



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 2 OF 2013

REPUBLIC.....PROSECUTION

VERSUS

ZACHARIA OMARA HIRIBAE.....RESPONDENT

JUDGEMENT

THE CHARGE

1. The accused person stands charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 26th December 2012 at Handampia in Ndura Location, Tana River District within Tana River County murdered Roselina Maalim.
2. He has denied the offence, and the prosecution has called eight (8) witnesses. The trial was conducted by two judges, as I took over the case from Justice Stella Mutuku when she proceeded on transfer in 2014.

THE EVIDENCE OF THE PROSECUTION

3. PW1 was Joseph Hiribae Bahola, a resident of Handampia village. It was his evidence that on 26/12/2012 at around 9 pm while watching video movies at the home of Isaya Omara he heard a loud voice crying “*unaniua*” – meaning “*you are killing me*”. The voice was from a neighbour’s house and he immediately rushed there followed by Moses Omara.
4. He found the door to the home closed and broke it open. He also found the inner room door closed and he also broke it open, entered the room and flashed his torch, only to see a woman lying on the floor, and Zacharia Omara (the accused) holding a pestle in his hand. While there, Zacharia Omara lifted the pestle and hit the woman with it again.
5. His companion Moses Omara then rushed into the room and picked a crying baby from the bed and walked to the door. Zacharia (the accused) then went under the bed and emerged soon after and tried to hit Moses with the pestle but ended up hitting the hand of this witness and the torch dropped down and went off.
6. As it was now dark, they could not see the accused, and they called the chief on phone but could not go through. He thus boarded a motorbike to the chief’s village and brought him to the scene, whereupon the chief called the police from Hola on phone who came to the scene later.
7. The witness observed the woman’s body and noted that she had a cut in the abdomen. He knew the accused well as a Primary School teacher, as well as the deceased. According to him the police removed the body and also recovered a knife from the scene.
8. In cross-examination he stated that he was not aware of any existing family problems between the accused and the deceased, or an illness afflicting the accused.
9. PW2 was Moses Omara Hiribae a farmer from Handampia in Ndura Location. His testimony was that on 26/2/2012 at 8 pm as he watched video, he heard screams of a woman who cried twice – “*ameniuu, ameniuu*” – meaning “*he has killed me, he has killed me.*”
10. As a result, the owner of the video house told Joseph (PW1) to break the door of the house leading to where screams came from. Joseph then broke the outer door and the inner door, both of which had been locked. He followed Joseph who shone a torch in the room and this witness saw Roselina Maalim, an aunt, lying on the floor. He then picked the crying baby from the bed, and saw Zacharia (the accused) who emerged from under the bed holding a pestle and threatened him. According to him, the owner of the house was Isaiah (PW3), and Zacharia (the accused) and his wife (the deceased) lived in that house.

11. In cross-examination, he denied that they took drinks while watching video. He stated that he was not aware of a family dispute between the accused and the deceased. He was also not aware that the accused had health problems.
12. PW3 was Isaiah Luusa Omara an Education Officer in Bura Tana, from Handampia village, the landlord of the accused.
13. It was his evidence that on 26/12/2012 at 8 pm, while watching video with others including women and children in his house, he heard screams from the room where Zacharia Omara Hiribae the accused, who was a tenant lived. He heard the words “*unaniua, njooni munisaidie*” – that is “*you are killing me, come and help me*”.
14. Since he had a sickly left leg, he told Joseph Hiribae (PW1) his nephew to proceed and break the door. As a result Joseph then broke the door, entered the room with Moses who came out with a baby. People then gathered and there was a lot of noise from crying women. He then entered the room and found a woman lying down at the door in the inner room.
15. Shortly thereafter, the light went off and he was thus not able to see Zacharia the accused. The headman then arrived and though he provided the chief’s telephone number, it could not be reached, and people thus got a motorbike and proceeded to trace the chief at Kelokelo area. The police were later called, came and took the body away.
16. According to this witness, he noticed a stab wound on the side of the woman’s abdomen, and a swollen right eye, and a blood stained knife blade was on the side of the dead body.
17. In cross-examination, he denied that the deceased was at the video room that night, and also denied that there was drinking at the video room. He accepted that he did not witness the hitting.
18. PW4 was Ismael Chalana Hamisi the chief Ndura Location. It was his evidence that on 26/12/2012 while at Kelokelo village, Isaiah Omara reported the death of a woman. He then proceeded to the scene, saw the dead woman and called the police who came and took away the body.
19. He was informed that the suspect had escaped, but the next day which was 27/12/2012, he received a report that he had been seen somewhere. He then dispatched people who brought him to his office, and the police came for him. He knew the suspect as his cousin, and identified him in court.
20. PW5 was Omara Cheche Omara a Kenya Police Reserve (KPR) officer. It was his evidence that on 27/12/2012 he was called by the chief and asked to look for a suspect. He proceeded with Joseph Odha also a KPR and found the suspect sitting under a mango tree. They arrested the suspect who did not resist, and merely asked for the whereabouts of his wife.
21. PW6 was Tola Hidavo Maalim a brother of the deceased from Mikinduni village. It was his evidence that on 26/12/2012 after 7.30 pm he was phoned by an uncle who informed him that his sister Roselina had been killed.
22. On the 27/12/2012 he saw the body of the deceased at Hola District Hospital, and was present during identification of the body for postmortem examination. According to him, the deceased was the wife of the accused, and the two had a six (6) months old child.
23. PW7 was Dr. Faraj Amin of Ijara District Hospital who conducted the postmortem examination of the deceased on 27/12/2012 at Ijara Hospital at 2.50 pm.
24. He noted the state of the body of a female African with a crushing injury on the head and lateral cut on the abdomen. The cause of death was excessive bleeding due to injury to the skull which was caused by a strong tool used on the scalp. According to the doctor a sharp metallic object was used to cause the surface cutting in the abdomen. He produced the postmortem report as an exhibit.
25. PW8 was IP Jonathan Ekidor the then Deputy OCS Hola Police Station and investigating officer.
26. It was his evidence that on 26/12/2012 he received a phone report from the chief Ndura Location of a killing. He proceeded to the scene and in the bedroom found a dead body of a woman with severe head injuries, and blood oozing from the head. He saw a pestle nearby, and took possession of the same. He also drew a sketch plan of the scene and removed the body to Hola Hospital.
27. On the next day 27/12/2012, as no doctor was available at Hola District Hospital, he transferred the body to Ijara Hospital where postmortem examination was conducted. On the same 27/12/2012 he received a report that the suspect had been found, and he re-arrested him. He produced the pestle, which was not taken to the Government Analyst for examination as it had no visible blood stains. He also produced the sketch plan of the scene as exhibits.
28. In cross-examination, he said that he learnt that the deceased and accused had a quarrel due to a Christmas gift which the accused had not bought the deceased. He noted signs of a struggle in the room, as cups and spoons had been scattered. He maintained that no blood stains were noticed on the pestle.
29. The prosecution then closed its case on 28/5/2014 and this was followed by many adjournments due to alleged sickness of the accused as well as the absence of Mr. Nyasani advocate for the defence. Subsequently Mr. Nyaga was appointed to act for the defence which was tendered on 7/2/18.

THE DEFENCE

30. When put on his defence, the accused initially elected to keep quiet, but later when he was informed that he could not call a witness if he kept quiet, changed and gave a short defence statement saying that he denied the charge, and would call one witness.

31. The defence witness was DW2 Dr. Haitham Mohamed of Hola District Hospital.

32. His evidence related to a medical report dated 11/5/2018 prepared by Dr. Kheri Hassan Mohamed of Mombasa, whose contents highlighted that on 3/3/2012 the accused was a patient at Coast Province General Hospital Mombasa with severe headache and exhibited psychiatrist behaviour by claiming to see imaginary persons.

33. According to the report, a CT scan was conducted in the accused's brain and normal findings were made which discounted the necessity of surgery, and which meant that the abnormal behaviour of accused arose from psychiatrist issues. According to the report, the patient was put on psychiatrist drugs for 3 weeks, and thereafter improvement was noted. However thereafter the patient lost follow up. The doctor produced the medical report as a defence exhibit.

34. In cross-examination, the witness stated that the report did not have a reference number nor did it indicate if Dr. Kheri treated the patient. He admitted that the report was prepared from Dr. Kheri's private clinic and not Coast General Hospital. He stated also that if the patient was later said to be normal at Garissa Provincial Hospital, that might be a sign of improvement in his mental condition.

35. That was close of the defence case.

SUBMISSIONS OF COUNSEL

36. After the closure of the evidence both for the prosecution and the defence, counsel made oral submissions.

37. Mr. Nyaga for the defence submitted that the prosecution had failed to establish a case against the accused beyond any reasonable doubt. First reason was that the incident occurred at night and there was no electricity light. With regard to the torch said to have been flashed by PW1, the intensity of the light and duration of the light was not given in evidence. Also there were two entrances to the room and as such according to counsel, the assailant who was not the accused, must have escaped through the other exit.

38. Counsel added that since the accused was said to be hiding under the bed, he must have been hiding from the assailant.

39. With regard to proof of malice aforethought under Article 206 of the Penal Code (Cap. 63), counsel submitted that none of the prosecution witnesses testified about any reason which would have prompted the accused to kill, and though PW8 the Investigating Officer talked about a Christmas gift, he did not know the accused and deceased before, nor their lifestyle. Malice aforethought, according to counsel was thus not proved.

40. Counsel submitted also that with the accused's observed state of health and behaviour in court, the prosecution did not prove that he would have knowledge that such an act could cause death or grievous harm, as the accused appeared disturbed, and DW2 the doctor said that accused had earlier been put on psychiatrist drugs in March 2012.

41. In addition to the above, counsel submitted that the mode of arrest and the accused's reaction under the mango tree of asking about the whereabouts of his wife on arrest demonstrated that he was not mentally sound.

42. Counsel concluded by stating that the evidence of PW1 and PW2 was contradictory, and the prosecution did not thus prove that the accused intentionally caused the death, nor did they positively identify him as the culprit. Counsel asked this court to acquit the accused.

43. Mr. Okemwa for the prosecution submitted that the prosecution proved all the ingredients of murder to the required standards. Death of the deceased was proved. The person who caused the death was positively identified through witness testimonies. Intention was also proved as the accused person used a pestle to hit the deceased on the head.

44. Counsel opined that the day after Christmas being Boxing Day, the day of opening gift boxes, the evidence of the Investigating Officer on gifts should not be ignored by the court.

45. On the alleged defence of insanity, counsel submitted that it was a late turn taken by the defence during their defence case, and an afterthought. Counsel observed that though the accused sometimes acted unusually, he was attentive during the defence hearing which showed that he was sane. In any case counsel added, if a finding of guilty but insane was entered, some legal consequences would have to follow. Counsel urged the court to convict the accused as charged.

46. Mr. Nyaga for the defence in a short reply stated that he relied on the Court of Appeal case of **Marii vs Republic – Nairobi Criminal Appeal No. 116 of 1985** on insanity.

CONSIDERATIONS

47. This is a murder case. The burden is always on the prosecution to prove all the elements of an offence beyond any reasonable doubt. An accused person has no obligation to prove his innocence even where he/she raises an alibi defence. See **Leonard Aniseth vs Republic [1963] EA 206**.

48. The prosecution was required to prove beyond reasonable doubt four important elements in this murder case. First, whether the deceased died. Secondly, the prosecution was required to prove that the death was unlawful. Third, the prosecution was required to prove that the death was caused by the accused. Fourthly, the prosecution was required to prove that, if the accused caused the death then it was caused with malice aforethought. Each of these ingredients was to be proved beyond any reasonable doubt.

49. Did the deceased die? The evidence on record is that on 26/12/2012 the day after Christmas day, there was video watching in the house near the room in which the deceased lived with her husband the accused at Handampia in Tana River County.

50. Suddenly, those watching video, including the owner of the house PW3 Isaiah Omara heard “*you have killed me come and help me.*” PW1 and PW2 rushed there and PW1 Joseph Hiribae Bahola broke two doors to enter the room. PW1 flashed his torch and saw the deceased lying down at the door motionless with visible injuries in the head and a cut in the abdomen. Everyone who came to the scene including PW2 Moses Hiribae PW3, and the chief and police said that they saw the deceased dead lying on the floor. Next day, a postmortem examination was conducted at Ijara District Hospital by PW7 Dr. Faraj Amin. The cause of death was established by the doctor as haemorrhage in the brain.

51. In my view, the prosecution proved beyond any reasonable doubt that the deceased died of haemorrhage in the brain.

52. Was the death unlawful? There is no suggestion anywhere in the evidence that the death was lawful. No law authorised or allowed anybody to kill the deceased the way the deceased died. No defence of accident was raised. I find that the death of the deceased was unlawful.

53. Was the death caused by the accused? The prosecution say so. The defence is that the death was not caused by the accused in that he was either not in the room with his wife or alternatively death was caused by someone who exited through the other door.

54. The incident occurred at night, and there was no lamp in the house or room, nor was there electric light. No one witnessed the killing.

55. The evidence of PW1 and PW2 however was that when they entered the room after PW1 broke two leading doors, they met the accused in the room holding a pestle – the weapon used to kill. The accused was seen by PW1 to have hit the deceased on the head a last time, then went under the bed only to emerge threatening them and hit PW1 hand knocking the torch down which went off, then escaped. The accused was not seen in his bedroom or in the village from then until next day when he was found by the public sitting under a mango tree after police came to the scene and left because they could not trace him.

56. Regarding the defence of the deceased being killed by another person who escaped through another exit, my understanding of the evidence was that such action was not possible. My understanding is that the room had only one exit door. The reference to two doors merely meant that there was an outer door and an inner door, with the outer door opening to an inner door, and the inner door opening into the bedroom.

57. No one saw the incident and therefore it is a case based on circumstantial evidence. The prosecution is required to demonstrate that the facts are inconsistent with any other inference than that of guilt. See the case of **Muchene vs Republic [2002] 2 KLR 367**.

58. In my view, all the circumstances and evidence on record point to the accused, the husband of the deceased, as the person who killed the deceased, his wife that night. I therefore find that the accused caused the death of the deceased, his wife.

59. Was the death caused with malice aforethought? There is a proposition of the prosecution through the investigating officer PW8 IP Jonathan Ekidor that the reason of the killing was a Christmas gift to the deceased, which the accused did not know. The assertion is not supportable as it emerged from the investigating officer without disclosing its source. It was hearsay evidence, as the investigating officer was not present and could not give direct evidence on such an allegation.

60. The attack on the deceased was quite vicious and in law, everybody is presumed to intend the natural consequences of his or her acts. See section 9 (2) of the Penal Code. Certainly, hitting a person severally on the head with a heavy piece of timber like pestle is meant to kill or cause grievous bodily harm which is enough to establish malice aforethought – which is defined under section 206 of the Penal Code (Cap. 63).

61. The defence also suggested a defence of insanity. Under section 12 of the Penal Code everyone is presumed to be sane. Section 166 of the Criminal Procedure Code (Cap. 75) provides a defence of lunacy or insanity. There are certain legal requirements for establishing such a defence and there are also statutory consequences that follow a finding of guilty but insane. Such a defence has to show that the accused could not understand the consequences of his acts. The defence has to be raised and evidence given and the court has to be convinced that the accused was insane when he committed the offence. The standard of proof is lower than beyond any reasonable doubt. See the case of **Marii vs Republic (Supra)** relied upon by the defence.

62. In the present trial, it did not come out clearly from the defence until at defence stage when they defence sought to call a doctor to testify on the state of mind of the accused.

63. The evidence tendered by DW2 Dr. Haitham on insanity in my view did not meet the requirement of section 77 of the Evidence Act (Cap. 80) and was hearsay evidence. There is no confirmation that Doctor Kheri who prepared the medical report in May 2018 treated the accused for any mental condition. The doctor was also at the time of making the report in May 2018 not working for Coast General Hospital where the accused was said to have attended medical treatment in 2012. No official confirmation was given from the Coast General Hospital that the accused was treated there in 2012 for mental illness. Though a medical report was produced, in my view it was hearsay evidence.

64. Though the accused appeared to have unpredictable conduct in court, and was in and out of hospital a number of times for treatment which delayed his trial, I find that such may have been due to stress rather than mental insanity.

65. I thus discount the defence of insanity and find that the accused caused the death of the deceased with malice aforethought.

DETERMINATION

66. I consequently find that the accused is guilty of murder contrary to section 203 as read with section 204 of the Penal Code and convict him for the offence under section 215 of the Criminal Procedure Code.

67. The bond/bail is cancelled and accused will be detained in prison custody to await sentence.

Dated and delivered at Garissa this 27th day of September, 2018.

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George Dulu

JUDGE