



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**CRIMINAL CASE NO. 6 OF 2015**

**REPUBLIC.....PROSECUTOR**

*versus*

**A K W.....ACCUSED**

**JUDGMENT**

1. **A K W** is charged with the **offence of murder contrary to section 203 as read with section 204 of the Penal Code**. He pleaded not guilty.

2. At the trial prosecution called **9 witnesses**. The primary objective of a criminal trial is to determine whether the accused is guilty of the charge, in this case of murder. Prosecution has a duty to prove the case on the standard of proof of beyond reasonable doubt. In doing so the prosecution has an obligation to prove:

*(i) The fact of death of the deceased;*

*(ii) That the accused committed the unlawful act which caused the death of the deceased; and*

*(iii) That the accused committed the unlawful act with malice aforethought.*

3. The prosecution's evidence was that the accused on 26<sup>th</sup> October 2015 killed his **wife D T K** in the presence of their two children. The first witness prosecution called was **K K** the couple's youngest child. He was, at the time of testifying 4 years old. However the moment the Principal Prosecuting Counsel, Mr. Tanui, directed this child to the events that occurred at their home on 26<sup>th</sup> October 2015 the child became very emotional and the emotions overwhelmed him. He was stood down and was never recalled.

4. **J W**, the couple's older son, 6 years old, after voir dire examination was found to be intelligent and appreciative of the consequences of lying. He tendered sworn testimony. He stated that on the day in question he and his younger brother, K, heard as though something had fallen. He and K were asleep in the next room to their parent's bedroom. This witness then stated in his testimony:-

*“I saw what fell, it was mum (the deceased). Mum fell, she was made to fall by baba (pointed to the accused). He (accused) cut her (deceased) with a knife. He (accused) cut her (pointed to his neck). I saw blood ..... We (this witness and K) saw what happened. We woke up with K to see what our parents were doing. Yes I saw the knife our dad (the accused) used to cut mum's*

***(deceased) throat.”***

5. The witness stated that the accused told him and his brother K to go outside the house to wait for their uncle.

6. **S N M (PW 3)** is married to the sister of the deceased, namely **M M N PW4**. PW 3 recalled that on 26<sup>th</sup> October 2015 at 6.30 a.m. he received a telephone call from the accused. The accused asked him to **“go and get them.”** PW 3 said that he understood the accused to mean that he wanted PW 3 to go and assist him to move house, a matter they had previously discussed. PW 3 informed his wife, and sister of the deceased of the request made by the accused. PW 3 mentioned to his wife that during his telephone conversation with the accused he had heard the accused’s children crying in the background. This led to PW 3’s wife calling her sister’s (the deceased) telephone number but it was answered by the accused. PW 3’s wife informed PW 3 that the accused had spoken to her very harshly on telephone. Since PW 3 had with him his employer’s company car he and his wife drove to accused’s home. Before reaching that home and at the road they met the two children of the accused. The children boarded the vehicle and PW 3 said:-

***“While in the car they (accused’s children) started saying baba (accused) has killed mum (deceased).”***

7. When they arrived at the accused home PW 3’s wife went inside the house first. PW 3 entered the house then said:-

***“K (accused) came out of the bedroom and his shirt (was) full of blood. K’s (accused) face was looking really wild ..... when I first entered the house K (accused) said “I killed my wife because she used to call me kihii.”***

PW 3 on entering accused’s bedroom saw the deceased lying near the bed on the floor facing the ceiling. He noted she was dead. He also noted that she had been cut on her neck and there was a lot of blood on the ground. This witness identified the knife and its sheath marked as Prosecution Exhibit No. 1 and 2. That knife and sheath before court were those he saw on the subject day although he said that on that day he was in shock and he further said that it was the accused who showed he police where both the knife and its sheath were in the house.

8. PW 4, the wife of PW 3, also stated that when they picked the accused’s children on the road on the subject day those children informed her and PW 3 that their father, the accused, had killed their mum, the deceased. PW 4 on entering the accused’s house she saw blood and the children’s footsteps imprinted in the blood in the sitting room. As she proceeded to the bedroom the blood on the floor made her to feel slippery. PW 4 then said that the accused informed her and PW 3 that he had killed his wife because according to accused’s own words:-

***“You people say I (accused) am a prostitute I have killed her (deceased).”***

### **THE FACT OF DEATH OF DECEASED**

9. PW 3 and 4, the first witnesses at the scene confirmed that the deceased was dead. Indeed PW 4 the sister of the deceased tried to speak to the deceased who did not respond. Moreover the pathologist Ayub Gitaka Macharia who conducted the post-mortem confirmed the deceased’s death. The prosecution did indeed prove the fact of the death of the deceased.

### **THE ACCUSED COMMITTED THE UNLAWFUL ACT CAUSING DEATH**

10. PW 2, J W, the child of the accused and the deceased, clearly testified how he and his brother heard something fall and how he witnessed his father cutting his mother’s neck. This child even motioned before court the act of cutting his mother’s neck which he saw his father do. Further PW 3 and PW 4 were told by the accused that it was he, the accused, who killed the deceased. He gave two reasons for

killing her, that she had called him 'kihii' (uncircumcised man) and because they (it was not clear who he was referring to) said he was a prostitute. There was sufficient evidence, adduced by prosecution's witnesses, which showed beyond reasonable doubt that it was the accused who committed the unlawful act.

11. In the light of that evidence the defence offered by the accused was simply for rejection. He gave sworn evidence in his defence. His defence was that the deceased who was armed with a knife came to their bed where the accused was sleeping bent down and abused him by calling him *kihii*, and motioned to cut him. It was then the accused lifted off the blanket and as he got up out of bed he saw the knife the deceased had hurting her. That the knife cut the deceased on the left side of her neck. On being injured the deceased fell down. This is what accused said in his defence:-

***“When she (deceased) got injured she fell down. I (accused) tried to get her up. I had no bad intention against her. I helped her because she was cut and blood was oozing. The knife was still embedded in her neck. I removed it.”***

Accused said that up to that day his relationship with the deceased had been good.

12. On being cross examined accused said he was unable to explain exactly how deceased cut herself with the knife but he denied that there was any physical contact between him and the deceased. He further explained that his son J W (PW 2) must have seen him when he was trying to assist the deceased and mistakenly thought he was cutting the deceased.

13. **Elizabeth Waithira Oyiengo**, the government chemist on analysing the accused shirt found that the partial DNA profile generated from the blood stains on that shirt matched the DNA profile generated from the deceased blood sample.

14. The evidence of the prosecution proved beyond reasonable doubt that it was the accused who committed the unlawful act which caused the death of the deceased. It is imperative to note that the accused counsel did not cross examine on the evidence of the appearance of blood stains on accused shirt nor on his admission to both PW 3 and 4 that he had killed the deceased.

### **DID ACCUSED HAVE MALICE AFORETHOUGHT**

15. The above issue requires this court to interrogate the evidence and determine whether the accused in committing the unlawful act which caused the death of the deceased had an intention to cause death or to do grievous harm. The accused's child J W (PW 2) gave graphic evidence of how he witnessed his father, the accused, cut his mother, the deceased. He even motioned before court how his father cut his mother's neck.

16. Further the evidence of the pathologist who conducted the post-mortem stated that his examination of the deceased's body revealed a cut wound on the anterior neck measuring 13 cm. In layman's terms he said that the depth of the cut on the neck extended to the left side of the neck up to the bone surrounding the spinal code. He also saw another cut extending from the exterior neck to the left side including the ear lobe. The descriptions of those cuts on deceased neck would lead credence to the description PW 3 gave that the accused had cut the deceased like how one would cut a goat.

17. The above evidence indeed shows that the accused intended or had malice aforethought when he committed the unlawful act which caused the death of the deceased. The cut on deceased was not a slight one but it was deep and extensive. Indeed the deceased had two major cuts on her neck amongst others. Those injuries show that the accused intended to cause death or grievous harm to the deceased.

18. On the whole the prosecution well met the criminal standard of prove and did prove that it was the accused who killed D T K. Accordingly A K W is hereby convicted of the offence of murder.

**DATED AND DELIVERED AT NANYUKI THIS 2<sup>ND</sup> DAY OF AUGUST 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Accused: A K W.....

For Accused.....

For the State: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**