



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 5 OF 2018

THE REPUBLIC.....PROSECUTOR

VERSUS

ERIC ISOE OMWANZA.....ACCUSED

JUDGEMENT

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on the 15th day of April 2018 at Bonyengwe II Sub-location in Nyamira North Sub-county within Nyamira County the accused murdered Emilly Kemunto.

The accused who was represented by Mr. Ondigo Advocate pleaded not guilty to the charge whereupon the prosecution proceeded to call 9 witnesses to prove its case.

Briefly the prosecution's case is that the accused was the deceased's husband and they lived alone in their homestead. On 15th April 2018 the body of Emily Kemunto was found on a bed in their matrimonial home with deep stab wounds on the head and injuries on the legs. The key witness Samuel Omwansa (Pw1) a child aged ten years told this court that on the material day he was awakened by the accused to go and look for a motor cycle rider to take the deceased to hospital. He stated that the deceased has injuries on the head and leg and she was bleeding. He went and called Samuel Monari Mong'are (Pw4) but when Pw4 went to the accused's house he too observed that the deceased had a blunt injury on the head and a cut on the leg. He therefore decided to go call the accused's brother to see for himself. That brother was David Ongori John (Pw2). When the two of them went back to the scene they found the deceased unconscious. She was lying on a bed. When Pw2 uncovered her he also saw she had a deep wound on the head as if she had been hit by something and that her leg was severed at the ankle. Upon observing her condition, Pw2 inquired from the accused, who is his brother, what had happened but his answer was that he did not know; that he had stumbled on her in that condition in another of their houses when he went there for drinking water. Pw2 decided to call his other brothers but when they went to the scene she was dead. The matter was reported to the authorities and the body was subsequently removed to the mortuary to await investigations. The accused was also arrested.

Dr. Steve Onsase (Pw7) testified that he performed a post-mortem on the body of the deceased at Nyamira Level 5 Hospital. The body was identified to him by Police Constable Paul Kimwele Kuthuka, as well as Thomas Muchuka and Samson Owange. It was his evidence that when he examined the body it had a swelling on the forehead mainly on the temporal parietal region, a cut wound on the temporal region, a depressed skull fracture on the left parietal temporal region and brain cariation on the left temporal parietal region. He formed the opinion that the cause of death was: -

(a) Brain haemorrhage with subdural haematoma on the parietal subdural region.

(b) Brain herniation on the left temporal parietal region with a depressed brain fracture.

In cross examination the doctor stated that the injuries could have caused bleeding both externally and internally.

Chief Inspector David Mursoy (Pw9), the investigating officer, testified that he got information about the incident on 15th April 2018 at about 8am. The information was given to him by the Officer Commanding Station (OCS) Ekerenyo Police Station who had already gone to the scene and arrested the accused and removed the body. Pw9 testified that he saw the body in the police vehicle that carried it from the scene. He stated that it had injuries on the forehead and right leg. He suspected the deceased was assaulted with a blunt object. He stated that he also observed that the accused's trousers, T-shirt and slippers had blood. He took them into his custody. Thereafter on 19th April he caused the accused to be taken to Nyamira Hospital for a psychiatric examination but he was referred to Mathari Mental Hospital where by a report tendered in this trial as Exhibit 7 he was adjudged mentally stable and fit to stand trial. Pw9 further testified that he subsequently took a blood sample of the deceased, a blood sample of the accused, the accused's clothes, slippers and a suspected murder weapon collected from the scene to the Government Chemist for analysis. He stated that after the samples were analysed he received a report which implicated the accused person. He contended that moreover the accused was the only person who was home with the deceased when she met her death. He

produced the report of the government analyst, the stick and the accused's clothes in evidence. He claimed to have learnt from the mother of the accused that the motive of the murder was an illicit affair the accused was having with another woman and drunkenness. He stated that the homestead had only one dwelling house and a kitchen which had a bed. He was categorical there was no blood in the house either on the walls or on the floor.

When this court put the accused on his defence, he elected to testify on oath and stated that the deceased was indeed his wife of eight years. He stated that there was no strife between them. He stated that on 14th April 2018 the deceased left their home at about 4pm with a cousin called Linnet Kemunto. By 8pm she had not returned so he went and slept. However, at between 4am and 5am he went to another of their houses to drink water and found her lying in the sitting room. He explained that that was a house they were constructing but it had no bed the only bed being the one in the old house where he was sleeping. He testified that when he found her she was not talking and she had injuries and her dress had some blood. He went to look for his mother but found she had left for the shamba. He returned to his house with his brother who helped him to carry the deceased to the bed. He then sent his brother to call a cousin who owned a motor cycle but when that cousin saw her he said he could not take her to hospital. He instead went and called his uncle who went and said she was dead. Thereafter a village headman took him to Nyamusi from where he was picked by police officers and taken to Ekerenyo Police Station. Regarding his clothes, he stated that it was possible they got blood when he carried the deceased. He contended that the wall of the house had a hole through which a person outside could insert their hand and open the door. He surmised that the deceased could have been killed elsewhere and brought to the house. He admitted that he used to drink chang'aa and stated that on that day he was very drunk and could not have heard what was happening outside. He also admitted that they used to live alone save for the occasional visit by a certain child who was however not in their home at the material time. In cross examination he disputed he was drunk and stated that the reason he did not hear anything was because his radio was on. He vehemently denied that he killed the deceased. About calling Linnet Kemunto as a witness he stated that it is the prosecution that should have called her not him.

In a charge of murder, the prosecution is required to prove beyond reasonable doubt that **the death of the deceased occurred; that the accused person caused the death of the deceased by an unlawful act and that he did so of malice aforethought.**

In this case the death of the deceased is not in doubt. Several witnesses who knew her well gave evidence of her death and their evidence was corroborated by the evidence of the doctor who performed the post-mortem as well as by the accused himself. The fact of death was therefore established beyond reasonable doubt.

It is also evident that the death was by a human hand and by an unlawful act. All the witnesses who saw the body of the deceased confirmed that she had injuries on the head and on the leg. The cause of death was opined to be those injuries. In the case of **Republic v Tubere s/o Ochen [1945] 12 EACA 63**, it was held that in determining whether malice aforethought has been proved, the following elements should be considered: -

“The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”

In this case it is clear from the nature of the injuries inflicted as well as the part of the body targeted that whoever committed this crime intended to kill the deceased or at the very least to cause her grievous harm. The injuries were extensive as can be discerned from the post-mortem report and could not have been inflicted by a mere single strike. The deceased was clearly murdered. Be that as it may I am upon a closer analysis of the evidence unable to find that those injuries were occasioned by the accused person. It is trite that murder may be proved either by direct evidence or circumstantial evidence. It is my finding that in this case there is neither direct nor circumstantial evidence to connect the accused person to this offence. Much as the accused lived alone with the deceased and much as there was evidence that the two of them used to fight a lot especially when they were drunk he was so consistent in his defence that he created doubt in the mind of this court that the crime may have been committed by a person other than him as he slept in his house. Right from the time his brothers went to the scene up to the time he entered his defence he was emphatic that he had gone to bed before the deceased returned home and that he stumbled upon her body when he went to the other house to drink water. His evidence that it was him and his brother Pw1 who carried the deceased to the bed where the other witnesses found her was corroborated by Pw1. His evidence that his clothes could have been stained with her blood when he carried her was also very consistent and has a high likelihood of being true. This is given that the investigating officer seemed not very candid when he connected the government analyst's examination of the blood on the clothes to the commission of the crime. The report of the analyst was very clear that nothing was found on the samples to elicit the DNA of the accused person. It was interesting that even the alleged murder weapon did not do so. Saying that the blood on the clothes matched that of the deceased was not in this case sufficient more so given that the accused readily admitted getting into contact with the deceased. Of more importance would have been to establish whether the murder weapon was handled by the accused person. Did it have his finger prints or DNA for instance? Moreover, the investigating officer told this court that he went to the scene long after the body had been removed and the accused placed in custody. It cannot be ruled out that the scene may have been tampered with and the bolt headed stick put there by another person. This is because none of the first witnesses to get there alluded to seeing such a stick at the scene. It is also not clear how or where the investigating officer obtained the blood sample of the deceased given that the doctor who did the post-mortem was categorical that no sample was drawn from the body of the deceased. It could therefore be that the sample used to implicate the accused was not that of the deceased but somebody else. Pw1, the witness treated as the prosecution's key witness, did not help this court in unravelling the truth. He did not disclose whether he lived with the deceased and the accused and he blatantly lied that he did not know the deceased. His evidence could not therefore be trusted. In any event all that he **“witnessed”** was the accused sending him to call a **“boda boda”**. That in itself is not proof that the accused killed the deceased. In the premises and in the face of all the reasons enumerated above, I find there is no evidence that the accused killed the deceased. Suspicion may linger even in the mind of this court but suspicion cannot be the basis of conviction. I would in the circumstances afford him the benefit of doubt and leave it to his conscience should he be the one who committed this heinous crime.

Signed, dated and delivered in open court this 19th day of December 2019.

E. N. MAINA

JUDGE