



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL CASE NO. 42 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

A S M.....ACCUSED

JUDGMENT

1. The accused person, A S M, was on the 2nd November, 2010, arraigned in court for the charge of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the charge were that on the night of 11th and 12th October, 2010 at [particulars withheld] village in Kakamega East District within Western Province murdered A M K. The accused person pleaded not guilty to the charge and a plea of not guilty was entered. This was followed by the proceedings which have culminated in the writing of this judgment.

THE PROSECUTION'S CASE

3. PW1, C I a residence of [particulars withheld] sub-location in Kakamega informed the court that A M K, the deceased, was his sister-in-law. She was married to his younger brother. He testified that on the morning of 12th October, 2010, at about 6.00 a.m., he heard screams. Ongoing outside, he found that the deceased had died. Her body was lying inside her house which is in his neighbourhood. The husband of the deceased had long passed away. Although the deceased had been married elsewhere, she parted with her husband and started living with the accused person. PW1 informed the court that the accused person A S M *alias* Moi had inherited the deceased although not in the proper traditional widow inheritance way, as the accused person was not a member of PW1's family.
4. PW1 observed that the deceased had a bleeding wound on the head. The body was on some blankets on the floor where the deceased used to sleep. He did not find the accused person at the scene. The body of the deceased was removed from the scene to the mortuary by the police.
5. PW2, Atanas Losiolo informed the court that he is the Village Elder of Rastaman village. On 17th October, 2010, he was informed of the presence of a murder suspect in his village, who had gone to a chang'aa den near his home. The suspect's name was Alfred Shikutwa. He proceeded to the said chang'aa den and arrested the accused person and escorted him to Kakamega police station.
6. PW3, Catherine Indoshi informed the court that she hails from Shidodo sub-location of Shinyalu in Kakamega District where she works as a farmer. She gave evidence that on 12th October, 2010 at about 6.00 a.m., she heard screams coming from the home of Khalai. She heard that death had taken place. She

rushed to the home of the deceased. She found the deceased's body inside the house. There was blood oozing from the head of the deceased. The children of the deceased were present. The Village Elder and neighbours went to the scene. The Chief and the Police were informed of the matter and visited the scene.

7. PW3 further testified the court that the deceased used to live with the accused person, whom she identified in court. She further stated that the accused person is her in-law as the deceased was her sister-in-law. PW3 testified that she had seen the accused person at the home of the deceased the previous night. The following morning they found the body of the deceased but the accused person was not in. She informed the court that the accused person used to live with the deceased as man and wife.

8. PW4, S M M, a child of 11 years of age was taken through voire dire examination. Judge Jaden who was hearing this case at that time was satisfied that the child understood the meaning of an oath. PW4 gave sworn evidence. She informed the court that she goes to school at [particulars withheld] primary school. She testified that she could recall the date her mother, the deceased, passed away. Her father's name was E M but he had passed away. She gave evidence that the accused person, whom she identified in court, used to live with her mother in their house. The night before she died, the accused person asked to be served with ugali. He was served with the same and green vegetables. He asked why her mother had not cooked meat or eggs to serve with the ugali. Her mother said there was no money.

9. PW4 gave evidence that the accused person picked a jembe from inside the house and hit her mother with it and she fell down. PW4 tried to call her mother but she did not respond. Her mother had been injured on the head. They (the deceased's children) started crying. PW4 could not recall the time when the incident happened but they had not yet gone to bed. The accused person told them to go to bed or he would kill them together with their mother. She informed the court that the house had a sitting room and a bedroom. They were to sleep in the sitting room. They left their mother in the bedroom. PW4 indicated that the accused person and her mother used to sleep in the bedroom which also served as the kitchen.

10. PW4 testified that when they woke up in the morning, they found their mother where she had fallen down. She called her mother but she was non-responsive. The accused person was nowhere to be seen. They could not get out of the house as the door was locked from the outside. They screamed and neighbours opened the door for them.

11. On cross-examination, PW4 stated that her mother had quarreled with the accused person on the material night as he asked for eggs. She heard the accused person say that her mother had another man friend and that the quarrel had gone on for a while before he hit her mother with the jembe.

12. PW5, Wilson Tom Mwavaka, the Assistant Chief of Khoyaga, Shidodo informed the court that on the morning of 12th October, 2010 at about 7.00 a.m., he received a phone call from Gabriel Khayemba, a Village Elder, that A M K had been killed. He proceeded to the scene immediately and found the deceased whose body was lying on the floor. She had injuries and there was an indication that she had bled and that he blood had clotted by then. He did not find the accused person at the scene although he knew that he lived together with deceased. PW5 reported the incident to the Chief. They tried to trace the accused person in vain. PW5 rang the OCS Kakamega who went to the scene and took the body to Kakamega mortuary. In the house, PW5 met three children sitting next to the deceased, who was their mother.

13. After about 5-6 days, when PW5 went to record his statement at the Police Station, he found the accused person whom he knew, having been arrested. PW5 testified that at the scene of crime, there was a blood stained jembe (hoe). He did not see any other weapon. He informed the court that the accused person had inherited the deceased but did not know if he had another wife.

14. On cross-examination, PW5 informed the court that he had not heard of any disagreement between the deceased and accused person. They had lived normally as a couple for 1 ½ years. PW5 stated that he met the accused six (6) days after the incident at the Police Station but could not recall when he last met him.

15. PW6, Dr. Philip Kawarob Atero stated in Court that he lives at Sirembe in Siaya District and works at Rabuor Dophul Nursing Home, Siaya. On being shown a post mortem report, by the prosecuting Counsel, he indicated that it was completed at Kakamega hospital on 16th October, 2010. The body was that of Adelaide Musanga, her age was 45 years. She was of good nutrition. The report showed that rigor mortis had set in. The body had two cut wounds. On the body being internally examined, there was no abnormality noted. On the head there was fracture of the skull. The Doctor who conducted the postmortem formed the opinion that death was due to cardio respiratory arrest due to bleeding. The postmortem form was signed by Dr. Visula. PW6 was familiar with his handwriting. He produced the post mortem report as P. Exhibit. 1.

16. PW7, No. 45571 PC Daniel Owino Asin testified that he was attached to Kakamega Police Station at the time off the incident. He was a joint investigator in the case with PC Mungai who was injured at Baragoi. He adduced evidence that on 12th October, 2010, at 8 a.m., the OCS Kakamega received a call from the Chief Shidodo sub-location, that there was a murder incident that took place at [particulars withheld] village on the night of 11th/12th October, 2010, where the deceased was killed by her husband. The OCS and his team rushed to the scene where they found the deceased's body lying in the bedroom. The suspect, who was the accused person was not found at the scene. The body taken to Kakamega hospital mortuary.

17. PW7 further testified that on 17th October, 2010, in the morning, a Village Elder from Rastaman village took the accused person who had escaped from the scene, to the Police Station where he placed him in the cells. The murder weapon was not traced. Investigations were started by P.C. Mungai.

18. On cross-examination, PW7 informed the court that on 12th October, 2010, he was at the Police Station in the Occurrence Book (OB) office (report office) and did not do anything else in the case other than book the report. On 17th October, 2010, while at the report office at 8 a.m., he received the suspect and informed PC Mungai who went and brought witnesses who identified the suspect. PW7 recorded the statement of the Village Elder Atanas Mbuyi, who took the suspect to the Police Station.

THE DEFENCE CASE

19. The accused person, A S M, gave sworn evidence in his defence. He informed the court that he was 34 years old and that he comes from Khayega. He was a farmer before arrest. He stated that he knew A, the deceased, as they come from [particulars withheld] sub-location and have the same sub-chief. by the name, Tom Mwawaba. The deceased's home was about 2km away from his.

20. He informed the court that he knew the deceased for many years but had no relation with the deceased and had no family relation as well. On the allegation that he killed the deceased, on the night of 11th/12th October, 2010, he stated that he was at home with his wife, Caroline Mbakala with their three children. He slept at home and woke up in the morning. He took tea and at 9 a.m., he went to Khayega market to meet somebody. He waited but the person did not turn up and went back home in the evening. He informed the court that the last time he saw the deceased was in July, 2010.

21. The accused person stated the court that he did not agree with the evidence of the people who testified in court against him as they lied that he inherited the deceased. He stated that he did not disagree with any of the witnesses and he was not related to any. They were relatives of the deceased's husband.

22. The accused person informed the court that he was arrested on 17th October, 2010. He indicated that he was in the area as usual doing his normal business and did not escape. He was arrested at Rastaman taking alcohol. He stated that on the day he was arrested, it was because he was drinking after hours. When he arrived at the police station, he was not informed about killing. He was only informed of the offence of murder in court. He denied the offence.

23. On cross-examination, the accused person stated that he knows C A well as they come from the same area and that E A is C brother. The accused person indicated that the deceased was E wife. He denied having inherited the deceased. He also denied being seen by a child Sylvia Maina (PW4), eating food at

the deceased's house on the night of 11th/12th October, 2010. He admitted that he knows the deceased's child by the name Sylvia Maina. He reiterated that he did not inherit the deceased and that all the witnesses lied to court.

SUBMISSIONS BY THE DEFENCE

24. Mr. Aburili learned counsel for the accused person submitted that PW4, Silvia Mbuya Maina, the daughter of the deceased who was 10 years old testified that she saw the accused person hit her mother with a jembe. It was on the night of 10th and 11th October, 2010. It was submitted that although a *voire dire* examination was done, under section 19 of the Oaths and Statutory Declarations Act, the Hon. Judge did not indicate that the child was intelligent enough to be sworn. Mr. Aburili cited the case of **Baya vs. Republic (2000) KLR 376**. He submitted that PW4 being a child of tender age needed to have her evidence corroborated, Mr. Aburili relied on the case of **Malonza vs. Republic (1994) KLR at 673** to support that assertion.

25. It was submitted that no one else witnessed the deceased being killed and no corroboration was availed by the prosecution. The circumstantial evidence that the accused person used to live with the deceased as alleged by the prosecution was denied by the defence as the deceased was a widow who was inherited by someone. Although PW1 said that in court, he did not mention the name of that person. The claim that the accused person was living with the deceased as husband and wife was not proved by anyone. He was not at the scene of crime on the night 10th and 11th October, 2010.

26. Mr. Aburili submitted that the Chief, the Police and members of the public went to the scene on 12th October, 2010. The Chief who was PW5 said that he saw a blood stained jembe near where the deceased lay in the house. The jembe was however not produced in court in evidence. The Chief said that he had never seen the accused person and the deceased quarrel. He said the two cohabited. It was further submitted that the deceased was said to have been married to someone, the said person could have killed the deceased. No one made efforts to have the accused person arrested immediately after the incident if at all he was a suspect.

27. On his part, Mr. Oroni for the Prosecution submitted that the prosecution had proved its case beyond reasonable doubt. PW5, the Chief, confirmed that there was a love affair between the deceased and the accused person. PW4, the daughter to the deceased saw the accused person go to their house at night. The deceased prepared food which the deceased and accused person ate. An argument arose between the two about a love affair that the deceased allegedly had with an unknown man. The accused person picked a jembe which he used to hit the deceased on the head. The said blow caused fatal injuries on the deceased.

28. It was submitted that a *voire dire* examination was conducted and the court was satisfied that PW4 understood the meaning of telling the truth after which she gave sworn evidence. Mr. Oroni added that the court can convict on the evidence of a single witness if it is satisfied that the evidence that a witness has given is credible.

29. Mr. Oroni submitted that the case relied on by the defence Counsel of **Malonza vs. Republic**, states that it was not safe to rely on the evidence of the young child without corroboration. In the present case, the other witness who saw the incident was the deceased's 4 year old child who could not be called to court as a witness.

30. In response thereto, Mr. Aburili submitted that for a child of tender years to give sworn evidence, the judge has to be satisfied that the child understands the meaning of an oath.

ANALYSIS AND DETERMINATION

This court has to be satisfied that the prosecution has proved its case beyond reasonable doubt on the charge of murder by establishing that it was the accused person who caused the death of the deceased and that he had malice aforethought in so doing.

31. *Section 206 of the Penal Code defines malice aforethought as:-*

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

(a) 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 the death will probably cause the death or grievous harm to some person other than one killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish it may not be caused;

(c) an intent to commit a felony as an intention by an act or omission to facilitate the flight or escape for custody....".

32. In this case the key witness was PW4, a child of tender age. *Section 19 (1) of the Oaths and Statutory Declarations Act* provides as follows:-

"Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth".

33. It was as a result of PW4's age that Mr. Aburili submitted that the Hon. Judge did not indicate that the child was intelligent enough to be sworn. This court notes that this case was heard by three (3) Judges of concurrent jurisdiction. As such, this court is not sitting on appeal and does not have jurisdiction to determine if one of the trial judges properly undertook the *voire dire* examination of PW4. I will however point out that the importance of *voire dire* examination was addressed in the Court of Appeal in the case of **Samuel Warui Karimi v Republic** [2016] eKLR. The Judges' understanding of the provisions of *Section 19 (1) of the Oaths and Statutory Declarations Act* in that case was that **"voire dire is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the Evidence Act, the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence."** (emphasis mine).

34. This court notes that there is ample evidence on record that a relationship existed between the accused person and the deceased which PW1, PW3 and PW5 equated to that of husband and wife. PW4 informed the court that her mother, the deceased, used to sleep with the accused person in the only bedroom in their house. This is enough proof that the two were lovers. It was therefore not surprising to PW4 when the accused person went to their home and asked to be served with ugali on the night of 11th and 12th October, 2010. On being served with the same and green vegetables, he asked the deceased why she had not cooked meat or eggs to serve with the ugali and she responded that there was no money. The accused person also accused the deceased of having another male friend and a quarrel ensued. It was then that the accused person picked a jembe (hoe) from inside the house and hit the deceased with it on the head and she fell down. The accused person told them to go to bed or he would kill them together with their mother.

35. PW4 found the deceased lying in the same position the following morning. The accused person was nowhere to be seen and they could not get out of their house which was locked from the outside. PW4's evidence to the effect that the accused person was at their home on the night of the murder, was supported by the evidence of PW3 who saw the accused person at the home of the deceased on the material night.

The accused person therefore had the opportunity to commit the offence he is charged with.

36. It was submitted that the evidence of PW4 as to who caused the deceased's death was not corroborated by an independent witness. Although this is the case, this court finds that PW4's evidence with regard to the fact that the deceased was hit on the head is supported by the findings contained in the post mortem report that the deceased had a fracture of the skull.

37. In his defence, the accused person denied having committed the offence and stated that he was at his home with his wife and children when the deceased was killed. I have considered the defence put forth by the accused person and I am of the considered opinion that his defence is a sham and that he is the one who killed the deceased. I therefore reject the defence put forth by the accused person in this regard.

38. As earlier said, PW3 and PW4 put the accused person squarely at the scene of crime. It is my finding that PW4 was a credible and consistent witness for the prosecution who with utmost clarity in both examination in chief and cross examination recounted to the court the events that unfolded on the night in issue. I believe her evidence that it was the accused person who assaulted her mother and this court is satisfied that despite her tender age, she was a truthful witness. It is my finding that the deceased died as a result of the injuries inflicted on her by the accused person.

39. On the issue of malice aforethought, PW4 stated that her mother had quarreled with the accused person on the material night over food and an alleged love affair that the deceased had with another man. This an indication that the accused person had not pre-meditated to kill the deceased and I therefore find that malice aforethought has not been established.

40. To this end, I find that that the charge of murder has not been proved beyond reasonable doubt against the accused person. I therefore find him not guilty of the said offence and acquit him accordingly. I however find the accused person guilty of the lesser charge of manslaughter contrary to section 202 as read with 205 of the Penal Code and I convict him accordingly.

DATED and SIGNED at MOMBASA on this..... day of 2016.

NJOKI MWANGI

JUDGE.

DELIVERED, DATED and SIGNED in open Court at KAKAMEGA on this 21st day of July 2016.

E.C. MWITA

JUDGE.

In the presence of

..... for the 1st and 2nd accused persons.

..... for the Respondent.

.....Court Assistant