



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL CASE NO. 6 OF 2015**

**REPUBLIC.....PROSECUTOR**

**-versus-**

**E O R..... ACCUSED**

**JUDGMENT**

1. **R O N** (hereinafter referred to as '**the deceased**') must have undergone a very painful death. Her body was found lying on the floor in the bedroom of her house in Mbwa Kali area in Rongo township within Migori County. Her hands were tied at the front using a neck tie and the neck itself was tied twice using another tie. Blood was oozing from her nose. That was in the morning of 26/06/2013.

2. Following police investigations, the accused person herein, **E O R**, who was the husband of the deceased was charged with the murder of the deceased. The particulars of the offence were that the accused person murdered the deceased on 26/06/2013 at Mbwa Kali Estate in Kamagambo Central Location within Migori County in the Republic of Kenya. The accused person was charged over 20 months from the date the alleged murder took place.

3. The accused person denied the offence and a trial was ordered. The prosecution availed six witnesses in a bid to prove the charge. **PW1** was **No. 73671 Cpl. W C** attached at the Migori DCIO's office. He was the arresting officer. A sister to the deceased testified as **PW2**. She was **A K N**. There was one **H N M** who was a workmate to **PW2** and the deceased who testified as **PW3**. A daughter to the deceased testified as **PW4**. She was one **S S** and the investigating officer **No.xxxxx PC D C** then attached at Kamagambo Police Station testified as **PW5**. **Dr. P A**, a Consultant Pathologist testified as **PW6**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

4. The prosecution's case was centered on circumstantial evidence. Leading the evidence was **PW4** and **PW2**. **PW4** lived with both the deceased and the accused person. Whereas the deceased was the mother to **PW4**, the accused person was a foster father to **PW4**. They all lived in a rental house in Mbwa Kali Estate in Rongo township. The deceased was employed as a Store Keeper at Alliance One Company Ltd at Rongo while the accused person was a Public Service Vehicle driver and **PW4** was by then in xxxx Primary School. At the time of testifying in Court **PW4** was aged 16 years old and in Form 3 at xxxxx High School.

5. As **PW4** left home for school that fateful morning, the deceased and the accused person were at home. The night before had not been a peaceful one. The deceased and the accused person had sharply differed, and the deceased had asked the accused person to pick up his items and leave the house. That night was a culmination of 2 weeks of serious misunderstanding between the accused person and the deceased. **PW4** had witnessed all the happenings at their house.

6. The deceased was responsible of opening all the offices at her workplace where she worked with her sister, **PW2** and **PW3**. That morning, **PW2** was surprised to see another staff called **Joslyn** (not a witness) opening the offices. On enquiry, **PW2** learnt that the deceased had not yet reported to work and although her phone was calling she was not picking any call. **PW2** was bothered and rushed to where the deceased stayed only to see the house locked with a padlock from outside. She was however called back to work and after waiting for the deceased to turn up for a while in vain **PW2** and **PW3** were dispatched from work to look for the deceased.

7. The first point of call was at **PW4**'s school where they hoped to get the keys to the house so that at least they could access the house and try to see if they would get the office keys. Unfortunately, **PW4** had left the keys at home since the deceased and the accused person were both at home when she left for school. **PW2** and **PW3** decided to go to the house of the deceased and while on the way **PW2** was called by a number which she had not saved in her phone. She picked the call and learnt that it was the Accused person. The Accused person told **PW2** that he was trying to reach the deceased in vain and complained that the deceased was about to be married by a local Pastor. Since **PW2** was not interested in the discussion she disconnected the call and proceeded to the house. **PW2** and **PW3** were determined to at least see the inside of the house. **PW2** managed to peep through the window at the sitting room and was shocked at the way the things were so disorganized inside. **PW3** went to the bedroom window and forced it open. They had a glimpse of what had happened.

8. The body of the deceased was lying on the floor. Her hands were tied at the front using a neck tie and the neck itself was tied twice using another tie. Blood was oozing from her nose. The body seemed lifeless. While **PW2** raised alarm, **PW3** called the office and rushed to report

the matter at Kamagambo Police Station. PW5 in the company of other police officers rushed to the scene and broke the padlock and accessed the house. The house was seriously disorganized as a sign of a sustained struggle. The police took photographs of the inside of the house as well as the body of the deceased. The body was then removed to the police station before it was taken to Hema Mortuary in Kisii town where it was preserved, and an autopsy conducted on 01/07/2013 after the body had been identified by *inter alia* PW2 and the examination witnessed by PW5.

9. PW5 took over the investigations and recorded statements from several potential witnesses. He also took custody of the Post Mortem Report which had been filled in by PW6. PW5 concluded that the Accused person was to be charged with the murder of the deceased. However, PW5 did not apprehend the Accused person as he had fled after the burial of the deceased. The accused person relocated from where he used to live with the deceased in Rongo and was spotted over 20 months later driving a vehicle in Migori town. PW5 was so informed by an informer and that led to the arrest of the Accused person by PW1 at Migori town. Upon arrest the Accused person was examined and found to be mentally fit to stand trial. He was charged with the current information.

10. PW6, a Consultant Pathologist, produced the Post Mortem Report. He testified that during the autopsy he found two neck bones, C2 and C3 dislocated and that the neck was bruised from outside by the neck tie which was tied twice around it. There were other superficial bruises on the lower limbs. PW6 formed the opinion that the cause of death was asphyxia due to nerve injury caused by the dislocation of the neck bones that resulted from an assault. The Report was produced as an exhibit.

11. At the close of the prosecution's case, the accused person was placed on his defence and he elected to give sworn evidence without calling any witnesses. The accused person denied committing the offence. He stated that he had left early in the morning on the day the deceased died and as usual at 03:00am and drove a motor vehicle registration number KBH 023T on the Kisumu – Migori highway. That, as he was approaching an area known as Awach he was called by PW2 who informed him that the deceased was not picking up calls and their house was locked from outside. That, their conversation ended prematurely as PW2's phone went off. That, on reaching Kisumu he called a neighbour who informed him that the deceased had been found dead inside their house. That, he hired a taxi and rushed to Rongo and then proceeded to Hema Mortuary where he confirmed the death of the deceased. That, he took part in all the funeral arrangements and eventually laid his wife to rest and that he had all along been in touch with PW5 who was leading the investigations. He denied that he fled after the burial as he had relocated to his rural home in Bondo Nyironge in Migori town.

12. At the close of the defence case the matter was left to Court for a determination. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether the accused person is guilty as charged.

13. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients: -

**(a) Proof of the fact and the cause of death of the deceased;**

**(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;**

**(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.**

14. There is no doubt that the deceased died. PW2, PW3, PW4, PW5 and PW6 so confirmed. As to the cause of death, PW6 took this Court through the Post Mortem Report he had personally prepared and opined that the cause of death was asphyxia due to nerve injury caused by the dislocation of the neck bones that resulted from an assault. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

15. On the second ingredient as to whether the accused person caused the death of the deceased, since there is no eye-witness account on how the deceased died, reliance is now on the circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

**(i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;**

**(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**

**(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.**

16. The foregone principles were set out in the *locus classicus* case of *R -vs- Kipkering arap Koske & Another (supra)* and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI -vs- Republic (2013) eKLR*, *Musii Tulo vs. Republic (2014) eKLR* among many others.

17. The Court of Appeal in the case of *Musii Tulo (supra)* in expounding the above principles expressed itself as follows:-

**“ 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v. R (1958) EA 715* citing with approval *Teper v. R (1952) AL 480* thus: -**

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

18. PW4 testified that as she left for school that fateful morning, she left behind the deceased and the accused person at their house. That was certainly not 03:00am. The Accused person on the other hand contended that he left their house at 03:00am and proceeded on with his normal duties of driving a 'matatu'. I carefully watched the witnesses and the Accused person testify before me. PW4 was very composed and narrated the events with the ease not commonly associated with some one making up a story. She shielded all questions well from all angles as they were put to her. She was consistent and very clear. I was satisfied that she was truthful and hence believed her testimony. I must also state that I was equally satisfied that the rest of the prosecution witnesses were truthful given their demeanors and the forthright and steady manner in which they all tendered their testimonies.

19. I have also considered the version by the Accused person. There was an assertion that when the Accused person left his house at 03:00am, that he picked the owner of the vehicle he was driving from his place to the Bus stage where he boarded a vehicle to Nairobi. Summons to that person called **Olambula** were issued but he did not testify. Whereas the burden of proof squarely and throughout rests on the prosecution, a consideration of the whereabouts of the Accused person becomes necessary more so where that accused person raises an *alibi* as is the case herein.

20. The prosecution having confronted the accused person with the evidence of PW4 which placed him in the house well after the time he alleged to have left his house, it was incumbent upon the defence to disprove such evidence. That was not the case herein. The defence did not raise any doubt to the prosecution's evidence. I hence find and hold that the accused person did not leave their house at 03:00am as he alleged but that the accused person was left in the house together with the deceased as PW4 left to school that morning.

21. There was also the issue of the deceased and the accused person having disagreed for 2 weeks and the night before the deceased died PW4 overheard the deceased and the accused person engage in a fierce exchange of words and the deceased was repeatedly asking the accused person to pick up his items from the house and leave. The accused person was definitely not for that position. It was PW2 who received a call from the accused person at around 08:00am while he was in the company of PW3. The accused person complained that the deceased was intending to leave him for a certain Pastor. PW2 did not sustain that conversation and disconnected the call only to shortly thereafter find that her sister had been killed. According to the Post Mortem Report the deceased must have died between 07:00am and 09:00am when the body was discovered. It therefore means that PW4 must have left their house for school at around 07:00am. It was hence a period of around 2 hours from the time the deceased was last seen alive and in the company of the accused person and when the body of the deceased was discovered.

22. There was as well the issue as to whether the accused person fled after the burial of the deceased. The accused person denied such. However, PW5 testified that upon conclusion of the investigations he formed an opinion to charge the accused person, but he was nowhere to be seen. That, the accused person had moved from Rongo township and stopped driving the public service vehicles. That, it took the intervention of police informers to trail the accused person for a very long time until on 01/07/2015 when the accused person was arrested in Migori town by PW1. On his part, the accused person stated that he used to get in touch with PW5 on the progress of the matter even after he relocated to his rural home in Bondo Nyironge in Migori town.

23. If it is true that the accused person was in touch with PW5 I highly doubt that PW5 would have had to wait for all that time and to even seek the assistance of an informer and PW1 to arrest the accused person. Conversely, the arrest would have happened long ago. I therefore do not believe the position taken by the accused person that he did not disappear. I instead find that indeed the accused person disappeared after the burial of the deceased.

24. Therefore, given the said short period of time from when the deceased was last seen alive and in the company of the accused person and the time the deceased was found dead and the disagreement which lasted for 2 weeks and culminated with the deceased demanding that the accused person leaves the house and the concern by the accused person that the deceased was planning to be married by another man and the subsequent disappearance of the accused person, I find that the events cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person and none else. I equally find that there are no other co-existing circumstances which would weaken or destroy that inference. The second ingredient of the offence of murder was therefore proved.

25. As to whether there was malice aforethought in the accused person causing the death of the deceased, the starting point is the law. **Section 206** of the Penal Code defines '*malice aforethought*' as follows:

**"206. 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.**

26. The Court of Appeal has also dealt with this aspect on several occasions. In the case of Joseph Kimani Njau vs R (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of Nzuki vs R (1993) KLR 171, held as follows: -

**“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -**

**i. The intention to cause death;**

**ii. The intention to cause grievous bodily harm;**

**iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.**

**It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed”.**

27. My Lordships in the above case went on to say that: -

**“In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -**

**“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR...”**

28. And in the case of Mary Wanjiku Gitonga -vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR) the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows: -

**“We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed....Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.**

***In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.***

***In the circumstances we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record.”***

29. In this case malice can be gleaned from the events as they unfolded towards the death of the deceased. It is not in doubt that the attack on the deceased was pre-planned. I say so because there was such a long period of disharmony between the accused person and the deceased. PW4 stated that the accused person and the deceased had disagreed for a whole 2-weeks’ period and that it had reached a point when the accused person was being chased away from the house. The accused person also called PW2 and complained that the deceased was planning to be married by a Pastor. The attack on the deceased cannot therefore be said to have been sudden. There was such a long time within which the accused person planned how he will kill the deceased.

30. There is also the way the deceased was killed. Having tied her hands, the accused person also tied her neck with a tie as well. By doing so it was obvious that the accused person intended to kill the deceased. I say so because it is common knowledge that the tie would block the flow of oxygen into the body and suffocation would result. And, in fact that was the cause of death. Further, by the accused person closing the front door from outside he implied that there was no one in the house such that no immediate assistance would have come upon the deceased.

31. It is therefore obvious that the accused was fully aware that there was a serious risk that death or grievous bodily harm will ensue from his acts. Likewise, the acts were very deliberate and without any lawful excuse and the accused person remained aware that he was exposing the deceased to the risk of death or grievous harm because of his uncalled-for acts. That was therefore a clear manifestation of malice.

32. This Court hence finds that the prosecution has likewise proved malice aforethought in this matter.

33. As the prosecution has proved all the ingredients of the offence of murder against the accused, this Court now finds **E O R** guilty of the murder of **R O N** and is hereby convicted under **Section 322(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 24<sup>th</sup> day of May 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Kisia**, Counsel for the Accused person.

**Monica Owenga**, Senior Principal State Counsel instructed by the Office of the Director of Public Prosecutions.

**Evelyne Nyauke** – Court Assistant