



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL CASE NO. 2 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOEL MULI NGUTHU.....ACCUSED

J U D G M E N T

1. **Joel Muli Nguthu**, 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 **5th day of September, 2015** at **Mwaeni Village, Chuluni Division** in **Nzambani District** within **Kitui County** he murdered **Muyendi Mutua Nguthu** (Deceased).

2. Facts of the case are that the Deceased was the Accused person's wife. On the **5th September, 2015**, **PW1 Eric Kidusi Muli**, their son was woken up by screams at about **9.30 p.m.** It was his younger sister **Lydia** screaming. In the process he heard his parents quarreling. He lit a torch and went out of their room. The Accused told him to switch off the torch. However, he ran out and managed to inform his grandparents. They accompanied him to their house. On arrival the Accused told them that the Deceased had run away. As his parents walked back **PW2 Susan Mutia** his aunt and sister to the Accused arrived in company of his son **Nguthu Mutia**. They demanded to see the Deceased. The Accused left for an unknown place. They seized the opportunity to check inside the house. They found the Deceased on a bed that was broken with a bed sheet stuffed in the mouth. They rushed her to hospital but she was pronounced dead. The matter was reported to the police who investigated and charged the Accused.

3. When put on his defence the Accused stated that the Deceased was being accused of being a witch by people. As a result, in company of his mother and their three (3) children they went to take an oath at **Mutomo**. They returned home at **5.00 p.m.** When they went to bed they had a disagreement. Previously they had a disagreement since the Deceased wanted to seek employment but he opposed her. They separated for seven (7) months. When they went to take the oath she had just returned home. On the fateful night she hit him with a piece of wood. As a result of the provocation he held her neck. When she screamed he released her and went outside. The bed was already broken. He went to inform his brother **Kennedy** who promised to mediate over the conflict in the morning. He slept at his brother's place and was arrested in the morning. That is when he learnt that his wife had died. He denied having intended to kill his wife.

4. Issues for determination are:

i) Whether death occurred.

ii) Whether it was caused by an unlawful act or omission occasioned by the Accused.

iii) Whether it was done with malice aforethought.

5. The Prosecution adduced evidence to establish that by the time the Deceased was taken to hospital she was pronounced dead. The body of the Deceased was identified to PW8 **Dr. Cosmas Muthama Mutisya** who conducted the postmortem by PW6 **Junis Kathini Mutua** and **Mwambwa Mutua**. On examination the body was cyanotic, it was bluish on the tongue and lips. There was a transverse groove at the base of the neck. Some scratch marks were noted around the groove. Lungs were congested. As a result, he concluded that the cause of death was hypoxia caused by strangulation. This was proof of the fact of death.

6. The Accused was sleeping on the same bed and in the same room with the Deceased. Their son PW1 heard him quarrelling the Deceased. When he (PW1) lit the torch the Accused went out of the room and told him to switch it off. But, he managed to escape. He went to call his grandparents.

7. PW2 **Susan Mutia** the sister of the Accused person on hearing PW1 waking up his grandparents went to their house. On reaching near the Accused person's house she heard him saying he did not want to see any person. He deterred her and **Nguthu**, her son from entering the house. They seized the opportunity of seeing the Deceased when her parents arrived and after the Accused disappeared. Ultimately PW4 **Kathini Nguthu** the mother of the Deceased arrived and they managed to enter the bedroom. The Deceased was found on the bed that was broken with a sheet stuffed in her mouth.

8. The Accused was not seen committing the act that resulted into the death of the Deceased. Evidence against him was circumstantial. In the case of **Abang'a alias Onyango Criminal Appeal No. 32 of 1990** the Court of Appeal stated conditions in which circumstantial evidence is accepted in evidence thus:

"It is settled law that when a case rests on circumstantial evidence, such evidence must satisfy three tests:

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

(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) 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."

9. Circumstances that prevailed namely that the Accused was the one quarrelling with the Deceased prior to her being found dead were cogent. In his defence he admitted that he disagreed with the Deceased. He even admitted having held her neck until she screamed. Her act of screaming made him release her but it was too late in time. Therefore evidence points at him unerringly as the person who committed the act that resulted into the death of the Deceased.

10. This then brings us to the issue – whether he acted with malice aforethought. **Section 206** of the **Penal Code** defines malice aforethought 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.”

11. In his defence the Accused stated that he disagreed with his wife. They fought, she picked a piece of wood and hit him hence provoking him. This was putting up the defence of provocation. The defence of provocation is recognized by statute.

Section 207 of the **Penal Code** that is in regard to killing on provocation provides thus:

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”

The act of provocation itself is defined in **Section 208** of the **Penal Code** that stipulates thus:

“(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.”

The Accused and the Deceased had a history of having disagreed and separated. The Deceased according to PW2 returned to her maiden home. She returned to her matrimonial home in **August, 2015**. It was then declared that she was to take an oath by drinking some anti-witchcraft water. In his defence the Accused stated that people were accusing his wife, the Deceased, of witchcraft. This prompted him to take her to a witchdoctor to take an oath when she returned. He went with PW2, his mother and their three (3) children. They returned home at **5.00 p.m.** After dinner they went to bed and subsequently disagreed.

12. On cross examination the Accused stated that his family members, his mother and siblings were the ones accusing his wife of being a witch. He seems to have been perturbed with the allegation such that he caused his wife (Deceased) to be subjected to taking an oath.

13. It is alleged by the Accused that the Deceased hit him with a piece of wood below the armpit. He did not allege that he was injured if indeed it happened. The question would be whether such an act would make an ordinary person to be deprived of the power of self control so as to kill a person as he did.

14. PW1 woke up on hearing the quarrel. The Accused instructed him to switch of the torch that would have enabled him to see and intervene prior to going back to commit the act that caused the death of the Deceased.

15. In the case of **Tei s/o Kabaya vs. Republic (1961) EA** the Court of Appeal held that:

“In consideration whether the defence of provocation was sufficient to reduce the offence to manslaughter is material to consider the degree of retaliation as reported by the number of blows and the lethal nature of the weapon used.”

The act that caused the death of the Deceased was strangulation. The Accused used his bare hands to compress the neck of the Deceased. He went on to stuff a sheet into her mouth that prevented her from breathing when the Deceased was screaming. It implied that she was terrified but that could not deter the Accused from accomplishing the intention of putting his motive into action of killing her following allegations that she was a witch.

16. Taking all evidence adduced into consideration I find that the Accused did not act in the heat of passion. He acted knowing that his action of gripping the Deceased’s neck would injure her and even cause death. In the result he acted with malice aforethought.

17. Therefore, I find him guilty and convict him of the offence of murder as charged.

18. It is so ordered.

Dated, Signed and Delivered at Kitui this 28th day of July, 2017.

L. N. MUTENDE

JUDGE