



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL CASE (MURDER) NO. 42 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

SIMON MUSAMBAI NAMAN.....ACCUSED

J U D G M E N T

Introduction

1. The accused herein, Simon Musambai Naman is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars thereof being that on the 1st day of November, 2012 at Emariku Village, Kisa South Location in Khwisero District within Kakamega County, [he] murdered HELLEN MBOKA NAMAN. He pleaded not guilty when he first appeared before Hon. Mr. Justice Chitembwe on 3rd December, 2012 and the case proceeded for full hearing.

2. The accused was represented by Masake Advocate in the first instance and later Khayumbi Advocate took over the conduct of the case on behalf of the accused.

The Prosecution Case

3. From the six prosecution witnesses, the prosecution case was that on the morning of 1st November, 2012, the deceased herein Hellen Mboka Naman woke up as usual, took her kitchen stool and went to milk her cow. At about 8.00am that morning, the deceased's neighbour, Lusiana Ibrahim Nziwa Amukasa, whose home was only about 100 metres from the deceased's home arrived at the deceased's home with the intention of buying milk Lusiana Ibrahim Nziwa Amukasa testified as PW4 (Lusiana) and stated that she had gone to buy milk from the deceased. She stood some eight(8)metres from where the deceased was milking her cow.

4. At that moment, Lusiana saw the accused, Simon Musambai Naman, who is the deceased's eldest son, walking towards the two of them. He was armed with an axe and without saying anything to either of them he went straight to where the deceased was sitting as she milked the cow and cut her once on the head with the axe. The deceased fell down immediately.

5. On seeing what had happened Lusiana started running towards the road as she screamed while saying "*Simon has killed his mother*". The accused followed her but soon thereafter neighbours, some of whom were armed with rungu appeared on the scene. The accused at once turned back and headed for the direction he had come, still with axe in hand. Later, the accused surrendered himself to Khwisero Police Station.

6. In the evening of that same day Peter Mudogo Naman, a son to the deceased and a younger brother to the accused was informed that his mother had been injured and was in bad condition. Peter Mudogo Naman who testified as PW1 (Peter) was at the time a student at the University of Nairobi. He took the night bus from Nairobi on 1st November, 2012 and got home at about 4.00am on 2nd November, 2012. He was escorted to Mbale District Hospital Mortuary where he saw the deceased's body. He was one of the family members who identified his mother's body for post mortem examination which was done on that same 2nd November, 2012 by Dr. Aluga.

7. On the same morning of 1st November, 2012, Cleophas Ocholi PW2 (Cleophas) was informed by his village elder of Emanika village Edward Amutsama Otieno, PW3 (Edward) that the accused had cut his mother on the head with an axe. Both Cleophas and Edward went to the deceased's home and made arrangements for the deceased to be taken to the hospital for treatment, but the deceased died before she could get to the hospital.

8. PW5 was Dr. David Akaliche Adori of Vihiga County Referral Hospital. He produced the Post Mortem report on behalf of Dr. Oluga who carried out the post mortem examination on the body of the deceased on 2nd November, 2012. From the report, the deceased had an open depressed skull fracture measuring 5X7 cm. at the back of the head involving both the parietal and occipital skull with open scalp laceration. There was also brain laceration below the area of impact; subdural haematoma below the depressed skull fracture which involved the parietal as well as the occipital bones secondary to trauma

9. During cross examination, Dr. Adori conceded that the suspected murder weapon was not indicated in the post mortem report but he confirmed that there was a skull fracture which made a valley inside the brain. PW5 also confirmed that the force applied was indeed very big. He also stated that it was possible for a person to suffer the kind of injuries seen on the deceased if the person fell with force and on a hard surface. On re-examination, Dr. Adori stated that from a reading of the post mortem report a blunt object caused the injury. He also clarified that from the nature of the injury a fall was unlikely as a cause for the injury.

10. The last witness for the prosecution was No. 233932, Chief Inspector Lilian Otieno, formally of Khwisero Police Station. She was the investigating officer in the case. CI Otieno received instructions from the then OCS, Khwisero Police Station Inspector John Ogoti. She confirmed from the OB that a report of the incident had been made earlier at the station by Cleophas. On receiving the instructions, CI Otieno proceeded to the scene where she found the body of the deceased lying in the house with cuts on the head.

11. On interrogation of the people found at the scene, CI Otieno came into contact with Lusiana who gave her details of what had transpired before the deceased died.

12. After taking the deceased's body to the mortuary, CI Otieno returned to the patrol base and took accused to Khwisero police station. The accused was subsequently charged with the present offence, after due mental assessment was done on 2nd November, 2012. The witness also testified that the accused presented himself to the police but without the suspected murder weapon.

The Defence case

13. The accused gave sworn testimony after the court found that the prosecution had established a prima facie case requiring him to be placed on his defence. He did not call any witnesses. He denied the charge facing him. His evidence was that on 1st November, 2012, he had spent the night at the funeral of one Tabitha Oduoli and got home at about 10.00am. He encountered people at the gate. Those people, who comprised mainly the area vigilante group members attacked him but he managed to escape. He went straight to Khumusalaba Police Patrol Base for safety. He testified that the people who attacked him were claiming that he had killed his mother, an allegation he denied.

14. On cross examination the accused claimed that he did know how the deceased died and further that he did not participate in her death. He also denied that he presented himself to the police but maintained that he was chased until he entered the police station for fear of being lynched by the vigilante group that chased him claiming that he had assaulted his mother. He added that he had some difference with Lusiana was over land. He denied cutting his mother with an axe and maintained that he had a good relationship with the mother. The defence closed its case at this juncture.

Analysis and Determination

15. The events in this particular case occurred on the 1st November, 2012 at about 8.00am. They occurred at the deceased's home. The deceased and the accused were neighbours the accused being her eldest son. Lusiana was at the scene on that day at 8.00am where she had gone to buy milk. Her testimony squarely puts the accused at the scene on that day. The accused had an axe and went straight to where his mother was milking the cow and cut her on the head. The accused then started to chase away Lusiana who ran away screaming and shouting that "Simon has killed his mother". Though Peter did not witness the incident he was called and was informed of what had happened by his uncle and sister. Peter rushed all the way from Nairobi and only witnessed the post mortem Examination on the body of the deceased. Peter was the brother of the accused and one of the sons of the deceased. Cleophas the area assistant chief received the report of the murder from the village elder Edward. He organized transport to take the deceased to hospital. Edward the village elder was alerted to the scene when he heard screams coming from the deceased home. He too went to the scene and it was Edward who reported the case to Cleophas.

16. The post mortem report (PEX1) was produced and it showed that the deceased died as a result of a serious injury on the head. The case herein was also investigated by CI Lilian, PW6 who went to the scene at around 1.00pm on the same day the incident occurred.

17. The accused in his defence raised an alibi that at the material time on 1st November, 2012 he was not at home but was attending a funeral in the neighbourhood. He further claimed that he reached home at about 10.00am and found a vigilante group waiting outside his gate. The said group then chased him claiming that he had killed his mother. He sought refuge at a nearby police post. He did not call any witnesses in his defence.

18. Section 203 of the Penal Code defines murder as the causing by a person or persons with malice aforethought the death of another person by an unlawful act or omission. For an accused person to be convicted of the offence, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. The three ingredients which the prosecution must prove beyond reasonable doubt in order to secure a conviction are:-

a) *The death of the deceased and the cause of that death*

b) *That the accused committed the unlawful act which caused the death of the deceased and*

c) *That the accused acted with malice aforethought*

19. With regard to the first element, the prosecution witnesses all testified to the fact that the deceased died on the 1st November, 2012 after being assaulted. Peter and CI Lilian witnessed the post mortem examination, while Cleophas, Lusiana and Dr. Adori saw the body of the deceased. The post mortem report gave the doctor's opinion as to the cause of death which was severe head injury. The doctor clarified that the said injury was not as a result of a fall. I am therefore satisfied that both the death and cause of death were proved by the prosecution to the required standard.

20. On the second ingredient as to whether it was the accused who committed the unlawful act which caused the death of the deceased, Lusiana gave a vivid account of what happened that morning. She gave a clear account of the events of that day. Her testimony was not shaken even during intense cross examination. She remained consistent all through. Everything happened in the morning and she was able to see the accused with an axe. She told the court she knew the accused very well and at first she thought that accused was going to cut a tree. But she was shocked when the accused attacked his mother as the mother sat on a low stool milking her cow. She said the attack was from behind. She ran in shock shouting that "*Simon has killed his mother.*" Accused chased her. Her screams attracted Edward, the village elder who rushed to the scene where he found the deceased's body lying on the ground. The account by Lusiana clearly proved that the accused was at the scene and that indeed he attacked the mother with an axe. I have no reason to doubt her testimony though she was the only identifying witness. I have no doubt in accepting and relying on the evidence of Lusiana as a single identifying witness for the prosecution. She impressed the court as a truthful and straight forward witness.

21. Lastly on whether the accused had malice aforethought, it came out clearly from the testimonies of Cleophas, Edward and Lusiana that the accused used to pick quarrels with the mother from time to time, the reason being that the accused did not want the mother to cut the trees that his late father had planted.

22. Malice aforethought describes the mens rea or the mental element required for a conviction of murder. It means a notion of culpability or moral blame worthiness on the part of the offender. This is clearly defined under Section 206 of the Penal Code. The accused was seen carrying an axe which he used to attack the deceased. The force with which he struck the deceased as confirmed by the post-mortem report confirms that the accused intended to cause the death of or to do grievous harm to the deceased. He never blinked an eye as he went to attack the mother. He saw Lusiana standing some 8 metres from the deceased, but ignored her and went straight to his target: the deceased who was sitting on a stool and who had no chance to escape the deadly attack.

23. Thus the ingredient of malice aforethought has clearly been proved by the prosecution. I am therefore satisfied that the accused is guilty of the offence. His alibi defence is a mere after thought and has not shaken the prosecution case against him. He presented himself to the police having known that he had committed the offence and this showed his guilt. The accused is accordingly convicted of the murder of Hellen Mboka Naman on 1st November, 2012, under Section 322(2) of the Criminal Procedure Code.

Orders accordingly

Judgment delivered dated and signed in open court at Kakamega this 29th day of May 2018

RUTH N. SITATI

JUDGE

In the presence of:-

Mr. Ngetich - present.....for State

Mr. Osango for Khayumbi.....for accused

Polycap.....Court Assistant