



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 11 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN MUTHUI KYALO.....ACCUSED

JUDGMENT

1. The accused herein stands 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 27th June, 2013 at Kathuri Market Kitovoto Sub-location Masyungwa Location in Tsheikuru District within Kitui County murdered Munyoki Mwinzi.
2. He has denied the charge. In proving their case the prosecution has called five (5) witnesses. The accused in his defence has given an unsworn statement and has not called any witness.
3. The hearing of this case commenced before Hon. Lady Justice Mutuku who heard the evidence of two witnesses, then the honorable Judge was transferred and I took over the case, and heard the remaining witnesses.
4. The evidence of PW1 Agnes Ngala Muthangia is that she was the aunt of the deceased. On the 27th June, 2013 she received a report that the deceased had been injured and was at a hospital in Masungwa. She proceeded there and hired a vehicle and took him to Mwingi Hospital arriving at 3.p.m, where he was admitted to hospital, but died the morning of 28th June, 2013.
5. PW2 is Chief Inspector Francis Oyieno of Kyuso Police station. He stated that he recorded a statement under inquiry from the accused person after cautioning him. He recorded a statement from the accused, and signed the same. He produced it in court.
6. PW2 stated that the accused recorded that the deceased had formed the habit of sleeping with his wife when he was absent from home on business. That on the day in question, he arrived home at about 1.30a.m and on knocking the door his wife opened the door and asked why he had come that late. When he entered the house, he found the deceased hiding in the bedroom behind the door and they fought, and he later went and reported the incident to the police after locking the house. The deceased was found in the house by the police.
7. PW3 was Phillip Muthui Muthengi an uncle of the deceased who on 4th day of July, 2013 identified the body of the deceased to the doctor who conducted the post-mortem examination. He saw injuries on the body of the deceased.
8. PW4 was Police Constable Ndiyo Simiyu of Musungwa Police post who took over investigations of the case, on instructions of the O.C.S. He stated that earlier on, on 27th June, 2013 at about 1a.m, he had received a report at the Police Post from Stephen Kyalo Muthui that he had found his wife sleeping with a man.
9. PW4 on receiving the report went to the scene and found the deceased lying unconscious on the floor of the house and blood oozing from the nose. According to him, the reportee said that the two had a fought. He was aware that the deceased was taken to Mwingi General hospital by an aunt, but learnt on 28th June, 2013 in the morning that the deceased had passed on at 1a.m.
10. PW4 drew a sketch plan of the scene and took measurements, and also attended the Post mortem examination conducted by doctor Indumwa.
11. He also escorted the accused on 10th July, 2013 to Kyuso hospital where a P3 form was filled, and the injury suffered by the accused classified as harm. The accused was then arraigned in court.
12. PW5 was Doctor Abdalla Mohammed who had worked at Mwingi General hospital from April, 2013. He stated that Doctor Indumwa who had filled the post-mortem was on study leave but that he had worked with him. He produced the Postmortem form filled by doctor

Indumwa. The deceased was a male African who was sixty (60) years, and had blood clots in the nose, and cut wounds on the left chest. The cause of death was severe head injury due to assault. That was the close of the Prosecution case.

13. In his defence, the accused elected to make an unsworn defence statement. He stated that he was a farmer who sold food stuffs. He used to go for business trips sometimes for three (3) days.

14. On that day he arrived home at about 12.30a.m in the morning, and knocked on the door, but his wife did not open even after knocking three (3) times. He pushed the door and found that it had not been locked. The house had two rooms and he went right into the bedroom and found his wife naked with another man making love, as they had not noticed that he had entered the room.

15. He then called his wife by name, and she got shocked and ran away naked. He remained behind with the man, and they fought. He said that he did not have intention to kill, and that the death was bad luck, as his wife had betrayed him even though they were married for thirty (30) years. Unfortunately the person he fought with died.

16. This is a case of murder. In a case of murder, the Prosecution is required to prove firstly that the deceased died. Secondly, that the death was unlawful. Thirdly, whether the accused is the one who caused the death. Fourthly, whether the death was caused with malice or aforethought.

17. With the evidence on record, I have no hesitation in finding that the deceased died. Both civilian and professional witnesses, including the doctor confirmed that the deceased died. The accused also agrees that the deceased died. The cause of death was described by the doctor as blunt injury on the head. I thus find that the death of the deceased was proved by the state.

18. Turning to whether the death was unlawful. In my view the accused did not have a legal right to kill the deceased, as the death was not an accident, and it was not in execution of a lawful sentence of death. I find that the death of a deceased was an unlawful death.

19. With regard to whether the accused is the person who caused the death of the deceased, my answer to this is in the affirmative. The accused admits that he fought the deceased and then went to report the incident to the Police. The police arrived at the scene and found the deceased unconscious. He was later taken to Mwingi hospital, and died the next day. There is no doubt in my mind, that the death of the deceased was caused by the injuries occasioned by the accused person. I thus find that the death of the deceased was caused by the accused person.

20. I now turn to malice aforethought. Malice aforethought is defined by Section 206 of the Penal Code (Cap 63). The accused has attempted to put up a defence of provocation. I find it to be a weak defence, as he was aware that the deceased used to visit his wife when he was absent, and went to ambush him. They also fought on that day. In my view therefore, the defence of provocation of the accused falls short of becoming a full defence in the circumstances of this case.

21. I find that the accused fought and killed the deceased due to sudden feeling of emotion but which falls short of the complete defence of provocation. It was unlawful death which was caused by him. I find him guilty of the lesser offence of manslaughter contrary to Section 202 of the Penal Code, because malice aforethought was not proved.

22. Consequently I find the accused not guilty of the offence murder charged, but instead find him guilty of the lesser offence of manslaughter contrary to Section 202 of the Penal Code and convict him accordingly.

Dated, signed and Delivered at Garissa this 20th day of April, 2018

George Dulu

JUDGE