



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO.9 OF 2014

REPUBLICPROSECUTOR

VERSUS

SAIDI MANYASA.....ACCUSED

JUDGEMENT

1. This Criminal Trial is in respect to the alleged Murder of **Esther Kwamboka Nyamori (the Deceased herein)**. It is alleged that Saidi Munyasa(**the Accused**) murdered the Deceased on 17th April 2014 at Ikonyo Sub-location, Bujumba Location within Busia County. The Accused faces a Charge of murder contrary to Section 203 as read with Section 204 of The Penal Code.
2. The Deceased had leased some land from the Accused. According to Jennifer Achieng Wesonga(PW1) the two visited her home at about 5.00pm on 16th April 2014 for a drink of Changaa. PW1 used to brew and sell Changaa. After taking a glass of Changaa, the two went outside the house and started to argue. The Deceased insisted on going to her home while the Accused wanted her to accompany him so as to cook for him.
3. It was the evidence of PW1 that when the Deceased refused, the Accused assaulted the Deceased by hitting her on the leg using a stick. PW1 says that she tried to intervene but she was pushed away by the Accused. The two then left.
4. In cross-examination and answering to a question posed by the Court, the witness told Court that the Police threatened to Charge her if she did not tell them how the Deceased and Accused fought. The witness however insisted that she saw the Accused assault the Deceased.
5. Another witness who stated that she saw the Accused assault the Deceased was Violet Kwaboka(PW2). On 16th April, 2014 she found a crowd as she made her way back home from a Posho Mill at Funyula. This would be at about 6.00pm. The crowd was around Saidi (the Accused) who was assaulting a woman. The witness knew the Accused and knew the woman as the person who had leased a farm from the Accused. The witness beseeched the Accused to stop beating the woman. After dropping the maize flour at her home, PW2 went to the home of the Village Elder with the intention of reporting the incident but did not find him. The day following, the witness learnt that the Deceased had passed on.
6. Under cross-examination and re-examination, it emerged that the witness recorded her Statement with the Police long after the incident. She told Court that an Assistant Chief by the name Kamache had asked her to record the Statement. The Defence saw this issue as pointing to the unreliability of this witness.
7. Asha Shiundu Okumu (PW3) is the sister in-law to the Accused. On 17th April 2014, at about 6.30pm,

the Accused requested her help to take the Deceased to Hospital. It was her evidence that the Accused told her that the Deceased was suffering from a bout of Malaria. When she saw the Deceased, she noticed that her head was swollen.

8. PW3 sought the assistance of a BodaBoda Operator (Patrick Sande Ouma,(PW4) who helped to take the Deceased to a Clinic. PW4 picked up the Deceased from the home of the Accused. PW4 noted that the condition of the Deceased was critical. Her face was swollen. It was her evidence that the Accused told her that the Deceased had too much to drink.

9. The Accused supported the Deceased on the Pillion seat of PW4's Motor Cycle and they made their way to a Clinic at Makopiyo.

10. Everlyn Akello Okumu (PW5) is a Nurse. She received the Deceased at St. Cecilia Afya Centre Clinic. The Deceased was brought by PW4 and the Accused. Both were known to the witness. It was her evidence that the Accused's explanation was that the Deceased had not eaten for 2 days because of excessive intake of alcohol. The witness observed that the Patient's face was swollen and so was her vagina. She had bruises on the right part of her body and head. She was half naked and she was not wearing any under wear. After administering first aid on her, she referred her for further treatment at Lwaya Health Clinic.

11. P.C Johathan Wanjala (PW9) is the husband of the Deceased. On learning of the serious condition of his wife, he informed his son George Pius Ochieng Wanjala (PW8) about it. PW8 later picked him up on his way to Tanaka Hospital.

12. PW8 had the Deceased transferred to Tanaka Hospital. As Tanaka Hospital was unable to handle the case, they were referred to Busia District Hospital. The Deceased was transferred to Busia District Hospital where she was admitted but later passed on.

13. Before transferring her to Tanaka Hospital, the Deceased had been attended at Matayos Health Centre. There PW8 saw the Accused seated on a bench outside the Examination Room. The Accused described himself as a Good Samaritan and Landlord to the Deceased. He also told the witness that the Deceased was drunk and had fallen severely on a bench and tree stumps. PW8 was not convinced by the explanation and reported the matter to Matayos Administration Police (AP) Camp.

14. PW9 and Joyce Awino Wanjala (PW6) identified the body of the Deceased to the Doctor who performed the Postmortem on the body at Busia District Hospital Mortuary. That Doctor was Dr. Dixon Muchana (PW7). On the External appearance of the body the Doctor noted that there had been medical intervention. There was also peripheral cyanosis and generalized non- extensive bruises on the face, scalp, forearms, front knees and right leg.

15. Internally, there was a mild blood clot on the right chest, extensive bleeding under the scalp, bleeding under the right subdural with a mild swelling of the brain. The Doctor also noted extensive subcutaneous bleeding of all 4 limbs. The Doctor formed the opinion that the cause of death was a Closed Head Injury secondary to Blunt force Trauma following an Assault.

16. S.G Julius Muchiri (PW10) conducted the Investigations onto the death of the Deceased. He interviewed witnesses and visited the homes of both the Accused and PW1. Inside the house of the Accused, he recovered some clothes which were identified by PW9 as those belonging to the Deceased. These were:-

- Green Jacket
- Blue Jumper
- Brown Brassier

- Cream under pant

They were produced as P Exhibits 2a,2b,2c and 2d. The Officer re-arrested the Accused from the Police Officers at Matayos AP Camp and charged him.

17. In his Defence, the Accused made an unsworn Statement. The Accused told Court that the Deceased had bought some nappier grass from him. On 17th April 2014, at about 2.00pm, the Deceased visited the farm of the Accused and worked on some land she had leased. At about 2.30pm, the Deceased and the Accused went for a drink at the house of the Accused's in-law.

18. The Accused testified that he left at about 3.00pm. At about 4.00pm he received information that the Deceased was asking for him. He went back to the house of his in-law and found that the Deceased was drunk. The Accused took the Deceased to his home where her face began to swell. The Accused called for help and PW3 called for a BodaBoda which was used to take the Deceased to a Dispensary. At the Dispensary, the Medical Officer referred them for further treatment and he took her to yet another Dispensary. That the Deceased died at Busia District Hospital. The Accused denied the Offence.

19. At the close of hearing, Mr. Obiri the State Counsel asked the Court to rely on the direct evidence of PW1 and PW2 to convict. It was also submitted that PW3 provided corroborative evidence. The Accused had sought help from PW3 to take the Deceased to Hospital and the witness found the Deceased with an overly swollen face.

20. The Defence requested for an acquittal. It was submitted by Counsel that the evidence of the star witnesses being PW1 and PW2 was not credible. Counsel argued that the evidence of PW1 was prompted by a threat upon her by the Police. In addition, the court was asked to consider her conduct prior to recording the Statement. That she disappeared for 2 days after the incident.

21. As to PW2, it was argued that it was PW1 who requested her to record her Statement. The Court was also asked to make a negative inference of her reluctance to answer some questions when she testified. It was ultimately submitted by the Defence Counsel that once the evidence of PW1 and PW2 was impugned then Prosecution case would collapse.

22. The evidence of the Pathologist (PW7) was that, after examining the body, he formed the opinion that the cause of death was a **'Closed Head Injury secondary to Blunt Force Trauma following Assault'**. The issues to be determined by this Court are whether;-

- a. the Accused person caused the assault to the Deceased,
- b. and if he did, whether there existed malice aforethought.

23. There is, certainly, merit in the argument by the Defence that evidence of PW1 and PW2 was somewhat tainted for the reasons stated in the preceding paragraphs of this decision. But the view of the Court is that, whether that evidence loses all credibility will substantially depend on whether the testimony of the two witnesses was consistent and believable in the context of the evidence of the other witnesses.

24. PW1 says that she hosted the Deceased and the Accused to a drink of the popular drink, Changaa. This was confirmed by no less than the Accused himself when he gave his Defence. There was then evidence from PW1 that an argument arose between the Accused and the Deceased as to whether the Deceased should accompany the Accused or whether she should go to her home. The reluctance of the Deceased to accompany the Accused appears to have angered the Accused who then assaulted the Deceased using a fimbo (stick). PW1 testified that she witnessed the assault.

25. Although PW1 tried to intervene, she failed and the two left together. The evidence of PW1 on this aspect finds support in the evidence of PW3 that the Accused sought her help to attend to the Deceased. PW3 found the Deceased inside the house of the Accused. There is therefore some credibility in the

evidence of PW1 that the Accused and Deceased were together after they left her(PW1's) house.

26. The evidence of PW2, If believed, incriminates the Accused further. She stated that she saw the Accused beating up the Deceased using a stick from a 'Lukhoni' plant. This would be soon after PW1 had left the Accused and the Deceased together.

27. Thereafter PW3 found the Deceased in the house of the Accused. The face of the Deceased was overly swollen to the point that she was beyond recognition. PW4 who helped the Accused to take the Deceased to hospital stated,

"Mzee Saida and Asha carried the Patient from the house to my motorcycle. I saw the Patient, her face was swollen and I was unable to recognize her".

28. It would seem that the Deceased was in a critical condition and a Clinic assessment confirmed that. PW5 who received the Deceased at St. Cecilia Afya Centre Clinic observed,

"I saw that the Patient's face was swollen and part of her vagina was swollen. She had bruises on her right part of the body and head".

29. Clearly the Deceased had sustained some injuries between the time she left the house of PW1 and when PW3 saw her at the house of the Accused. The Postmortem Report (P Exhibit 1) gave details of those injuries as,

"Generalized non-extensive abrasion/contusion on face/scalp/both forearms, anterior aspect of both knees and anterior right leg".

Internally, the Deceased had extensive subcutaneous hematoma of the scalp and of all the 4 limbs. There was subdural hemorrhage and mild cerebral odema. The Doctor formed the opinion that the cause of injuries was an assault.

30.. The Medical evidence supported the evidence of PW1 and PW2 that the Accused assaulted the Deceased. That Medical evidence dispelled the theory put forward by the Accused that the Deceased suddenly fell ill in his house.

31. This Court believes as truthful the evidence that PW1 and PW2 saw the Accused assault the Deceased. Both were known to PW1 and PW2. The assault happened in broad day light and the outcome of the Postmortem was consistent with the evidence of the two witnesses. This Court finds that the Accused assaulted the Deceased and the assault cause the Death of the Deceased.

32. The Defence given by the Accused is further debunked by what was recovered from his house. A green jacket, blue jumper, brown brassier and cream under pant (P Exhibit 2a – 2d) belonging to the Deceased was found in the house of the Accused by PW10. This evidence must be juxtaposed with the evidence of PW5 that when the Deceased was brought to the Clinic, she was half naked and did not have any underwear. No explanation was given to Court by the Accused as to why the Deceased had undressed. The Accused was unwilling to tell the whole story and was less than candid.

33. Was malice aforethought established? There is no evidence that the Accused premeditated the death of the Deceased. And although the injuries he caused her eventually resulted in her death, there was no evidence that the injuries were obviously grievous. The impression one gets, at least from the evidence of PW1, was that the Accused and the Deceased were friends who had visited her home together to enjoy a drink. But things turned for the worse after the drink. Yet to be fair to the Accused his conduct after assaulting the Deceased demonstrated his concern for the victim's wellbeing. He sought for Medical help and accompanied the Deceased to two Medical Clinics and was arrested while attending to her. His conduct was not the conduct of a person who had an intention of causing the death of the Deceased. For the reasons given, I am unable to find that malice aforethought was established.

34. The result is that I find the Accused guilty of the lesser Offence of Manslaughter Contrary to Section 202 as read with Section 205 of The Penal Code and Convict him accordingly.

Dated, Signed and Delivered in Court at Busia this 16th Day of August, 2016.

F.TUIYOTT

JUDGE

PRESENT:

Jumba for Accused

Owiti for State

Khuloi - Court Clerk