



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE NO. 69 OF 2014
BETWEEN
REPUBLIC PROSECUTOR
AND
M O O ACCUSED
JUDGMENT

1. **M O O** (“the accused”) was charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. In the information, it was alleged that on 14th December 2014 at Kowino Market, Nyalenda area in Kisumu East District within Kisumu County, he murdered his wife, **N O K** (“the deceased”). After the accused denied the charge, the hearing commenced before Chemitei J., who took the evidence of four witnesses. I completed the matter after complying with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.

2. At the time of the incident, the accused and deceased were married and were living at Nyalenda with their two children; V A (PW 1) aged 9 years and F J, who was younger. Also residing with them was the deceased’s sister, C K (PW 3), aged 17 years. PW 3 recalled that at about 7.00pm on 14th December 2017, while she was having supper with the children and the deceased, the accused arrived and called the deceased. They both went outside. PW 3 heard them talking then the accused started beating her with stick. When one of the children started crying, the accused returned to the house and locked them in a bedroom. While in the bedroom, PW 3 continued to watch what was happening through the window. She saw the accused tie the deceased’s hands and legs and continue to beat her. After a while, the deceased went silent. The accused then poured water on her and carried her to the bedroom. PW 3 further testified that thereafter the accused called his sister, M A’ (DW 2), who came over and they called the police who later came and collected the deceased body.

3. PW 1 gave an unsworn statement and told the court that on the material evening, as they were having dinner, the accused came and called the deceased outside and began beating her with a stick. He took a rope, tied her legs and arms continued to beat her. PW 1 stated that when the three of them began crying and screaming, the accused locked them up in the bedroom and continued beating the deceased until she was quiet. He then poured cold water on her and carried her to the bedroom.

4. The Investigating Officer, Sergeant Robert Moseti Tingo (PW 6), recalled that on the fateful night, he was on duty at Kisumu Central Police. At around 10:00pm, the accused, accompanied by DW 2 and another male friend arrived at the police station. The accused reported that he had caned the deceased and that she died as a result of a fall she sustained while attempting to jump over the perimeter wall. PW 6 visited the scene in the company of other police officers. He found the deceased lying in bed. He

surveyed the area but there was no perimeter wall. He recorded statements from the witnesses, took the deceased's body to the Jaramogi Odinga Oginga Teaching and Referral Hospital ("JOOTRH") mortuary and arrested the accused.

5. In his sworn testimony, the accused recalled that on the material day, the deceased called him as he was watching soccer at nearby hall. He went home and found her busy hosting a meeting of her friends. He decided to wait outside and at the end of the meeting, the deceased escorted her friends. When the deceased returned, she walked past him and despite him calling her she neither stopped nor responded to him. He suspected that she was drunk as that is how she behaved when she was drunk. The accused became angry when she ignored him. He testified that he started caning her as he had warned her against taking alcohol.

6. The accused further stated that as he was caning her, she ran to the back of the house where the bathroom was and she tried to climb the wall, she slid and fell on her back. After falling the deceased stood up and asked the accused to assist her go to the bedroom. Since she was dirty from the fall, he poured water on a basin and she cleaned herself, changed into her sleeping clothes and went to sleep while the accused left to go outside as he was still angry. When he returned after he found that she was asleep but he realised she was not responding so he called DW 2.

7. DW 2 testified that she received a call from the accused who requested her to go to his place. On arrival, the accused told her that he had quarrelled with the deceased and she was in bed sleeping. He requested her to check on the deceased's condition. DW 2 touched her and found that the deceased was already dead. She accompanied the accused to the police station where they reported the matter.

8. To prove murder, the prosecution must establish three key ingredients beyond reasonable doubt: first, the prosecution must prove the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

9. The fact that the accused assaulted the deceased by caning her is not in dispute. PW 1 and PW 3 witnessed the assault while the accused reported to PW 6 that he had caned the deceased. In his defence, the accused admitted caning the deceased on the material evening. This leaves two questions for consideration. The first is whether the assault led to the deceased's death or whether the death was accidental as suggested by him. In the event the deceased died as a result of the assault, the second question is whether the killing was done with malice aforethought.

10. Dr Solomon Sava (PW 5) produced a post mortem report of an autopsy performed by Dr Dixon Mchana on 16th December 2014 at JOOTRH after the body was identified by F M B (PW 2) and J O O (PW 4). The key observation by Dr Mchana was that the deceased had extensive streaked abrasions, skin contusions on the scalp and face and on the front and back sides of both hands, legs and trunk. Internal examination of the head revealed a scalp haematoma and mild cerebral edema. Dr Mchana concluded that the deceased died as a result of extensive sub-cutaneous soft tissue injury secondary to blunt force trauma following assault. These injuries were consistent with the caning inflicted by the accused with a piece of wood as witnessed by PW 1 and PW 3. I reject the accused's evidence that she died as a result of the fall as the evidence of the cause of her death is very clear. Further, both PW 1 and PW 2 recalled that the accused beat the deceased until she went silent. I therefore find and hold that the deceased died and she died as a result of the beatings inflicted on her by the accused with a cane.

11. I now turn to the issue of malice aforethought. "*Malice aforethought*" is the *mens rea* for the offence of murder and it is the presence or absence of malice aforethought, which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether malice aforethought is proved depends on the peculiar facts of each case. In *Rex v Tubere s/o Ochen [1945] 12 EACA 63*, the former Court of Appeal for Eastern Africa stated thus on the issue:

With regard to the use of stick(s) in cases of homicide, this Court has not attempted to lay down any hard and fast rule. It has a duty to perform in considering the weapon used and the part of the

body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick; that is not to say that the Court takes a lenient view where a stick is used. Every case has, of course, to be judged on its own facts.

12. Whether there was malice aforethought, turns on the testimony of PW 1 and PW 3. According to the record, PW 1 was a child of tender years and the judge concluded, after a *voire dire*, that she could not give sworn testimony. I also note that PW 1 was not cross-examined on her testimony. There is also evidence from the cross-examination of PW 6, that she may have been a child of tender years in which case a *voire dire* ought to have been done. If I accept that PW 3 was a child of tender years, the testimony of PW 1 and PW 3 ought to be corroborated to sustain a conviction (see ***Bernard Kungu Kariuki v Republic NRB CA Criminal Appeal No. 362 of 2012 [2014] eKLR***). Even if there is doubt as to the age of PW 3 then such doubt must be resolved in the children's favour.

13. The evidence is clear that the accused used a stick to assault the deceased multiple times all over her body. She suffered multiple bruises and abrasions which PW 5 referred to as soft tissue injuries that resulted in her death. In his testimony, the accused stated that he did not intend to kill the deceased and was only disciplining her. On the other hand, the testimony of PW 1 and PW 3 was that the accused tied the deceased's hand and legs before beating her until she was silent would support a case for finding malice aforethought. However, the ropes that the accused tied the deceased were not produced and the post-mortem form did not reflect ligature marks on the hands and legs consistent with being tied by a rope.

14. I have no option but to give the accused the benefit of doubt since the evidence is clear that he assaulted the deceased and caused her death. I therefore find the accused **M O O** guilty of manslaughter contrary to **section 202** of the ***Penal Code*** for the unlawful killing of **N O K** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 27th day of November 2017.

D.S. MAJANJA

JUDGE

Mr Yogo, Advocate for the accused.

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