



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO. 18 OF 2017

REPUBLIC.....RESPONDENT

VERSUS

GEORGE MUTHORA NYUTU.....ACCUSED

JUDGEMENT

1. The accused is charged with murder contrary to section 204 as read with section 203 of the Penal Code (Cap 63) Laws of Kenya. He pleaded not guilty. The prosecution called 9 witnesses in support of their case.

2. The prosecution case was that on 24/8/2014, the deceased reported to No. 99014680 APC Joseph Kuntus (PW 3), that she had been assaulted by her husband with whom they lived in a one roomed house. PW 3 testified that the back of the head of the deceased appeared burnt. PW3 further testified that the deceased told him that the accused had hit her on the back of her head with a metal bar. Finally, PW 3 testified that the relationship between the deceased and the accused was a difficult one and that they had had previous disagreements.

3. Furthermore, there is evidence of Dennis Giatu (PW 4) who was the neighbour of the accused person. PW 4 testified that he saw the deceased bleeding from her head and she told him that the accused had stabbed her on 24/8/2014. His further evidence was that he heard screams in the room of the deceased at about 11.00 p.m. Finally, he testified that both the deceased and accused appeared to be drunk.

4. There is further evidence of Jacinta Njeri (PW 5), who was the daughter of the deceased. It is her testimony that she saw the accused and the deceased fighting on 24/8/2014. In the following morning, she went to the room of the deceased and upon close observation, she saw blood where the head of the deceased rested. As a result, she screamed. Upon seeing her, the accused escaped. It is also her evidence that the deceased and accused were fighting every month. She also testified that the accused had hit the head of the deceased with a nail. The deceased asked her daughter to take to her, her gumboots. Before doing so, the accused got hold of one of the gumboots and throw it. This was followed by a fight between the deceased and the accused. It is also her evidence that the deceased was treated and returned home although she appeared weak.

5. Furthermore, Nelson Mwangi Gathogo (PW 6) testified that the deceased was cohabiting with the accused in 2014. On 24/8/2014, he saw the deceased and accused fighting but they were separated. The following morning, he heard screams to which he responded. Upon arrival at the room of the deceased, he found the deceased dead and her body was naked. He did not find the accused there. It is also his evidence that the deceased and the accused used to fight often. He also testified that the deceased and the accused used to drink at a local bar.

6. There is further prosecution evidence of a confessionary statement taken by the Senior Resident Magistrate, Temba Allan Sitati (PW7). The confession was taken from the accused and was put in evidence as exhibit 3A, which was accompanied by his certificate, which was put in evidence as exhibit 3B.

7. There is further evidence of Dr. Ndulungu (PW 8), who performed a post mortem examination on the body of the deceased. PW 8 found that the deceased had a deep cut wound on the back of her head and other wounds. He also found that the deceased had a swollen head and lacerations on her lips. He also found bruises on her right chest with broken ribs. The post mortem report was put in evidence as exhibit 4. According to PW 8, the cause of death was due to head injury with blood loss attended by brain concussion arising out of multiple blunt traumatic forces.

8. All the 9 witnesses had testified before Lady Justice Meoli, who found that the accused had a case to answer.

9. When I put the accused on his defense and following the explanation of his rights in terms of section 306 of the Criminal Procedure Code (Cap 75) Laws of Kenya, the accused elected to make an unsworn statement. In that statement, he stated that the deceased and her brother fought against him. Thereafter, the deceased and himself went to sleep in their one roomed house. The following morning, he found the deceased dead on their bed. As a result, he proceeded to go to their shamba to work which was in a forest. He further stated that he was unable to work because of the death of the deceased. Thereafter, he was arrested in a forest.

10. In the light of the prosecution and the defense evidence together with the submission of counsel for the accused, I find the following to be the issues for determination.

1. Whether or not the accused inflicted the fatal head injury on the deceased.
2. Whether or not the accused had malice aforethought (mens rea) when he fought with the deceased.

11. I find from the evidence of No. 99014680 APC Joseph Kuntus that it is the accused who inflicted the deep cut wound in the head of the deceased with a metal bar. This is what the deceased told PW 3. The evidence of PW 3 is supported by that of the daughter of the deceased namely Jacinta Njeri (PW 5). It was her evidence that the accused hit the head of the deceased against a nail that was in the wall. There is further evidence from PW 3 and PW 5 that the relationship between the deceased and the accused was strained. They used to fight often. They also used to drink often.

12. There is further evidence of Temba Allan Sitati, who took a confession from the accused that was put in evidence as exhibit 3A.

13. I also find that the accused and the deceased used to drink often and that on the material date, they had also drunk alcohol. I also find that the deceased and the accused were the only occupants of that one roomed house during the material night. The deceased had told her daughter to go and sleep in the neighbour's house. In the circumstances, I find from the totality of the prosecution and defense evidence that it is the accused who inflicted the fatal head injury. I also find that it is the accused who broke the ribs of the deceased. I do not believe the evidence of the accused that he woke up in the morning and found the deceased dead and naked in their one roomed house. I find that after inflicting the fatal injury and other injuries on the body of the deceased, the accused escaped to the forest from where he was arrested.

14. Furthermore, I find from the totality of the evidence tendered at trial that the accused was the one who inflicted the fatal injuries on the deceased. I do not believe his evidence that when he woke up in the morning, he found the deceased dead and notwithstanding her death he proceeded to his shamba. This is incredible. I find from the evidence that after inflicting the fatal injuries, he covered the body of the deceased and escaped to the forest from where he was arrested.

15. The only issue left for consideration is whether he had the intention to murder the deceased. In this regard, I find that the relationship between the deceased and the accused was strained. I further find that both the accused and deceased used to drink alcohol most of the time even before inflicting the fatal injuries on the deceased. The accused and the deceased had fought during day time. The evidence of the daughter of the deceased is that the accused hit the deceased against a nail which was embedded in the wall. I find her evidence to be credible. I also find that although she was a child of tender years, she gave sworn evidence and therefore in law her evidence did not require corroboration. In this regard, I am guided by the Court of Appeal in *Kibageny arap Kolil v. R (1959) EA 92* in which it was held that the evidence of a child of tender years given an oath does not require corroboration. I also find that the accused confessed to killing the deceased and this is clear through his confession which was put in evidence as exhibit 3A.

16. In the light of the foregoing evidence and the applicable law, I find that the offence proved is manslaughter contrary to section 205 of the Penal Code. I therefore find the accused guilty of manslaughter and is hereby convicted of that offence.

Judgement delivered in open court this 18th day of October, 2017 in the presence of Ms Mogere for the accused and Ms Nyaroita for state.

J. M. Bwonwonga

Judge

18/10/2017