



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 28 OF 2013

BETWEEN

REPUBLICPROSECUTOR

AND

FRANK TURO..... ACCUSED

JUDGMENT

1. **FRANK TURO** (“the accused”) was charged with the offence of murder contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on 29th June 2013 at Manyatta within Kisumu East District of Kisumu County, he murdered **JACKLINE ACHIENG ABUTO** (hereinafter “the deceased”). The accused pleaded not guilty.

2. The prosecution case was that the accused attacked the deceased, who was his wife, and assaulted her after which she died. The prosecution marshalled 4 witnesses while the accused gave sworn testimony and called 3 witnesses in his own defence.

3. The fact and cause of death of the deceased is not in dispute and was confirmed by the testimony of Dr Nelly Wanjala (PW 4) who produced the post mortem form prepared by Dr C. K. Muturi. He performed the post-mortem on the deceased body on 2nd July 2013 at the Jaramogi Odinga Oginga Teaching and Referral Hospital (“JOOTRH”). He observed that the deceased had a swollen face with multiple bruises. Her hair on the right side of the scalp appeared to have been plucked off with the hair piece. There was a small stab wound on the right side of the gluteus. Internal examination of the head revealed extensive bruises on the scalp and extensive bleeding beneath the scalp. There was a linear fracture on the left parietal region of the skull measuring about 6 cm long with extensive bleeding. Dr Muturi concluded that the cause of death was a severe head injury due to blunt force trauma.

4. As to whether the accused committed the unlawful act that led to the deceased’s death, the key prosecution witness was the deceased’s mother, Magdalina Okinda (PW 1) who, at the material time, was residing at Manyatta. She recalled that on 29th June 2013 at about 5.00pm, the accused and deceased came together where she was roasting maize. The accused left after they had talked. At about 7.30pm, the accused returned and found the deceased seated outside PW 1’s house while the deceased was still roasting maize. He started beating the deceased. According to PW 1, the accused hit the deceased with a stone causing her to fall. PW 1 heard him saying, “*Today I will kill you, today I will kill you.*” She tried to intervene but was pushed aside. As the accused continued to beat the deceased, PW 1 raised alarm and rushed to Kondele Police Station to report what had happened. In cross-examination, PW 1 stated that the accused hit the deceased with a stone on the left side of the face.

5. On the material day, PC Albert Micha (PW 2) was on duty at Kondele Police Station when PW 1 arrived at about 8.00pm and reported that her daughter had been assaulted by the accused and that she feared for her life. Together with Corporal Samuel Sang (PW 3), the investigating officer, and other officers, they went back with PW 1 to the scene and upon arrival they found people had crowded at PW 1's house. They found the deceased lying in the sitting room unconscious and took her to JOOTRH. PW 3 completed investigations by recording witness statements. PW 3 also recalled that on 9th June 2013, the accused escorted by his father, was brought to Kondele Police Station whereupon he was arrested and charged.

6. When put on his defence, the accused testified on oath that on 29th June 2013, he had taken a few days off from his work as a Revenue Collection Officer with the Kisumu County Government to look for a house as he need to move his family from Nyalenda to Manyatta. He had met the deceased earlier in the day and they agreed that she would look for the house while he would get the money necessary for him to secure the house. At about 11.00am, he was received the money from his friend who insisted on giving it directly to the deceased. He continued in his activities before proceeding to Manyatta later in the day where the deceased was with PW 1.

7. The accused recalled that when he met the deceased, he expressed disappointment when he noticed she was drunk. He asked her how much of the money he had given her was left. She did not take this well and he asked her not to disturb her and they started exchanging words. He further testified that they started fighting using their bare hands with blows and slaps and despite attempted intervention by PW 1, the fighting continued. He further explained that he slapped the deceased on the face and she fell and hit her head on the ground and started bleeding. After falling, she did not respond to him so he pulled her slowly to PW 1's house and left her lying there. After the incident he left and after receiving news of the deceased's death, he decided to go to his parent's home in Eldoret and remained there until his father advised him to surrender himself to the police station.

8. Thomas Majiwa (DW 2) testified that he was the landlord to the accused and deceased when they lived in Nyalenda Estate with their children from 2005 to 2013 and that they lived peacefully. Martin Omondi Osuro (DW 3) testified that the accused was his friend for a period of 13 years and that in 2013, the accused and the deceased came to see him looking for an apartment to rent. They agreed on rent and deposit to be paid on the next day. He did not notice any anything between the two of them in the manner they were interacting.

9. The primary issue for determination is whether the accused killed the deceased and if so, whether he did so with malice aforethought. As to whether the accused caused the death of the deceased, the accused admitted that he had a fight with the deceased on the evening of 29th June 2013. His version of the fight was that used their bare hands to fight each other and that he slapped the deceased on the face whereupon she fell and hit her head. This incident was witnessed by PW 1 who told the court the accused started beating the deceased with a stone and she fell down. The post mortem examination confirmed that the deceased died and died as a result of a severe head injury which was inflicted by the accused. The injuries inflicted by the accused on the deceased were inconsistent with mere slaps. That she fell and hit her head on the ground is also inconsistent with the evidence. First, PW 1 clearly saw him assault the deceased on the head with a stone. Second, the injury inflicted on the deceased was not accidental but deliberate. After he had beaten her, he dragged her by the hair to the house as evidenced by the fact that he her hair had been plucked from the scalp. The sum total of the evidence is that the deceased died as a result of being assaulted by the accused.

10. I now turn to the issue of malice aforethought. 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;

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. Counsel for the accused submitted that the prosecution failed to prove malice aforethought as the incident was a domestic altercation. There was also suggestion by the accused that the death of the deceased was accidental but as I stated elsewhere, the contention that the death was as a result of an accident is not supported by any of the evidence and I reject it. The testimony of PW 1 that the accused came and attacked the deceased with a stone is corroborated by the evidence of the injuries sustained by the deceased confirmed by the post-mortem.

12. There is also evidence emerging from the accused's defence that he may have been provoked into acting in the manner he did and that he also acted in self-defence. For the defence of provocation to hold under **section 207(1)** of the *Penal Code*, there must be evidence that the assault on the deceased which caused his death was caused by sudden provocation and before there was time for his passion to cool down. Provocation as defined under **section 208(1)** of the *Penal Code* is an act which is likely to deprive the person provoked 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.

13. The accused and deceased had a conjugal relationship hence fell within the realm of the relationships in which the defence of provocation is allowed within **section 208(1)** aforesaid. The question however is, whether the deceased actually provoked the accused. The deceased version is that when he arrived, he sensed that the deceased was drunk and that they started exchanging words and started fighting. There is no evidence that the deceased was drunk nor was this issue put to PW 1, who had been with the deceased for a better part of the day, in cross-examination. The accused did not disclose what unspeakable words the deceased uttered that so provoked him into a fit of uncontrollable rage causing him to react with violence and start hitting the deceased with a stone.

14. The evidence is that after the accused and deceased had parted two hours, the accused returned and immediately set upon the deceased while shouting, "I will kill you, I will kill you." PW 1 recalled that despite her intervention, he continued beating her. This evidence completely negatives provocation or indeed any notion of self-defence.

15. The fact that the accused hit the deceased on the head with a stone, continued hit her despite PW 1's intervention and even after she fell and then dragged her by her hair to the house, in the circumstances I have outlined, leaves no doubt that the accused intended to cause grievous harm to the deceased. I therefore find and hold that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

16. I therefore find **FRANK TURO** guilty of the murder of **JACKLINE ACHIENG ABUTO** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 21st day of September 2017.

D.S. MAJANJA

JUDGE

Mr Indimuli, Advocate for the accused.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.