



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 39 OF 2012

REPUBLIC PROSECUTOR

VERSUS

ISAIAH MBAABU BAITHANA ACCUSED

JUDGMENT

Isaiah Mbaabu Baithona is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on 11/3/2012 at Kaithe Village, Kaene Sub Location, Kawiru Location, murdered **Brenda Karimi**. The prosecution called a total of five witnesses in support of their case while the accused testified on oath but did not call any other witness. The State was presented by Learned Counsel Mr. Mulochi, while the Counsel for defence was Mr. Wamache.

PW2, Nathan Mutabari of Mbinda recalled the 11/3/2012 when he was in his house at about 8.00 a.m., he heard screams emanating from his brother's house Isaiah, the accused. He proceeded to the house which was about 60 metres away. He found Isaiah beating the wife who was on the floor. He found Isaiah and the wife in the space between their big house and the kitchen. He saw the accused beat the wife on the leg using a thick stick like his hand; their children were screaming. The eldest of accused's children was about 21 years. PW2 said that other neighbours came and Isaiah ran off but some people like Mwenda (PW3) and Joel (PW4) chased him and caught him. PW2 said that he took Isaiah's wife to Hospital at Maua. He observed that the deceased had sustained a fracture of the left leg.

PW3 John Mwenda, a neighbor of the accused also heard screams from the accused's home and ran there. He found the accused's children screaming saying that their mother was being killed by the father. PW3 said that he found PW2 had already arrived at the scene and was trying to restrain the accused from beating the wife. He arrived at the scene with Joel (PW4) and that when near, Isaiah ran off and they gave chase. He said that from a distance, he saw the accused assaulting the wife on the legs using a stick. They arrested the accused at the valley but he threw away the stick he used to assault the wife. PW3 said the accused and deceased used to have normal quarrels like a couple.

PW4, Joel Ntonjira reiterated what PW3 told the court that they arrived at the accused's home at same time with PW3. PW4 told the court that the accused and deceased had frequent quarrels.

PW5, Dr. Thiankunu who works at a private clinic in Maua performed the post mortem on the deceased at Maua District Hospital on 2/4/2012. He found that the deceased had a fractured tibia midshaft with extensively cadimatus (swollen) and peeling of the skin of lower limb. On dissection of the lungs, he found a column of blood clot. He concluded that the cause of death was cardio pulmonary arrest

secondary to thrombo embolus which was secondary to deep veins thrombotis due to the plaster of pains that had been applied on the fractured leg.

The Investigation Officer, **PW1, CPL David Koech** recalled that while at Maua Police Station, a report of assault was made by Brenda Karimi, the deceased, and others who went to the Station in a vehicle. He noted that Brenda, the deceased, had injuries to the left leg and could not get out of the vehicle and she complained of chest pains. He referred her to Hospital. Later on the same day at 11.00 a.m., the accused was taken to the Station under arrest for assaulting the wife. PW1 visited Maua Methodist Hospital next day and found Brenda's leg had been put in a plaster cast and she informed the Police that her husband beat her because of her allegedly spending the night away from home. He also gathered this information when he recorded witness statements.

In his sworn testimony, the accused stated that on 10/3/2012, he left home to work on his farm which he did the whole day. He returned home that evening but did not find the wife. The children did not know where she had gone. He called her parents but they did not know where she was. Next day, he took the small child to her parents and on returning home, found the wife and that she was drunk; that he asked her to make for him tea but she refused and told him not to ask her where she had been and when he turned to leave, she hit him with a piece of wood on the ribs and started screaming; that he took the piece of wood and hit her on the leg and it is then his brother arrived; that PW2 his brother, told him to stop beating her and he saw PW3 and 4 coming and so ran off because Joel (PW4) who is the brother-in-law wanted to hit him with a stick. He said that they only disagreed that day and he had no intention of injuring her; that had he intended to injure her, he would have used the *panga* that he had. In cross examination, he said that his brother had wanted to sell their land in 2010, but he had put a caution but he had never disagreed with the other witnesses.

In his closing submissions, Mr. Wamache, Counsel for the accused submitted that the prosecution had failed to prove malice aforethought because this was a domestic squabble that resulted in the injuries and the loss of life.

In reply, Mr. Mulochi, Learned Counsel for the State submitted that the witnesses PW2, 3 and 4 all found the accused giving the deceased a thorough beating; that there had been squabbles between the accused and deceased which points to malice aforethought. He urged that the accused be found guilty of the offence of murder.

The duty always rests on the prosecution to prove any criminal charge beyond reasonable doubt. In an offence of murder, the prosecution has to prove beyond any doubt, the following ingredients:

1. **The death of the deceased;**
2. **That the death was caused by the accused through an unlawful act or omission;**
3. **That accused possessed the intention or malice aforethought.**

The post mortem was done on the body of the deceased by Dr. Thiakunu who found injuries to the deceased's lower limbs with fracture of the tibia midshift. PW2, 3 and 4 all saw accused beating the deceased on the legs. The evidence of PW2,3 and 4 corroborates the findings of the Doctor. The Doctor found the cause of death to be cardio pulmonary arrest secondary to deep veins thrombosis due to the plaster of pains applied on the fractured leg. The death of Brenda is not in issue.

The accused testified on oath and did admit that indeed, he assaulted the deceased on the legs. Of course, none of the witnesses knew the source of the dispute on that day. The children who were present were never called as witnesses. One was an adult by the time i.e. 23 years old but no explanation was given why she was not treated as a witness. We therefore have only heard from accused as to what occurred on that fateful day. The accused agreed with the evidence of PW2, 3 and 4 that he assaulted the deceased on the legs. Having heard the evidence of the Doctor, the death of deceased is as a result of the assault inflicted by the accused.

In his defence, the accused laid blame on deceased for having started the fight but there is no evidence of

that and he never alluded to it during the prosecution case. The accused even seemed to allege that his brother, PW2, had disagreed with him over land but again, that was an afterthought. PW2's evidence was corroborated by PW2 and 3 in all material particulars as to what they found at the accused's home upon hearing screams.

The only outstanding issue is whether the accused had malice aforethought. The accused told the court that he lived happily with his wife. Likewise PW2 denied that he knew of any dispute between the accused and deceased. However, PW3 and 4 said that the accused and deceased had frequent fights. Unfortunately, none of accused's children was called as witness though one was an adult at the time the incident occurred and was present. Even if there were frequent domestic disputes, this court has not been told of their magnitude. Did they involve physical fights or were they just mere verbal quarrels and had they been reported to any authorities? These questions were left unresolved through independent evidence for example, the local administration or anybody else who may have mediated between the two or the deceased's children.

Malice aforethought is defined under Section 206 of the Penal Code as an intention to do grievous harm or kill. Since the court has no idea what the source of the disagreement was, the court will find that this was a domestic quarrel between the accused and deceased. There is no evidence that the accused held a grudge against deceased or planned to harm her. The cause of death was a result of one injury to the left leg. No other injuries were noted on the deceased. Of course, there may have been more injuries had PW2, 3 and 4 not arrived and intervened.

Taking into account all the evidence before me in its totality, , I find that the prosecution has not demonstrated that there existed any intention on the part of the accused to do grievous harm or kill the deceased. It seems to have been one of those domestic quarrels and was instantaneous. For the above reasons, I find that malice aforethought has not been proved and hence the charge of murder cannot stand. Instead, I find that the accused caused the death of deceased unintentionally and will find him guilty of the lesser charge of manslaughter contrary to **Section 202 as read with Section 205 of the PC**. I convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF MAY, 2016.

R.P.V. WENDOH

JUDGE

19/5/2016

PRESENT

Mr. Mulochi for State

Mr. Wamache for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused