence was different which was evidence of lack of *actus reus*.

19. On *mens rea* the argument was that the Prosecution Failed to establish the reason why the Accused wanted to harm or kill the Deceased. That the last words spoken by the Deceased were to PW3 that she had taken a drug and she intended to die, evidence that was corroborated by the first postmortem that was conducted on the Deceased. That PW5 the nurse who received her at the hospital did not notice any injuries that she had.

20. The conflicting evidence adduced by PW9 and PW11 was pointed out. The Court was urged to consider that the alleged physical injuries noted by PW11 were as a result of stress on the body in the event of transportation, storage, burial and exhumation. That there was no indication that the first doctor was unavailable therefore the second doctor performed the postmortem in the absence of the first doctor contrary to medical regulations that evidence of an expert being an opinion and where there are different opinions, there must be a very good reason to prefer one against the other.

21. It was submitted for the State that it was not in doubt that the Accused assaulted the Deceased as witnessed by PW1 and PW4. The assault was so bad such that she could hardly support herself and after he dragged her into the house he assaulted her as he shouted that he would kill her.

22. That the act of the Accused was intended to cause not only grievous harm. It relied on the case of **Republic vs. Smith (1959) 2 ALL ER 193** where the Court held that:

“If a victim’s death is traceable to the injury inflicted by the Accused, it will avail him nothing to show that the Deceased’s death might have been prevented by proper care.”

23. That the assault on the Deceased and the shame caused on her and eventual death were a direct act committed by the Accused who acted with malice aforethought.

24. I have duly taken into consideration rival submissions by both Counsels.

25. As correctly submitted by Counsel for the State, in the case of **Anthony Ndegwa Ngaari vs. Republic (2014) eKLR** the Court of Appeal held that:

“For the offence of murder, there are three elements which the Prosecution must prove beyond reasonable doubt in order to secure a conviction. They are (a) the death of the Deceased and the cause of death (b) that the Accused committed the unlawful act which caused the death of the Deceased and (c) that the Accused had the malice aforethought (See Nyambura & Others vs. Republic (2001) KLR 355).”

26. It is not in dispute by both the Prosecution and defence that the Deceased was rushed to hospital following an incident that occurred and she succumbed thereafter. Two postmortems were conducted. **Dr. Allan Balaongo** (PW9) who did the first postmortem did not form an opinion as to the cause of death. He was a Medical Doctor who used to perform medico-legal duties at **Mwingi Hospital** where he worked between **2009** and **2011**. At the point of testifying, he was a post graduate student but he alluded to having been taught forensic medicine at the university. He acted on the history given of the Deceased having taken poison. He took specimens from the body, namely, kidney, liver, heart, lungs, intestines and stomach that were submitted to the Government Chemist for analysis. And per the report filed, the specimens that were examined for chemically toxic substances were negative. This was proof that the cause of death was not the alleged poisoning.

27. Consequently, the family of the Deceased caused another postmortem to be conducted by **Dr. Okemwa** (PW11) a Pathologist. He opined that the cause of death was a severe head injury that was caused by blunt trauma. He noted superficial bruises on the neck, puncture marks on the skin all over the body that were consistent with embalming of the body. On the head he found that the skull was not opened by the doctor who conducted the previous postmortem. There were no fractures noted but there was subdural haemorrhage in the brain with features of intracranial pressure.

28. As correctly submitted by the defence, evidence adduced by PW9 and PW11 was evidence of experts which was just opinions. It was urged that the opinions having been different the Court must be actuated by a good reason to prefer one over the other.

29. In the case of **Mutonyi vs. Republic (1982) KLR 203 Potter JA** stated that:

“Expert evidence is given by a person skilled and experienced in some professional or special sphere of knowledge of conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

Section 48 of the Evidence Act (Cap 80) provides that where, inter alia, the Court has to form an opinion upon a point “of science, art, or as to identity or genuineness of handwriting or finger or other impressions,” opinions on the point are admissible if made by persons “specialist skilled” in such matters ...

In cross on evidence 5th Edition at Page 446, the following passage from the Judgment of President Cooper in Davie Versus Edinburg Magistrates (1933) SC 34, 40, as scinting the functions of expert witnesses; “Their duty is to furnish the Judge or jury with necessary scientific criteria for testing the accuracy of conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence ...” (Emphasis mine).

30. This Court is therefore duty bound to consider if there are sufficient justificatory facts in relying on the expert evidence.

31. It must be noted that both experts were witnesses called by the Prosecution. What is apparent is that evidence adduced by PW9 was inconclusive. The conclusive evidence was adduced by PW11 who was a pathologist therefore an expert in performing autopsy. He had training in forensics hence was better placed to determine the cause of death after examining the corpse as compared to PW9, a Medical Officer who may have been inexperienced in the area.

32. It is not in dispute that PW9 had not examined the brain. The head was not touched. The skull was not opened. PW11 conducted the postmortem in the presence of the DCIO. It was the evidence of PW6 that per his observation of the body the hand had a wound, the face was swollen and the rear part of the head seemed swollen. The observation was made before the body was examined by PW9.

33. PW3 is the one who came up with the theory of the Deceased having ingested some substance alleged to be poison. It was her allegation that when she was called by her grandchildren she found the Deceased sitting on a chair with the baby. She told her that she had disagreed with the Accused who had taken her two (2) children leaving her with the baby and that she had taken some drug. The Deceased also told her that the Accused had assaulted her. On seeing her drooling she gave her some mixture alleged to be water and sugar that is when she started foaming at the mouth. Foaming may be a sign of a serious underlying medical condition that would have required medical attention. Frothing at the mouth being as a result of excess saliva that is mixed with air cannot be attributed to an alleged poisonous substance that was non-existent as suggested by the defence. It is worth noting that PW3 was also a suspect who was placed in custody following the demise of the deceased therefore her evidence had to be received with caution.

34. The Accused denies having done anything sinister to the Deceased other than declining to agree to the proposal to take care of her children while she was away. He alleged that the Deceased was supposed to travel to her maiden home with PW6 to attend a ceremony and she got late hence the request. When PW6 testified it was not suggested to him that the Deceased was required to join him to attend an alleged function that was to take place at his in-law's place. He stated that he learnt of the death of the Deceased but was in with his other brother but not the PW6. After the burial of the Deceased he learnt that the police were looking for him but he did not go to the police station until he was arrested.

35. He argues that he did not assault the Deceased but only argued with her because she was punishing her child.

36. It is urged by the defence that the evidence of PW1 that he saw the Accused assaulting the Deceased is contradicted by PW4. In the case of **Phillip Nzaka Watu vs. Republic (2016) eKLR** the Court of Appeal stated that:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

37. PW1 and PW4 were grazing animals when they heard screams. The fact of a person screaming was brought to the attention of PW4 by PW1 who was approximately 20 – 30 metres away. As an individual PW1 checked and saw the Accused assaulting the Deceased. When he saw some ladies going to assist the Deceased he gathered courage and followed them. At that point in time the Accused dragged the Deceased into the house and locked the door. PW4 on the other hand claimed he was approximately 200 metres away from the scene and by the time he reached the Accused and Deceased were inside the house. He heard the Accused warning people to leave. Prior to the Accused coming out of the house there had been screams but all over a sudden all went silent. PW1 stated that when the Accused emerged from the house he was wielding a panga, an act that made people scamper.

38. What is apparent is that PW4 and PW1 reached the scene of the incident at different times therefore the alleged inconsistencies in evidence cannot be attributed to dishonesty.

39. PW1 saw the Accused hit and kick the Deceased. He was specific as to the parts of the body that were hit, being the chest and abdomen, but when he dragged her into the house, screams continued to be heard. None of the witnesses saw him hit her on the head. This brings in the angle of circumstantial evidence.

40. In the case of **Sawe vs. Republic (2003) KLR 364** the Court of Appeal stated that:

“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 hypothesis than that of his guilt.”

41. There was continuous screaming inside the house until all went silent and the Accused emerged and scared people off. PW1 and PW4 amongst others ran away because of fear. PW5 was at Migwani hospital with **Caroline** and **Susan** her colleagues per her testimony. According to what she alleged, **Caroline Mutisya** who admitted the patient told her that the patient had taken triatix but the patient was not vomiting and could not express herself. On cross examination she said that there were no experts at the hospital therefore it was necessary for the patient to be transferred elsewhere. This particular witness lacked the expertise to tell the actual state of the Deceased while at the hospital.

42. The most important evidence regarding the state of the body remains that of PW11 that confirmed what PW6 saw upon observing the body. Therefore, evidence points at the Accused as the person who physically assaulted the Deceased and occasioned upon her the injury that she sustained which she ultimately succumbed to. There was the presence of *actus reus*.

43. **Section 206** of the **Penal Code** defines malice aforethought as:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(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 intent 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.”

44. From the evidence adduced by PW11, to inflict the injury on the head, the Accused must have targeted that particular part of the body. In the case of **Rex Vs. Tubere s/o Ochen 1945 12 EA CA 62** it was stated that:

“To determine whether malice aforethought has been established, to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the Accused before, during and after the incident.”

45. The Deceased having passed on without stating what she disagreed over with the Accused, the Court did not benefit from knowing the reasons behind the Accused person’s act. Looking at his conduct after the act, although he alleged that PW3 sent children to look for him,

PW3 told the Court that she did not see the Accused whom she presumed was at his house on the fateful date. His participation in the funeral arrangements was not stated.

46. What is however evident is the fact that as he assaulted the Deceased he should have foreseen that at least grievous harm would have resulted. Therefore, he was seized of the knowledge of wrong doing of the act that he committed. In the premises, he had the requisite *mens rea*.

47. From the foregoing, I find the Prosecution having proved the case against him beyond reasonable doubt. He is guilty and convicted for murder as charged.

48. It is so ordered.

Dated, Signed and Delivered at Kitui this 26th day of November, 2019.

L. N. MUTENDE

JUDGE