



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 11 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

M S M.....ACCUSED

J U D G M E N T

1. **MSM** the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **6th** day of **April, 2012** at [**particulars withheld**] **Village, Kibwea Sub-location in Kibwea Location in Mutomo District** within **Kitui County** he murdered **MS** (deceased).

2. Facts of the case as presented by the Prosecution are that the Accused, a husband to the Deceased who worked away from home returned home and had a disagreement with his wife, the Deceased. His family members saw him assaulting her. She succumbed to injuries sustained. The matter was reported to the police who visited the scene and removed the body to **Kitui District Hospital Mortuary**. The Accused was arrested and charged.

3. To prove the case the Prosecution called eleven (11) witnesses. **PW1 RM** a daughter of the Accused and the Deceased was asleep at her grandmother's house. She testified that by the time she was retiring to bed the Accused was not at home. She was woken up by some noise. Going outside she found the Accused assaulting the Deceased. Her younger sister **MS** was crying. She saw the Accused slap the Deceased. Neighbours who went to the scene were told to go away by the Accused. The Accused picked a stick that he used to hit her until it broke into pieces. He sent her brother **MS** to collect a belt which he used to hit her until it got cut into pieces. He started looking for another stick. In the process the Deceased managed to walk back to the house and she asked for drinking water. She (**PW1**) gave her water which the Accused snatched her and poured then picked a stool and hit her on the head. She bled from the head and fell down. They carried her into the house placed her on the floor and covered the body with a sheet. They slept until morning when the Accused left. Police Officers visited the scene and took photographs of the scene.

4. **PW2 Dr. Patrick Mutuku** conducted a postmortem on the body of the Deceased. He concluded that the cause of death was severe head injury secondary to assault.

5. **PW3, MW** stated that when the Accused, her son arrived on the material night he woke her up at **10.00 p.m.** with the intention of telling her something but she advised him to go and sleep and suggested that they talk the next day. She went to sleep. She was woken up by her four (4) years old grandchild who went running to her house. She went with **PW1** to the house of the Accused and found him beating the Deceased. She held the Accused and pleaded with him to leave the wife but he did not listen. He took a belt that he used to hit the Deceased. She snatched him the belt and helped the Deceased to go back

home. She left to call an uncle to her children leaving her sons **M** and **M** at the scene of the incident. On returning she found the Deceased injured. She was bleeding from the head. She saw a stool outside the house.

6. PW4 **MM**, a brother of the Accused was woken up by his children. On going to the home of the Accused he found him assaulting his wife, the Deceased. He restrained the Accused and stayed with him for approximately three (3) hours. Peace having prevailed he went to sleep. Later he was woken up by his brother **M**. He went out and found the Deceased lying on the ground and next to her was a stool. The Deceased who had a head injury was groaning. She died soon thereafter. With the assistance of **M**, they carried the body into the house. The Accused left and never returned home.

7. PW5 **MKM** identified the body of the Deceased to the Doctor who performed the postmortem.

8. PW6 **MM**, a brother of the Accused was woken up by the children of the Accused. He woke up his brother **M**. They went to the home of the Accused and managed to separate him and the Deceased. Thirty minutes later he heard noise again and went along with **M**. They found the Deceased on the ground. He went on to state that he used to see the Deceased socializing with one **Kamami** though he did not see him on the fateful night. However, PW1 purportedly told him that **Kamami** was seen at their home.

9. PW7 No. **94018524 AP Corporal Francis Mutunga** received the report made by PW2 and booked it. He visited the scene and telephoned the **OCS Mutomo** who later marked the scene. On arrival at the scene he found the body covered with a bed sheet that was blood stained; two (2) pieces of a belt and a blood stain stool were outside the house. Later on at **1.30 a.m.** the Accused went to the **AP Camp** and surrendered to the police.

10. PW8 **Lawrence Kinyua Muthuri**, a Government Analyst analyzed exhibits submitted to the Government Chemist and came up with a report thereof.

11. PW9 No. **64510 Corporal Livingston Katui of Scenes of Crime Support Section** prepared photographic prints of an exposed film received from **PC Salaton of Mutomo Police Station**.

12. PW10 No. **69408 PC Benjamin Maundu** escorted exhibits recovered to the Government Chemist.

13. PW11 No. **92289 PC Salaton Sironga** investigated the case and caused the Accused to be arraigned in Court.

14. When put on his defence the Accused who gave sworn evidence stated that his relationship with his wife was cordial. They were blessed with five (5) children. He testified that he arrived home at **12.30 a.m.** and found a man inside the house who confronted him and hit the Deceased in the process. They fought and since he (Accused) was drunk he lost consciousness. The person ran away. The Deceased screamed. His mother came out of the house and sought to know what was happening. He narrated to her what had transpired. He returned to the house and found his wife injured. She explained that she fell on a stool in the course of the scuffle. He sent his younger brother to call a Doctor but he did not find one. He denied having committed the offence.

15. As defined by **Section 203** of the **Penal Code**, any person who of malice aforethought causes death of another person by an unlawful act or omission commits murder.

16. Therefore issues to be determined are:

- Whether death occurred (**Actus Reus**).
- Whether it was caused by the Accused.
- Whether the unlawful act or omission was accompanied by malice aforethought.

17. Malice aforethought is defined by **Section 206** of the **Penal Code** thus:

“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.”

18. In the case of **Nzuki vs. Republic (1993) KLR 171**, the Court of Appeal stated that malice aforethought is a term of art and emphasized that:

“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 the risk as a result of those acts. It does not matter in such circumstances whether the Accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder (See Hyman vs. Director of Public Prosecution (1975) A C 55.”

19. When the police visited the scene of the incident, the police found the motionless body of the Deceased which they removed to the **Kitui District Hospital Mortuary**. PW2 **Dr. Mutuku** who performed a postmortem on the body of the Deceased concluded that she died of severe head injury secondary to assault. The time of death was estimated as **3.00 a.m.** of **6th April, 2012**. This was proof of the death of the victim, the Deceased herein having occurred.

20. The Prosecution adduced evidence to prove that the death of the Deceased was caused by the Accused. The defence on the other hand stated that it was caused by another person who was inside the house when the Accused arrived on the fateful night.

21. PW1, the Accused and Deceased’s fifteen (15) years old daughter, the crucial witness used to sleep with PW3, her grandmother and the Accused’s mother. Her four (4) years old sibling used to sleep with their parents in their one roomed house. She was woken up by the child who was crying. On going out she found PW2 already there. The Accused who was not at home by the time she was going to bed at about **9.00 p.m.** was assaulting her mother. Neighbours who went to the scene were ordered to leave by the Accused. The Accused used a stick, a belt and ultimately a stool to hit the Deceased. At the point of being hit with a stool the Deceased was sitting on the ground outside the house. The incident happened at night but there was moonlight which aided her to see. On cross examination she stated that when she asked the Accused why he was assaulting her mother he said that she had refused to cook for him food.

The Accused was hostile when his mother and brothers attempted to deter him from beating the Deceased. He was hostile therefore overwhelmed his mother and brother. It was not suggested to her in cross examination that the Deceased fell on the stool and sustained an injury in the course of a scuffle.

22. PW3, PW4, PW5, PW6, the Accused's mother and brothers, respectively gave evidence that corroborated evidence adduced by PW1 in every material fact in respect of the assault occasioned on the body of the Deceased by the Accused. Looking at injuries sustained, the Deceased suffered multiple bruises on the face and scalp; multiple small puncture marks on the body and bruises on both elbows and knees. These injuries were consistent with the beatings.

23. The defence put up by the Accused is a suggestion that he never touched/assaulted the Deceased. He stated that when he arrived home at **12.20 a.m.** the door to their house was opened by a man whom he confronted and the person hit the Deceased in the process. He fought him but the person ran away. Further, he claimed that when he went outside his mother had come out who sought to know what was happening.

24. PW3, his mother said that the Accused arrived at **10.00 p.m.**, he seemed drunk when he woke her up. He was reeking of alcohol. She told him to go and sleep. Later she heard footsteps of a person running. She was woken up by her four (4) years old grandchild.

25. Evidence adduced by the Accused in his defence of having arrived at **12.20 a.m.** is disapproved by evidence adduced by the Prosecution. Further, the Prosecution adduced evidence that remain unchallenged of the Accused having beaten the Deceased using a stick and later a belt until it got cut into two (2) pieces. And as a result of the assault she sustained injuries.

26. Further, evidence adduced by Prosecution that the Accused is the one who hit her on the head using a stool remains unchallenged. The stool was taken to the Government Chemist for analysis. The DNA Profile generated from the bloodstains on the stool matched the sample of the Deceased. This is proof beyond reasonable doubt that the stool was the murder weapon. Evidence proving the fact that the Accused used the stool to hit the Deceased is proved beyond any reasonable doubt. Therefore, it is the Accused who committed the act that caused the death of the Deceased herein.

27. It was alleged that when the Accused went to speak to his mother he was reeking of alcohol and PW6, his brother suggested that the Deceased used to socialize with a certain man known as **Kamami**. The Accused did not suggest that he acted as a result of intoxication. Similarly, he did not suggest that he acted as a result of provocation. In any case, in the case of **Kupele Ole Kitaiga vs. Republic (2009) eKLR Criminal Appeal No. 26 of 2007** the Court stated:

“A clear message must also go out to those of the appellants ilk who deliberately induce drunkenness as a cover up for criminal acts.”

Failure to plead the defence of intoxication is evidence of the Accused having been in control of his thoughts.

28. When the Accused started assaulting the Deceased he was aware she would suffer injuries. He continued beating her until she could hardly walk, an act that made her sit down. In the state of weakness and lack of strength she asked for water which PW1 gave her. The Accused could not let her drink the water to quench her thirst. He went on to pick a stool which he used to hit her on the head. As a result of the assault, she sustained a large subdural haematoma on the left hemisphere of the brain, the severe head injury that she succumbed to. At the point of hitting the Deceased the Accused committed the act knowing that the Deceased would at least suffer grievous harm. In the circumstances he acted with malice aforethought.

29. Having considered evidence adduced, it is apparent that the case against the Accused is proved to the required standard.

30. In the result I find him guilty of the charge of murder and convict him of the same contrary to **Section 203** of the **Penal Code**.

31. It is so ordered.

Dated, Signed and Delivered at **Kitui** this **25th** day of **April**, 2017.

L. N. MUTENDE