



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 55 OF 2015

THE REPUBLIC.....PROSECUTOR

=VRS=

JOASH MARUBE BICHANGA.....ACCUSED

JUDGEMENT

1. The accused person is charged with two counts of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. In Count I the particulars are that on the 19th and 20th March 2015 at Tondori village in Masaba North Sub-county within Nyamira County jointly with others not before court the accused murdered **AZNATH KERUBO KENYA**.
3. In Count II it is alleged that on the same night and place the accused jointly with others not before court murdered **N N J**.
4. The accused pleaded not guilty to the charge. In total the prosecution called eight witnesses. The case was tried partly by Nagillah J, who retired before he could hear all the witnesses and partly by myself. Of the witnesses the key witness was Brian Rioba Mbugare (Pw1). He told the court that Aznath Kerubo (deceased in Count I) was his aunt, his mother's sister and that he lived with her and the accused person and their little girl N N (the deceased in Count II). He stated that on the material day he arrived home from school at about 7pm and entered the house through the main door. He stated that when he entered the accused was watching TV in the sitting room. After he had gone to his bedroom and changed the accused called him and sent him to get flour from their landlord's shop. He left for the shop but when he returned to the house somebody he had not seen in the house before he left for the shop got hold of him by the neck, put a chain around his neck and led him to his aunt's bedroom. He stated that he found his aunt lying on the bed. Her mouth was gagged with a wire and she was crying and she seemed afraid. Beside her was N who had a red manila rope around her neck. He stated that the accused was all the while in the sitting room. After seeing his aunt, the man ordered him to sit in a corner and remain silent. After that the man went to the sitting room and returned with the accused. The accused is said to have ordered Aznath (deceased in Count I) to stand but before she could do so he slapped her. He then hit her on the back with a metal bar and then on the head and she fell down. In the meantime, the strange man was hitting her with a piece of wood. The two of them beat her until she fell silent. They then carried her to Pw1's bedroom. Then the man went into the other bedroom where N was and the accused followed him and asked him why he had not taken her out. Pw1 stated that at that juncture he saw the strange man reach for a panga and mustering all his strength he (Pw1) grabbed the panga and ran out of the room. He tried to leave the house through the back door but it was secured with a padlock. Pw1 testified that the accused told the man that he had treated him (Pw1) whereupon the man got hold of him (Pw1). After the man got hold of him the accused slapped him and then opened the door and led him to a car which was driven off by yet another stranger. He was taken to a house and ordered to remain there until the next day when he would be collected. The next day he was picked and taken to RAM hospital in Kisii. Although he was not sick he was to tell the doctor that he had a headache and was given a prescription to buy medicine. After that he was driven to Keumbu. The person who picked him put a bandage on his hand and told him to pretend he had been wounded if anybody asked him. After that he boarded a matatu and went to his parents' home. He did not talk to anybody about what he had witnessed until later when he was summoned to his grandmother's home and found CID officers. Pw1 told this court that he had lived with his late aunt for two years and some months. He described her relationship with the accused as one that was characterized by domestic quarrels and violence over money. He stated that the deceased used to operate a shop owned by the accused while he operated a taxi business.
5. Thomas Mokua Omosa (Pw2) testified that he was the accused's neighbour and lived in a house across from theirs. He stated that on the material day he arrived home from work at about 8pm and immediately after dinner he retired to bed. He stated that at between 1am and 2am his wife awakened him and told him somebody was calling out his name. He went to the children's bedroom but he did not see anything. It was when he went to the sitting room that he heard the accused shouting that he had been attacked by thugs. He (Pw2) called an administration policeman called Corporal Otieno who also happened to be their neighbour. Their other neighbours had also woken up so they all went to the accused's house. Pw2 stated that the main door of the accused's house which was made of steel was padlocked on the inside but the accused told them he did not have the key. He (Pw2) looked for a metal rod which he passed to the accused through the window and asked him to break the lock. After the accused broke the door they entered the house. He stated that there was nobody else in the house save for the accused. He stated that in the master bedroom there was no bulb so they used torches and noticed there was blood all

over. They went to the next bedroom and noted its door was locked from inside. When they entered that bedroom through a door leading to the outside which was open they found the two deceased persons under the bed. They called the police and when they arrived the OCS requested him (Pw2) to take the accused to hospital as he had an injury on the head and he was bleeding. Using the car the accused operated as a taxi, Pw2 drove the accused to Keroka District Hospital where the wound was stitched but he was referred to Tenwek Hospital for X-ray. He took the accused to Tenwek Hospital and an X-ray was done but not too long afterwards CID officers went there and arrested the accused.

6. Charles Mosongo (Pw3) confirmed that he was the accused's landlord and stated that he was in the shop when at about 6.30pm on the material day Pw1 went for 1kg of Jogoo flour which he said he had been asked to get by the accused. He stated that he closed the shop at 8.30pm and went to his house about 100metres from the rental houses and slept. He stated that at about 1 o'clock he received a telephone call from one of his tenants informing him that the accused had been beaten by gangsters and he needed help. He stated that he went there immediately and joined Pw2. He questioned the accused about the whereabouts of his wife, baby and Pw1 but all he told him was that he had not found them in the house and he could not remember who it was that had opened the door for him. Pw3 stated that he authorized those who were present to break the door and Pw2 passed the accused a metal rod to break the door. He stated that when they entered the master bedroom all they saw was blood on the floor and on the wall but there were no other people in the entire house. Like Pw2, he testified that the 2nd bedroom was bolted on the inside forcing them to go round the house to enter through the back door. He confirmed that it was there that they discovered the bodies of the deceased hidden under the bed. He stated that Aznath had blood everywhere and was covered with a sack and next to her was her daughter who had been strangled with a red nylon (manila) string. Pw3 confirmed that one of the officers gave instructions for the accused to be taken to hospital as he too had injuries on the head. Thereafter other officers arrived at the scene and took photographs. Concerning the relationship between the accused and the deceased, Pw3 stated it was a loving one and he knew of no domestic problems between them.

7. Mr. Pixley Musyoki (Pw8) then an Acting Superintendent of Police testified that at the material he was the Officer Commanding Station (OCS) at Keroka. He recalled receiving a telephone call from one IP Omollo at about 2am on the material time to the effect that one of IP Omollo's neighbours had been attacked by gangsters and his wife and two-year-old daughter murdered. Pw8 testified that he immediately put a team together and they went to the scene at a village called Kitondori. He stated that they found a crowd milling around and confirmed finding the bodies of the deceased under a bed in one of the bedrooms and that the child had a piece of red rope around her neck. He stated that he learnt that the accused had been taken to Keroka District Hospital and then to Tenwek Mission Hospital. He stated that in the master bedroom there was blood on the floor and on the walls and he suspected the crime had been committed there. After looking through the scene they removed the bodies and took them to Gucha Mortuary. The next day he was accompanied back to the scene by a team of officers who included Police Constable Jonathan Chepkonga (Pw7). They collected several exhibits which they suspected to have been used in the commission of the crime some of which had blood. The said exhibits were taken to the Government Chemist for analysis. He stated that when he learnt that the accused and his family were living with Pw1 he caused Pw1 to be traced and when Pw7 traced Pw1 to his home he gave a different version of the events of that night. The accused had been picked from Tenwek Hospital by PC Chepkonga (Pw7) and the police would have believed his version had it not been for Pw1's statement. Pw8 testified that it was after recording a statement from Pw1 that the accused was charged with this offence. This court also heard that autopsies that were conducted on the bodies of the deceased revealed that Aznath was pregnant. She had several bruises on her body and a stab wound on the head. In the doctor's opinion the cause of death was cardiorespiratory arrest due to external massive bleeding with stab wound and haematoma on the neck. As for the two-year-old N N she had a mark around the neck, broken cervical bones C1, C2 and her spinal cord was torn. The doctor concluded she had died due to cardiorespiratory arrest due to strangulation. Post-mortem reports in respect of the two deceased persons, an ultra sound report confirming that Aznath, the deceased in Count I was pregnant, an inventory of items recovered from the scene, a government analyst's report and the Exhibit Memo Form and the statement of Pw3 were produced in evidence.

8. The accused gave evidence oath but did not wish to call witnesses. He maintained his innocence and testified that he was a businessman living in Keroka and he had two vehicles. He recalled that on 19th March 2015 he woke up very early and after taking breakfast with his wife Aznath he left to carry on his taxi business. He confirmed that his wife worked at his wholesale shop for phones. He stated that at about 4pm she called him to say she was about to close the shop and that she also wanted to know where he was. He therefore bought some bananas for their dinner and put them in the boot of his car before going to Keroka where he continued with his taxi business until 12.45 am when he called his wife to tell her to open the gate for him. She did not pick the call even the second time so he called on Brian Rioba (Pw1) and informed him. Brian (Pw1) allegedly told him she was unwell and that she had left her phone with him to charge while she went to bed. He told Brian to open the gate as he was on the way. After buying bread, milk and yoghurt he left for his house. The gate was open so he parked, took out the shopping and walked to his door. When he knocked Brian went to the door and using a phone flashlight opened for him. He stated that he handed over some of the shopping to Brian while he himself carried the bananas. He had shut the door and secured the latch. He then proceeded to the bedroom to see his wife as Brian had said she was unwell but as soon as he opened the bedroom door somebody threw a car seat belt around his head. As he struggled to get the belt from his head his phone which was in his shirt pocket fell on the seat. It was then that a man emerged and stabbed him on the corner of his left eye and told him to surrender everything he had. Another person hit him on the right hip and he gave them his car keys and all the money that was in his possession. He was then taken to the bedroom where they switched on the light and begun enumerating the things they had come to get. They asked him for his logbook and money. He stated that he identified one of the attackers as Daudi (Pw1) as his head was not covered. He stated that Pw1 produced his wife's phone and told him to enter the PIN and when he said he did not know it he was hit on the head with a metal bar. He stated that he and his wife had applied for a loan of Kshs. 1.5 million which he was to get the following week but which his attackers, buoyed by information from Pw1, thought was already in his account. He however told them the money was to be credited the following week. He stated that after that the person he had given his logbook turned to a person he was referring to as Inspector and told him to finish the job so that they could leave. The so called Inspector hit the bulb and it broke. He, accused, was then cut on the head with a panga and he fell to the floor unconscious. When he regained consciousness he realized he was locked inside the house alone. He got up and went to the bedroom and called out to his neighbour Thomas Mokuia (Pw2). Pw2's wife heard and told him. Soon Pw2 went to the door and found him soaked in blood. He narrated what had happened. He stated that Pw2 called their landlord and other neighbours and they broke the door and entered the house. They went through the house looking for the attackers but they had fled through the back door of the other bedroom leaving the door of that bedroom bolted on the inside. The accused testified that as this was happening his phone was called through his wife's number. When he picked the call it was a woman but he did not recognize the voice. Thinking it was his wife he inquired where she was. She replied she was at home and disconnected the call. He tried to call her but she did not answer. He stated that when those who had answered his plea for help went round the house they did not find anybody. The rear door to Pw1's room was however open. At that juncture he was taken to Keroka General Hospital and then to Tenwek where police arrested him. He stated that one of his vehicles was found in the home of Pw1. He contended that his wife's relatives worked at the police station and he was therefore afraid to mention the Inspector. He stated that the

attackers were dressed in clothes similar to those of the Police. Asked if he had lived with Pw1 he stated he had stayed with him for three years. He contended that Pw1 could have lied because he (accused) identified him in the house and he was also the one who opened the gate for him. He contended that it was not until much later that he learnt that his wife and daughter had been killed and hidden under a bed. He denied having locked the doors with padlocks and also that he killed his wife and daughter. He also denied that he sent Pw1 to the shop and stated that he was not at home at the said time.

9. In summing up, Mr. Ondari, Learned Advocate for the accused urged this court to acquit the accused. He submitted that the evidence of Pw1 was farfetched and urged this court to draw an adverse inference from the prosecution's failure to call the other person who was said to have been living in the same compound as the accused when the offences were committed. He also submitted that the circumstances were not favourable to a positive identification and that no motive was demonstrated as to why the accused could kill a wife for who he had opened a shop and their child. Counsel contended that evidence that the accused had 2 cuts on the head was not controverted hence there was no doubt that he was attacked. He cited the case of **Piemo Ombura & another v Republic Nairobi Court of Appeal Criminal Appeal No. 98 of 1992**. He urged this court to find that the accused's defence created doubt in the prosecution's case.

10. Miss Okok, Learned Prosecution Counsel did not render any closing arguments.

11. Having considered the evidence of the prosecution witnesses, the post mortem reports and the testimony of the accused person I have no doubt that Aznath Kerubo and her daughter N N who was two years old were murdered in their house on the night of 19th March 2015. I say murdered because there could have been no lawful reason for the attacker(s) to bludgeon the deceased and to strangle her baby as they did. From the injuries that were inflicted on the deceased it is clear that whoever did it intended to kill them and indeed he/they killed them and left them under a bed in one of the rooms in their house. I am satisfied that not only was it proved that their deaths were as a result of an unlawful act but that malice aforethought was proved beyond reasonable doubt and the only issue for determination is whether the accused person took part in this heinous crime or whether he too was but a victim of the crime committed in his house on that fateful night.

12. There are two versions or accounts of what transpired in the accused's house on the night of 19th/20th March 2015 that of the prosecution through the testimony of Pw1 and that of the accused. After carefully considering and evaluating the evidence by the prosecution witnesses, the testimony of the accused and the submissions of his Advocate my finding is that the accused murdered his wife Aznath and their baby N N.

13. Brian Rioba Mongare (Pw1) who the accused admitted lived with them at the material time testified that when he arrived home from school on that day he found the accused person at home more specifically in the sitting room. He stated that after he had changed from his uniform the accused sent him to their landlord's shop to get 1kg of flour on credit. This was corroborated by the landlord Charles Mosongo Hodge (Pw3) who confirmed both in his statement to the police and in his testimony in court that he was indeed at his shop at the said time and that Daudi (Pw1) went and asked for a 1kg packet of Jogoo which he said his uncle Joash (the accused) had promised to pay the next day. Pw1's testimony that the accused was at home when he got there from school was therefore true given that there could have been no other reason for Pw1 to have gone to the shop for the flour other than that he was sent by the accused. That casts doubt on the accused's evidence that he did not get home until 12.45am. It is also my finding that Pw1's evidence that he saw the accused slapping his wife (the deceased) on the face before him and the strange man beat her with a metal bar and plank respectively was corroborated by the post-mortem report which indicates she had injuries on several parts of the body. Pw1 knew the accused very well having lived with him for over two years. The electricity in the house was still on a fact which the accused himself attested to. The circumstances prevailing at the scene were therefore conducive to a positive identification. Mr. Ondari's submission that it was not possible to identify somebody flies in the face of the accused's evidence that **"he saw and identified Pw1 as one of the assailants."** Pw1's testimony that the crime was committed in the master bedroom and then the deceased persons taken to the other room was corroborated by all the other witnesses and indeed even the accused himself who admitted there was a lot of blood in the master bedroom and that his wife was not there. That he himself was injured and bleeding when the other witnesses went to the house is not in doubt. However my finding is that he may have inflicted those injuries upon himself or caused them to be inflicted upon him as a cover up. He was at home throughout the commission of the offence and he took part in the commission of the crime then pretended not to have been aware of what had happened yet there is evidence from Pw2 and Pw3 that he was present when the bodies were discovered in the room where they had been concealed under a bed. Indeed, it is this piece of evidence which betrays that he was not candid in his defence. Pw2 and Pw3 confirmed that they did not find Pw1 in the house when they went there. This corroborates Pw1's testimony that he had been abducted and taken away. Corporal Jonathan Chepkonga (Pw7) testified that Pw1 narrated how he left the house and confirmed that he picked Pw1 at his parents' home thereby further corroborating Pw1's evidence hence confirming to this court that Pw1 was a witness of truth and his evidence was trustworthy and reliable.

14. The other piece of evidence that connects the accused person to these crimes is a knife and piece of wood which Pw6 stated he collected from the scene. The knife had bloodstains which according to the analyst's report were found to match the DNA of the accused person. In his testimony he made no mention of a knife or piece of wood and alleged to have been wounded with a metal bar. As for the allegation that he was locked up in the house, that was not true. Pw1 testified that up to the time he was whisked out of the house the accused had free movement in all the house and only the back door of the room where he used to sleep and which door the neighbours later used to access the bodies, had been locked. That door must have been opened and the middle door locked with the accused's knowledge.

15. Mr. Ondari submitted that no motive was demonstrated by the prosecution. However, **Section 9 (3) of the Penal Code** makes it clear that unless otherwise expressly declared, motive is not a necessary ingredient of a criminal charge. For murder the prosecution is required to prove circumstances establishing malice aforethought but not motive. Mr. Ondari asked this court to draw an adverse inference from the prosecution's omission to call one IP Omollo who at the time was living in the same compound. It is my finding that even without the evidence of that witness there is more than sufficient evidence that corroborates that of Pw1 and proves beyond reasonable doubt that the accused person committed the offences charged.

16. Accordingly, I find him guilty of the two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him.

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

E. N. MAINA

JUDGE