



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL CASE (MURDER) NO. 30 OF 2015
(FORMERLY NAKURU HC.CR.C. 119 OF 2013)

REPUBLIC.....PROSECUTOR

-VERSUS-

EVERLYNE RESIAN RIPAINÉ MOTONKA.....ACCUSED

J U D G M E N T

1. **Everlyne Resian Ripainé Motonka**, the Accused herein, was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The Information states that on the 18th day of December, 2013 at Oloombokishi village in Narok, she murdered **Benson Rimpainé Motonka**. The Accused denied the charge and was represented by Mr. Kilele.

2. Through eleven witnesses the prosecution presented the following case. The deceased lived at Oloombogishi village with his family, which included the Accused who was his wife, their five children including **S. M.** (PW4) and **L.M.** (PW5) both minors. The couple had also welcomed **Lilian Motonka** (PW1) a cousin of the deceased, who at the material time was living with them. Relations between the deceased and the Accused were poor and marked with frequent disagreement and fights.

3. On the evening of 18th December, 2013 the Accused returned home from the shops, and a quarrel ensued between her and the deceased. According to **PW1**, the deceased slapped the Accused as he demanded to know why she had returned home late.

4. **PW1** tried to separate the couple to no avail as yet another session of fighting broke out between them over some money. The incident culminated in the deceased lying dead on the veranda of the house having sustained a stab wound on his chest. The Accused left the home and presented herself to Administration Police **CPL Habel Gichohi (PW7)** who was manning a road block at Eor kule. She reported that the deceased had committed suicide and surrendered a knife (**Exhibit 4**).

5. The OCS Ntulele Police Station was notified. He instructed **PW7** to detain the Accused. Meanwhile, the deceased's children and **PW1** reported the incident to relatives including **Amos Motonka (PW2)**. Police eventually reached the home at dawn on 19/12/2013. **CPL Kiilu (PW9)** took photographs of the body while **CPL Darius Mwangi (PW10)** drew a sketch of the scene before removing the body.

6. On 23/12/2013 Dr. Titus Ngulungu performed the post mortem examination on the deceased's body. He concluded that death was caused by massive haemorrhage due to severing of the carotid jugular vessels and vascular muscles as well as lung injury, secondary to the chest stab wound. After witnesses had recorded statements, the Accused was charged, initially before the High Court at Nakuru, and

subsequently the case was transferred to this court.

7. The Accused elected to make a sworn defence statement upon being placed on her defence. She said she resided at Oloombogishi with her husband the deceased and their 5 children aged between 13 and 3 years. Relations between the couple were good at the beginning but deteriorated when the deceased's income improved and he began to take alcohol. That whenever he got drunk he assaulted the Accused and the relationship continued to deteriorate. She blamed alcohol and malicious influence for the deceased's conduct towards her.

8. That on the material date the deceased visited his brother identified as Amos and returned home drunk at 9.30pm. He caused a scene as he upset some hot water in a sufuria. He then picked up a knife from the table intending to stab the Accused. **PW1** separated them but the deceased broke out of a room where **PW1** had locked him up. He came out charging with the knife, causing the Accused to flee to a relative's home. Upon returning on the next morning, she found the deceased lying on the floor with a knife stuck on his chest. She raised alarm as deceased appeared dead.

9. A crowd gathered and soon, there were accusations that she murdered the deceased. She fled the home and reported at Eor Kule Police Post where she remained. She was detained as police removed the body. She said she had no desire to kill the deceased despite his cruelty towards her. As for the knife surrendered to police, she said she took it there having pulling it out from the deceased's chest out of shock. At the time, one Amos the deceased's brother was present. Despite directions given by the court no submissions were filed in the matter.

10. I have considered the evidence tendered before me. The basic facts of this case are not in dispute and can be recounted briefly. The deceased was the husband to the Accused. Between them they had five children, all minors, including **PW3** and **PW4**. They resided at Oloombogishi. In the material period, their marriage was strained as the couple fought often. Indeed at the material time, the deceased made his own meals separately from the rest of family. Early on the night of 18/12/2013 a fight broke out between the couple. A young relative of the deceased who lived with them (**PW1**) separated the two, locking up the deceased in a room. But the deceased broke out and the fighting/quarrel resumed. After a while the Accused left home. The children and **PW1** saw the deceased lying dead on a veranda adjacent to the parent's room and ran out to summon relatives.

11. Meanwhile the Accused presented herself at 3.00am morning of 19/12/2013 to **PW10** reporting that the deceased had committed suicide. She surrendered a knife (**Exhibit 10**) to **PW10**. Police visited the scene and found the deceased's body lying in his house with a stab wound in the chest. Post mortem examination confirmed that the death was caused by the chest stab which severed vital vessels.

12. It seems to me that the sole question for determination is whether or not the Accused fatally stabbed the deceased and with malice aforethought. On the material night there was a fight which started early in the evening between the deceased and the Accused. **PW1** in a bid to stop the fight restrained the deceased by locking him up in a room. The deceased was able to break out where upon the fighting resumed in the bed room where he and his wife engaged in combat.

13. The prosecution evidence is by and large circumstantial. Before it can found a conviction on such evidence the court must test the evidence against established principles. In **Republic –V- Kipkering Arap Koskei [1949] 16EACA 135** the court stated that:

“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

14. The above principles were further refined in the case of **Simoni Musoke –Vs- Uganda (1958) EA 715–** where the court citing the decision of the Privy Council in **Teper –V- Republic [1952] 2 ALLER**

447 added that:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

15. The couple’s children (PW4 and 5) were making supper in a separate room referred to as the living room, and hence did not witness the stabbing of the deceased. Neither did PW1 who had gone outside to the cowshed having separated the couple and locked in the deceased. It was while **PW1** was in the shed that she heard the children screaming that their father had been stabbed. If as she stated, they said the mother had stabbed him, it must have been an assumption because the children were not in the room where the stabbing occurred. Nevertheless, they could hear the fight going on and were only alerted by the youngest child referred to as Emmanuel that the father was bleeding.

16. Although **Emmanuel** was not a witness, **PW4** and **5** confirmed his report by going and peeping at the scene where the father lay. Both **PW4** and **5** were categorical that their mother left the house thereafter without saying where she was going. **PW4** in particular said the mother had the knife (**Exhibit 4**) in her hand as she left. **PW4**’s evidence was challenged by the defence on two accounts. Firstly, that her first statement to police purported that she witnessed the stabbing and secondly, that the living room through which the Accused allegedly exited the house was in darkness.

17. On the first issue PW4 stated in cross-examination:

“Yes I recorded a statement with police. The statement was not read to me. I could not explain clearly what happened. I did not speak the truth. Yes I was told not to tell the truth while writing statement All I heard is the noise (of fighting) and ongoing (to inquire) found father dead. Father and mother were in room. Even Emmanuel was not there. Yes (my) police statement says I witnessed stabbing. That is false”

18. On this subject **PW10** said he recorded **PW4**’s statement on 10/12/2013. In the course of cross-examination **PW10** was asked to read a portion of the statement he recorded from **PW4**. It said that she witnessed the deceased stab himself in the course of struggle with the mother. Ditto **PW11** who also claimed to have recorded the statements by **PW4** and **5**. It is clear that some pressure may have been applied on the minors while recording the said statements. The only person who stood to benefit from the said account would be the Accused. What is clear however is that these children were not with the parents in the final moments of the fight as they maintained that they remained in different rooms – the former in the bedroom, and the girls in the living room.

19. Regarding the exiting of the Accused, PW4 maintained that in the light of the *Koroboi* lamp she saw the mother exit the house. Her evidence that the mother had a knife at the time was confirmed by the Accused herself although her departure was timed at a different hour. The knife was tendered as an exhibit. **PW4** said during cross-examination that by the time the Accused left, the deceased had been stabbed. This is also the evidence of **PW5** who, because of her age at the material time could only paint broad strokes of the incident but was clear that her mother left after the stabbing albeit not herself (**PW5**) witnessing the actual stabbing.

20. Evidence that the Accused left after the stabbing is corroborated by the testimony of **PW1** who upon hearing screams came inside from the cowshed. Although she did not find the Accused in the house, her immediate departure from the house with the two girls, supported by **Amos Motonka** (PW2), is confirmation that a serious incident had occurred. The events described by the witnesses happened in succession in early part of the night. The children had just had supper and not gone to bed. Secondly, **PW2** said he was called from his house by PW1 at about 8.00pm. He came to the deceased’s house directly upon receiving reports of the stabbing.

21. Thus when the Accused says that she retrieved the knife from the body in the morning upon her return home, that cannot be accurate. **PW2** said he rushed to the house when summoned by **PW1** at 8.00pm and

found nobody in the house. He stayed on until police came at dawn. At no time did the defence suggest to **PW2** that she arrived in the morning and met **PW2** at the home and removed the knife from the body at the time. At any rate, that was not possible because **PW10** testified that the Accused had already surrendered to him a knife at 3.00am, claiming that the deceased had stabbed himself. She was detained and did not return to the home on the next day. It is also unbelievable that in the presence of **PW2** and other neighbours who were drawn to the home by the alarm the Accused had the opportunity to remove the knife from the body before the arrival of the police.

22. The knife had been removed much earlier, as neither **PW1** nor **PW2** saw a knife on the body immediately after the stabbing. It seems that the Accused made up the story concerning retrieving the knife from the body on the next morning to explain her possession of it at the Eor Ekule road block at 3.00am, when she presented it to **PW10**. This story and the claim that she sought refuge at the home of **PW2** at 10.00pm of the material night were never put into **PW2** during cross-examination and must be treated as an afterthought. And further, there can be no reason why, finding the body on return as she claims, she chose not to inform anyone and walked to the police roadblock alone.

23. By asserting that she ran to **PW2's** house at 10.00pm and stayed until morning, the Accused was seeking to explain away her absence after the death of the deceased and her appearance at the police road block at 3.00am; and also medical evidence that it seemed that the knife was pulled out after the stabbing. This explanation by the Accused not believable. Neither the possibility that she pulled out the knife out of the body in shock alone and walked 10 kilometres with it to report suicide. It sounds too bizarre for belief. If the deceased had not died by 10.00pm when she allegedly left home, there could be no explanation for the Accused's possession of the knife or report of suicide to **PW10** at 3.00am at a road block 10 kilometres away from home.

24. In my view, the Accused's assertion to have returned to the home in the morning is intended to counter the evidence that at 3.00am she reported to **PW10** that the deceased had committed suicide and using a knife. The prosecution evidence clearly shows that the Accused left after the death of the deceased, with the knife and never returned home. Evidence in this regard by **PW1, 2, 4** and **5** is confirmed by an elder **Simon Katoko Katamboi** (PW6) who said he was called to the home of the deceased at 10.30pm and informed of the death. He said people were already gathered at the home when he arrived. This witness said that no other family member was in the home except the deceased. He was present at the home until police came, took photographs and removed body.

25. To this witness too, no suggestion was made by the defence that at any point before then, the Accused appeared and removed a knife from the body. If indeed **PW1** and **PW2** being relative of the deceased were inclined to swear falsely against the Accused, PW6 had no reason to do so. The Accused when cross-examined admitted that there were no differences between her and these witnesses.

26. The possession of the murder weapon by the Accused on the night of the murder and knowledge that the deceased had "**committed suicide**" points to her as the culprit. In the proven sequence of events only she pulled out the knife from the body of the deceased soon after the stabbing and not later. Besides, the location and extent of the stabbing – upper chest – to my mind negatives self-stabbing. It is not possible for the deceased to have aimed a stab on himself and inflicted such a severe injury while holding the knife. The stab penetrated 2 centimetres into the right top lung lobe and upwards towards the lower neck. There is no suggestion that he fell on the knife. Even then such wounding could not happen.

27. The Accused's defence was a mix of denial and what was essentially an alibi (**See Osiwa –Vs- Republic [1989] KLR 469**). The defence was not canvassed during the cross-examination of witnesses such as **PW1, 2**, and **6**. **PW4** and **5** denied the suggested sequence that the Accused left home before the stabbing. Their evidence is believable and corroborated by PW1, 2 and 6. As regards the fight between the Accused and deceased prior to the stabbing there is no dispute.

28. Reviewing the entire evidence, it is my view that the inculpatory facts proven by the prosecution, and in part confirmed by the Accused, are incompatible with her innocence and are incapable of explanation upon any other reasonable hypothesis other than her guilt. Equally, I have not found any co-existing

circumstances as would weaken or destroy the inference of guilt. The Accused's alibi defence and denial was displaced by the prosecution evidence and shown to be a sham. It is incapable of belief and I dismiss it.

29. It is my finding that the Accused stabbed the deceased on the material night. There is no dispute that the stabbing resulted in instant death due to the severing of key vessels and lung injury. Undisputedly, there was a prolonged fight between the Accused and the deceased prior to the stabbing. The couple had a history of repeated squabbling and fighting. And while there is no evidence that the Accused sustained any injuries on the material night, the circumstances of the stabbing appear to negative malice aforethought on the part of the Accused.

30. The weapon used was a kitchen knife which the deceased was probably using while making his own supper in the part of the house that was the scene of the stabbing. Having assaulted his wife earlier on, the deceased who was said to be drunk at the time, broke out of the room where **PW1** earlier tried to restrain him, and fighting resumed. It is my considered view that this is a proper case to make a finding that an offence of Manslaughter Contrary to Section 202 as read with Section 205 has been established. I find such offence proven beyond reasonable doubt against the Accused and will convict her accordingly.

Delivered and signed in Narok this 28th day of September, 2016.

In the presence of:-

For the DPP : Mr. Koima

For the Accused : Mr. Yienko holding brief for Mr. Kilele

Accused : Present

CC : Baraza

C. MEOLI

JUGDE