



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL CASE NO. 12 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

WILBERFORCE KIRUI.....ACCUSED

JUDGMENT

1. The accused, Wilberforce Kirui, is 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 night of 16th and 17th March 2014, at Kabitungu village in Bureti Division within Kericho County, he murdered Faith Chepngeno Kirui.
2. The prosecution called 7 witnesses in support of its case against the accused. The first prosecution witness was Ibrahim Kipyegon Keter (PW1), a cousin of the accused and a resident of Kabitungu. His evidence was that on 16th March 2014 at 5.00 p.m., he had gone to the shops where he found some elders discussing the accused's family. The accused and his wife, the deceased, had wrangles, and the elders requested PW1 to speak to his cousin and his wife. PW1 and his uncle, Joel Bett, had gone to speak to the accused and the deceased but they would not listen. According to PW1, the accused was accusing the deceased of infidelity. The deceased, who was employed while the accused was not, had tried to explain that she was working because of the education of the children. At some point, the accused asked PW1 and his uncle to leave as they were unable to solve the problem between the accused and the deceased. The uncle had left but PW1 was left behind, still trying to calm the accused and the deceased, then he also left.
3. The following day, 17th March 2014, he was informed that all was not well at the home of the accused, and he went there to find that the deceased was dead.
4. PW2, Faith Chepkoech, a sister in law of the accused, had gone to the accused's home at 8.00 p.m. on 16th March 2014 to get milk. She had found the children cooking, and had asked for their mother, the deceased. The children had informed her that their mother was in the 'room', and she had taken the milk and gone home. At around 5.00 a.m. – 6.00 a.m. the following morning, her husband, (Erick Kirui, PW3) had called her as he went to work and asked her to wake up the accused's children. She had not done so immediately, and he had called her again and told her to wake the children up. She had done so and then returned to her house.
5. After a while, the accused's son, Dennis (PW5) had gone to her house and asked her where her husband was. PW5 had then requested her to go and see their mother at home. She had gone to the accused's house where she found Dan (a son of the accused and the deceased and a twin brother of PW5). Dan had led her to their mother's bedroom and put on the lights. PW2 had called the deceased, who was lying in bed, three times. She had then touched her and seen that her tongue was hanging out and she had foam in her mouth.
6. PW3, Kipkoech Kirui Erick, was a younger brother of the accused. On 16th March 2014 at 5.00 p.m., he was at his house which is adjacent to the accused's house. He had heard a commotion in his brother's house and had gone there and found the accused restraining his wife from leaving. The accused was telling the deceased to wait for the children to come so that she sees them before leaving while the deceased was adamant about going away. The accused and the deceased had gone back to the house, and the accused had called PW3 and he had gone into the house and sat with them. PW3 had had a discussion with the accused and the deceased and they had calmed down before PW1 and Bett arrived. PW3 had then left.
7. According to PW3, the accused had called him on 17th March 2014 and requested him to wake his children up so that they would not be late for school. He had not told him where he was. PW3 had forgotten to do as requested by the accused, and the accused had called him again, and since he had left for work, PW3 called his wife (PW2) and instructed her to wake up the children. PW2 later called PW3 and informed him that the deceased was dead. He had then gone home and found that the deceased was dead as he had been informed.
8. Raymond Metet (PW4), was a brother of the deceased. He had called his sister, the deceased, on 16th March 2014 at 7. 30 p.m. The

accused had answered the deceased's phone and told him to wait. He had called again, and the deceased had picked the call and had told PW4 that she would be coming home the following day as the accused had beaten her. The following day, 17th March 2014 at 11.00 a.m., he had been informed that the deceased was dead. He had gone with members of his family to the home of the accused. They had found people there, among them the accused. When they asked what had happened, the accused told them that he had left home at 11.00 p.m. without the deceased. That the deceased had called him at 3.21 a.m., but he had disconnected the call and deleted it. He had then called PW3 at 5.30 a.m. and asked him to wake up his children to go to school.

9. PW4 had attended the post mortem of the deceased at Litein District Mortuary and had identified the body of the deceased. The doctor who performed the post mortem told them that the deceased had died from strangulation.

10. PW5 was Dennis Cheruiyot, 15 years old. He was a son the accused and the deceased. On 16th March 2014, at around 5.40 p.m., he had gone home and found Ibrahim Keter (PW1) with his mother and father. They were talking in the sitting room. His sister, Daisy, was also in the sitting room. The accused told them that he was waiting for them to get home as their mother wanted to leave, and he asked them whether they were ready to release their mother. PW5 stated that they refused to let her go as it was getting late. Their mother insisted on going away but the accused told her not to leave till morning. She stated that she was tired of being harassed by the accused, and she refused to prepare supper and went to sleep. PW5 and his twin brother, Duncan prepared supper. They asked the deceased to eat but she refused. The children took their supper and went to sleep. PW5 and Duncan slept in a different house, while the accused, the deceased and Daisy slept in the same house but in different rooms. The accused and the deceased shared a bedroom.

11. The following day, at around 6.20 a.m., Daisy had woken PW5 and Duncan and told them to go and see their mother. PW5 had gone to his mother's room and found that she was dead. He had then informed their grandfather and called other people. His uncle and twin brother had reported the matter at Roret Police Station.

12. According to PW5, the accused was not at home at the time. They had tried to locate him and called him on the phone. By the time he came home, the body of the deceased had been taken to Kapkatet District Hospital.

13. PW5 testified that sometimes there were quarrels between his parents, and sometimes they were happy. At one time, the deceased had gone home to her parents. She used to say that it is better she dies when she quarreled with the accused, but she had not said so on the night of her death. PW5 had not heard any commotion on that night. He denied that he had quarreled with his father, or that he had given evidence in order to punish him.

14. The 6th prosecution witness was Dr. Kevin Wambugu, a medical officer based at Kapkatet District Hospital. He had performed the post mortem on the body of the deceased, Faith Chepngeno Kirui, on 20th March 2014 at 12.45 p.m. at the AIC Litein Mission Hospital. He produced the post mortem report in evidence (Exhibit 1).

15. Dr. Wambugu estimated the time of death at the time he performed the post mortem as between 48 – 72 hours. He had noted central and peripheral cyanosis on the nail beds and the lips, an indication that the deceased had died from deprivation of oxygen. She had ruptured blood vessels and bleeding in the eyes, which were very red. His testimony was that one would find this if there is compression on the neck. He had also found that there was biting down on the tongue and a wound that had bled when she bit her tongue.

16. According to Dr. Wambugu, the deceased's larynx was displaced and mobile, which was not common in a normal person. His internal examination of the deceased showed that the deceased's larynx had been crushed and displaced from its normal position. The lungs had deflated and had no air, and were discoloured blue, an indication of deprivation of oxygen.

17. Dr. Wambugu also found dark blood in her major vessels and her heart muscles had been discoloured dark brown, an indication that there had been acute deprivation of oxygen before her death. He formed the opinion that the cause of death was hypoxia by asphyxiation with a crushed larynx, which he stated in laymen's terms to be lack of oxygen due to a compression of her larynx, which caused the asphyxia.

18. Dr. Wambugu stated in cross-examination that the deceased died from strangulation. He had not found bruises around the neck or broken finger nails, just a crushed larynx. To the suggestion that this could have been as a result of a fall, his view was that a fall would cause other injuries such as a broken neck. His opinion was that for the deceased to suffer a crushed larynx, someone used their hands to crush the larynx.

19. PW7, the final prosecution witness, was the investigating officer, Richard Rotich. He was retired at the time of his testimony. However, at the time of the events in this case, he was attached to Roret Police Station performing general duties.

20. On 17th March 2014, he was at the Roret Police Station when a report of a sudden death was brought to the station at around 9.30 a.m. He accompanied the reportees to the scene of the sudden death at Kabitungu village in Charera location. On arrival, he was led to the house where he found a female adult lying in a bed covered with a blanket, but her face was visible. He did not notice any visible injuries at the time. The body of the deceased was removed to the AIC Litein Mission Hospital where a post mortem was conducted on 20th March 2014.

21. PW7 had interrogated relatives of the deceased and recorded statements of witnesses. He had also interrogated the accused and formed the opinion that he could be connected with the death of the deceased. He had placed him in custody and informed him of the charge of murder. He had also taken him to the Kericho District Hospital for mental assessment before he was charged in court with the offence of murder.

22. In cross-examination, PW7 stated that there was no sign of a struggle in the bedroom where he found the body of the deceased, and the room was tidy. He had recorded statements from about 5 witnesses, three of whom were children of the accused and the deceased and others were from neighbours.

23. Upon the close of the prosecution case, the court found that the accused had a case to answer and placed him on his defence. He elected to give an unsworn statement in his defence and call no witnesses.
24. The accused's defence was that the case against him concerning the death of his wife was fabricated. He gave a long narrative from the time they met and married in 1995, got children and lived happily together with their 3 children. Later, they had marital problems. His wife left the job she had, and whenever he gave her money to pay school fees, she would not pay, and they had started quarreling. He later found that she had joined Faulu Kenya and borrowed a loan of KShs. 100,000/-.
25. With respect to the material day, he stated that they had visitors in church and had taken some items to church. They had gone home after the service was over, had lunch and stayed home. Their children were not home as they used to go to school on Sunday, and he and the deceased would stay at home waiting for the children as they prepared for the next day.
26. The deceased had then received a phone call and seemed in a hurry to leave. He had asked her why she wanted to leave, and she had stated that she had been called from her place of work. She had earlier said, while they were leaving church, that she was at home till Monday as it was not usual for her to go to work on Sunday. They had quarreled and then she offered to go prepare food for the children. He had then gone to look after cattle
27. The accused stated that he later learnt that the kitchen was open and there was no-one inside. He had locked the kitchen door and gone to the main house and stayed there. The deceased had then come back for her medicine as she was asthmatic and had told him that she would have left home were it not that she had forgotten her medicine.
28. The accused stated that it was the deceased's routine to disappear from home sometimes for 3 days or at times a week. They had quarreled all through from the time she came for her medicine, and they continued quarrelling after supper which was prepared by the children. The deceased had refused to take supper.
29. According to the accused, they had fought, but he does not know what happened. He stated that he remembered that she had held him, and he had pushed her away. He had left home slightly after 10.00 p.m., but he did not know whether she was hurt or anything. He was later called and told that she was gone, and he thought that she had gone to her home the way she used to go. He maintained that they fought the way they used to fight regularly but he had no intention of injuring her and does not know what happened.
30. The accused stated that he was called a second time and informed that the deceased had died. He was asked where he was, and he went home where he stayed for about 4 days after her death. He was arrested the day after the post mortem on the deceased was conducted, and was charged with the offence before court.
31. The accused stated that he did not agree with the testimony given before court by the doctor who performed the post mortem. He alleged that the deceased's family had refused to have the doctor from Litein hospital conduct the post mortem and wanted the doctor from Kapkatet District Hospital to do so. There were other doctors from Kericho District Hospital, but the family of the deceased had insisted on the doctor from Kapkatet District Hospital, so he did not know whether that doctor was their relative.
32. He contended that the doctor who performed the post mortem did not highlight the deceased's medical issues before her death but only said that she was strangled. He maintained that all he did was to push her. He had no plan to hurt her or to kill her, and they were just fighting.
33. In written submissions on behalf of the accused, Learned Counsel, Mr. Langat, submitted that there was no direct, indirect or circumstantial evidence to prove the ingredients of murder against the accused. The only available evidence was that of domestic violence between the accused and the deceased. Further, even if there was circumstantial evidence to prove that the acts of the accused caused the death of the deceased, the prosecution had not called any evidence to support its case that the accused had a motive to kill the deceased.
34. It was his submission further that the daughter of the deceased and the accused had not been called as a witness, though she had spent the night in the same house as the deceased. Further, that the son of the deceased and the accused had testified that he had not heard any commotion. The submission of counsel for the accused was that this was a case of domestic violence gone bad, and he urged the court to find that the prosecution had failed to discharge its statutory duty of proving the case of murder against the accused beyond reasonable doubt. He urged the court to discharge the accused forthwith.
35. I have considered the prosecution evidence on record and the unsworn statement of the accused in his defence. I have also considered the written submissions of Counsel for the accused dated 28th May 2018.
36. Counsel for the accused terms the matter before me a case of domestic violence gone bad. The story that emerges is of a couple, married for almost twenty years, who had had differences that had led the wife, the deceased in this matter, to decide to leave the marriage. The evidence of PW1, an uncle of the accused, was that he was with the accused and the deceased on 16th March 2014 trying to help them resolve their domestic differences. Their differences were irreconcilable, with the deceased saying that she would rather die than stay in the marriage. He had learnt on the morning of the following day, the 17th of March 2014, that the deceased was dead.
37. PW2 was the accused's brother's wife. She had gone for milk from the accused's house where she found the children cooking by themselves as the deceased was not there. She had taken the milk and gone home. The following day, her husband had told her to wake the children of the accused. She had gone there and one of the children of the deceased had taken her to their mother's room, where she had found the deceased dead in her bed. The evidence of PW3, the brother of the accused, was that he was present on the evening of 16th March 2014 when the accused and deceased were quarrelling. The deceased was insisting on going away to her parents, but the accused convinced her to wait for the children.

38. PW3 had then left and gone to his home. He had been called by the accused the following day to go and wake the children, and he had in turn called his wife, PW2, who had found that the deceased had died. The son of the deceased and the accused, PW5, testified that he had gone home at about 5.40 p.m. on the material day to find his father, mother and a neighbour in the sitting room. There was an argument between his parents, and his mother was insisting on leaving, which everybody was opposed to. They had convinced her to stay until the next day. The children had cooked supper, then two of them had retired to a separate house, while his parents and their younger child, Daisy, had slept in the main house. His sister had woken him up the following day to inform him that their mother was not responding.

39. It seems to me that this is, as Counsel for the accused describes it, a case of domestic violence gone bad. Really bad. A woman who had been subjected to violence for a long time, and who had resolved to leave her marriage, had been prevailed upon to stay the night. However, the fact that it was domestic violence gone bad does not take away the fact that the woman is dead, and all the evidence before the court points to the accused as the perpetrator of the acts that led to the death of the deceased.

40. Section 203 of the Penal Code states that **“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

41. Malice aforethought is defined in section 206 of the Penal Code as follows:

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;

...

42. The evidence in this case shows that the deceased and the accused had a turbulent domestic relationship. The deceased would leave her matrimonial home sometimes, and then return. On the day she met her death, she had indicated her intention to leave. Her feelings were so strong that she had stated that she'd rather die than remain in the marriage. It would appear that everyone, including her children, prevailed on her not to leave. She stayed, and that was the last time she was seen alive.

43. The evidence indicates that she spent the night in the same house and in the same bedroom as the accused. Their youngest child, Daisy, was in the same house but in a different room. What transpired during the night is not clear. In the morning, however, she was dead. The medical evidence indicates that she was strangled. She had central and peripheral cyanosis on the nail beds and the lips. This indicated that she had died from deprivation of oxygen. The deceased also had ruptured blood vessels in the eyes, bleeding in the eyes and very red eyes. From the medical testimony, this was an indication that there was compression of her neck.

44. The medical evidence also indicated that her larynx was displaced and mobile, which in the opinion of Dr. Wambugu was not common in a normal person. Upon examining her internally, the doctor found that her larynx had been crushed and displaced from its normal position; her lungs had deflated, meaning they had no air and were discoloured blue, an indication of deprivation of oxygen. Her major blood vessels had dark blood and her heart muscles had been discoloured dark brown. These findings were also, in the doctor's opinion, consistent with acute deprivation of oxygen before death.

45. There was no serious challenge of the doctor's evidence in cross-examination. Though the accused attempted to cast doubt on the impartiality of the doctor in his unsworn statement, I am satisfied that such attempt was a weak ploy to divert attention from the issue. Had there been any basis for the allegations against the doctor and the deceased's family, Counsel for the accused would have brought it out in cross-examination. I am therefore satisfied that the medical evidence before the court properly established the cause of death of the deceased.

46. What had caused the death of the deceased? Only the accused, the deceased and their young daughter were in the house where the deceased was found the following morning. She was found after the accused called his brother (PW3) and asked him to wake up his children. PW3 then called his wife, PW2, and asked her to wake the accused's children. Meantime, Daisy had called her brother (PW5) and informed him that their mother was not responding.

47. Counsel for the accused is correct that there is no direct evidence linking the accused to the death of the deceased. No-one saw him strangle her, crush her larynx, and cause her death. The circumstantial evidence, however, in my view, points irresistibly to the accused as the person who, with malice aforethought, caused the death of the deceased. He had fought with her and had been known to have a history of domestic conflict with her. She had expressed a desire, a very strong desire, to leave the very night of her death. Regrettably, she was prevailed upon to stay.

48. The law with respect to circumstantial evidence is that a court may convict on circumstantial evidence where such evidence points irresistibly to the accused as the perpetrator of the offence charged. In **R vs Kipkering arap Koske & Another 16 EACA 135** the court stated that:

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

49. Similarly, in **Sawe vs Republic [2003] KLR 364 at page 375** the Court of Appeal stated as follows:

“There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

50. From the facts of this case, there cannot be, in my view, any other explanation for the death of the deceased than that the accused caused her death, with malice aforethought. The death of the deceased was as a result of asphyxia from compression of the neck; compression with such force that her larynx was crushed, her lungs collapsed from lack of oxygen, the blood vessels of her heart had no oxygen and turned blue in colour; and she had bit her tongue so hard during her ordeal that she had caused it to bleed. No one else was in the house with the accused and the deceased, apart from their young daughter sleeping in another room, and there cannot be any possibility that anyone other than the accused strangled the deceased. He compressed her neck, and did not let up, or release the compression, but ensued that she was dead. For having the temerity to want to escape from their troubled marriage. Did he strangle her in her sleep? Perhaps, given that no-one heard any commotion, and according to the investigating officer, there was no sign of a struggle.

51. In his defence, the accused gave a somewhat rumbling unsworn statement, starting from the time of his marriage to the deceased. In the course of it, however, he makes several statements that stand out. He admits that he fought with the deceased, the suggestion from his account being that they had fought over some money she had borrowed from Faulu Kenya. She had then received a phone call and had seemed in a hurry to leave. She had later returned for her medicine. They had quarrelled all through from the time she came for her medicine, and they continued quarrelling after supper, which the deceased did not prepare and did not eat.

52. The accused reiterated that they had fought, but he does not know what happened. He remembered that she had held him, and that he had pushed her away. He had then left home slightly after 10.00 p.m. He did not know, when he left, whether she was hurt or not. They had fought the way they used to fight regularly. He had no intention of “injuring her” and does not know what happened.

53. Implicit in this statement is an acknowledgment that the accused did ‘injure’ the deceased. Indeed, he strangled her, crushed her larynx, killed her. He did not care that his actions would cause her death, and doubtless intended that they should. The fact that he called his brother the following morning to tell him to wake up his children points to a person who knew precisely what he had done. He knew that his wife was in the house, but was dead, and was not in a position to wake up their children to go to school. Trying to feign innocence-his refrain in his statement that they fought “as they used to regularly”, and that he does not know what happened does not displace the strong prosecution case against him.

54. In the result, I find that the prosecution has established beyond reasonable doubt that it was the accused who, with malice aforethought, caused the death of the deceased. I accordingly proceed to convict him of the offence of murder contrary to section 203 as read with section 204 of the Penal Code in accordance with section 215 of the Criminal Procedure Code.

Dated Delivered and Signed at Kericho this 25th day of September 2018.

MUMBI NGUGI

JUDGE