



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 45 OF 2013

REPUBLIC.....STATE

VERSUS

COLLINS THIONG'O MAINA.....ACCUSED

JUDGEMENT

The accused **COLLINS THIONGO MAINA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

“On the 9th day of April 2013 at OL RONGAI SCHEME in Rongai District within Nakuru County, murdered JANE WAIRIMU MWANGI”

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced before me on 21/9/2015.

The prosecution called a total of seven (7) witnesses in support of their case.

PW1 EUNICE WANGUI MWANGI was the mother of the deceased. She confirmed that the accused was the husband to the deceased. She told the court that on 10/4/2013 a neighbour to the deceased phoned her and told her to rush to her daughter’s home. **PW1** rushed there with her husband. She found the dead body of the deceased lying on the sofa set.

PW2 JOHN NJOMBA MAINA was the brother to the accused. **PW2** told the court that on the material day he awoke and left to his farm to plant maize. **PW2** decided to call upon the accused who was his brother to help him in the task. He went to the house of the accused. Upon pushing open the door, **PW2** saw the deceased lying dead on the sofa and the accused lying unconscious on the bed. **PW2** screamed for help. Neighbours came and helped to rush the accused to hospital. Police were called in. they removed the body of the deceased to the mortuary.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied having killed the deceased. This court must now analyze the evidence on record to determine whether the charge of murder has been proved beyond reasonable doubt.

Section 203 of the Penal Code defines the offence of murder in the following terms

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

In any murder trial the prosecution must adduce evidence to prove beyond reasonable doubt the following ingredients of the offence

- i. Proof of the fact as well as the cause of death of the deceased
- ii. Proof that the deceased met her death due to an unlawful act or omission on the part of the accused.
- iii. Proof that the said unlawful act or omission was committed with malice aforethought.

The fact of the death of the deceased is not in any doubt. **PW1** the mother of the deceased described how she found the body of her daughter

lying dead on a sofa inside her house. **PW2** who was an in-law to the deceased also told the court that he was the one who recovered the dead body. **PW1** was one of witnesses who identified the body of the deceased to the doctor who performed the autopsy. All these witnesses who knew the deceased well identify her as ‘**Jane Wairimu Mwangi**’.

PW5 DR. TITUS NGULUNGU was the pathologist who conducted the autopsy on the body of the deceased. **PW1** told the court that he noted multiple bruises and lacerations on the body. He also noted that the thyroid bone was fractured. In the opinion of **PW5** the cause of death was ‘**asphyxia and blunt trauma to the head in keeping with homicide**’. The doctor filled and signed the post-mortem report which he produced in court as an exhibit **P exb 1**.

Having proved the fact as well as the cause of death the prosecution must go further and tender evidence to prove that it was the accused who assaulted the deceased and caused her death.

There was no eye witness to the events leading up to the death of the deceased. **PW1** and **PW2** both told the court that they got to the scene to find the deceased already dead in her house whilst her husband who was the accused lay unconscious on the floor next to her.

PW6 PC FRANCIS MURINGA the investigating officer told the court that he found the accused who was the husband to the deceased lying unconscious on the floor next to the body of the deceased. **PW6** also told the court that he recovered a bottle of deazenol (pesticide) next to the accused. In his evidence **PW6** stated that

“I concluded that it was the accused who murdered the deceased”

However **PW6** is unable to tell the court what led him to this conclusion. As stated earlier there was no evidence from any person who witnessed the events that occurred inside the house on the material day. The couple lived alone as their children were living away with their grandparents.

PW1, PW3 REUBEN OMONDI a fellow villager and **PW4 NELSON MAINA** the father of the accused all told the court that the accused and deceased had frequent domestic squabbles. The implication being therefore was that they must have fought on the material day leading to the death of the deceased. However this court cannot render a verdict on the basis of suppositions and/or assumptions. Only clear and tangible evidence will do. In this case there is no direct evidence pointing at the accused as the person who killed the deceased.

In his defence the accused explained that he and the deceased had been out drinking on that day. When they returned home both were very drunk.

According to the accused the deceased was staggering and falling. As she got up to get a drink of water the deceased fell and hit herself against a table in the room. The accused went to check on her and realized she was dead. In his despair the accused drunk pesticide.

This defence raised by the accused places a doubt on the prosecution case. The fact that **PW6** said he found a bottle of pesticide in the house corroborated this defence. **PW5** the doctor told the court that the cause of the deceased’s death was ‘**asphyxia**’. He did admit under cross-examination that

“The asphyxia was caused by blunt force trauma. The force was on one side of the neck. A fall onto a blunt surface like a chair (or a table) can cause such an injury...”

Thus the explanation given by the accused for the death of the deceased has been confirmed by the doctor to be a medical possibility. In the circumstances the defence of the accused cannot be dismissed out of hand.

On my analysis of the evidence as a whole I find that the *actus reus* of the offence of murder has not been proved as against the accused. The prosecution have failed to prove this charge of murder beyond reasonable doubt. I therefore enter a verdict of ‘**Not Guilty**’ and I acquit the accused of the charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 24th day of November, 2017.

Ms Chemgetich for accused

Mr. Motende for State

Maureen A. Odera

Judge