



IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 22 OF 2011

REPUBLICPROSECUTOR

VERSUS

F G N.....ACCUSED

JUDGMENT

The accused **F G N** 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 16th day of June 2011 in Rabai District, Kilifi County within Coast Province, murdered A O W.”

The information was read out to the accused on 30/6/2011 and he entered a plea of **“Not Guilty”**. **Mr. Onserio**, learned State Counsel called a total of nine (9) prosecution witnesses. **Mr. Mburu Kariuki** Advocate represented the accused.

The brief facts of the case were as follows. The accused and the deceased were man and wife. The accused was a school teacher in [particulars withheld] whilst the deceased ran a tailoring business in the same location. The couple lived together in [particulars withheld] Estate with the two daughters of the deceased from a previous union and the biological child born to the two a boy named B N. Evidence from witnesses is that the couple had a stormy relationship and at the time of this incidence the couple had been sleeping in separate rooms for about one month.

On 16/6/2011 about 9.00p.m. **PW1, B N** and his sister **M A W, PW3** testified that they were all in the family home having their supper. Due to the strained relations between the parents, **PW1** took supper with his father (the accused) in the living room, whilst Marion, **PW3** ate with her mother (the deceased) in the kitchen. The two children then retired to sleep. They later heard a commotion from the living room where their parents were. **PW1** reported hearing the deceased shout **“leo haunipigi”** i.e. **“today you will not beat me.”** **PW3** later heard the deceased say **“nimekwisha”** i.e. **“I am finished”**. They saw blood flowing from the living room floor.

In the meantime **PW2, D O**, a brother to the deceased who also lived with the family arrived home from the deceased’s tailoring shop where he had remained to lock up. **PW3** said he found the outer door locked which was not normal. He knocked and a neighbour let him in. **PW2** then peered through the living room window. He saw the deceased lying in a pool of blood on the floor and the accused was standing over her holding a knife in his hand. **PW2** began to shout and neighbours converged at their house. Later on the Chief, **Stephen Nkamba Muta, PW5** arrived with Administration Police. They broke down the door and found deceased lying dead in her own blood. The accused who was inside the living room was apprehended. A knife was recovered on the table. Police removed the body of the

deceased to the mortuary whilst the accused who had a cut wound on his right hand was taken to a nearby dispensary for treatment. The accused was later locked up at Rabai Police Station. Upon the conclusion of police investigations the accused was arraigned in court on the charge of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He opted to make a sworn statement in which he denied having attacked and killed his wife. This court now has the task of analyzing the evidence on record with a view to determining whether the charge of murder has been proved beyond a reasonable doubt. At the outset I wish to apologize for the delay in preparing this judgment. This was occasioned by the fact of my ill-health which necessitated my being off duty for about two (2) months.

The offence of murder is defined as follows by **Section 203** of the **Penal Code**:-

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

The prosecution therefore is required to tender proof of the following crucial ingredients to prove a charge of murder:-

- Proof of the fact of the death of the deceased;
- Proof of the cause of such death;
- Proof that the death of the deceased was caused by an unlawful act or omission on the part of the accused;
- Proof that such unlawful act or omission was committed with malice aforethought

Regarding the fact and the cause of death of the deceased there can be no controversy. **PW1, PW2** and **PW3** all relatives of the deceased confirm having seen her dead body lying in a pool of blood on the living room floor. They all identify the deceased as **‘A O W’**. Similarly **PW5**, the local Chief, and **PW6, G K** a colleague of the accused, both of who rushed to the scene after a distress call confirm finding the deceased lying dead in her living room. They too are able to identify the deceased by name.

Evidence regarding the cause of death was tendered by **PW8, Dr. Ngaali Mbuuko**, a pathologist based at Provincial Coast General Hospital who produced the post mortem report PEx.3. **PW8** confirms that his colleague, Dr. Ngone, conducted an autopsy on the body of the deceased on 20/6/2011. The doctor noted stab wounds on the front of head, left upper chest region and multiple deep cuts to the arms and back of the deceased. The cause of death was found to be **“cardiopulmonary arrest due to severe haemorage”**. This was expert medical testimony and was neither challenged nor controverted by the defence. I therefore find as a fact that the deceased lost her life due to excessive bleeding from multiple stab wounds to her upper body.

Having established the fact and cause of the deceased’s death the prosecution must tender evidence to prove that it was the accused who unlawfully stabbed the deceased thereby causing her death. The incident is said to have occurred inside the family home at about 9.00 p.m. after the evening meal. At the material time the accused, his wife (the deceased) and their two children, **PW1** and **PW3**, were inside the house. The two children were in their respective bedrooms while the parents were together inside the living room. **PW1** and **PW3** both testify that they heard the deceased shout **‘today you will not beat me’**. This statement could only have been addressed to the accused who was with her in the living room. Immediately thereafter both **PW1** and **PW3** say they saw blood flowing from the living room floor. **PW2** the brother to the deceased told the court that he arrived at the family home at about 9.00 p.m. only to find the doors locked. A neighbour let him in. **PW2** testified that he peered into the living room window and in his own words this is what he said:-

“I saw the deceased lying on the floor with a cut on her arm. I saw the accused standing over her with a knife in his hand. I feared that the accused would turn on me. I ran away”

Similarly **PW4**, Martin Matano, a neighbour to the couple told the court that on that day he heard the

commotion of the couple fighting. **PW4** went to the accused's house and looked through the window. He stated that:-

“I looked through the window. I could see as the lights were on. I saw accused holding a knife. His wife, A, was lying on the ground and there was blood all around.....”

The fact that the couple were said to have been on bad terms, the fact that the accused was alone with the deceased in the living room when she sustained the fatal injuries and the testimonies of **PW2** and **PW4** that they saw the accused standing over the deceased holding a knife all these facts point squarely at the accused as the one who stabbed the deceased to death. The knife used was recovered inside the house and was produced in court as an exhibit PEx.1. **PW1**, **PW2** and **PW3** all gave clear and consistent evidence. They corroborated each other in all material respects. They all remained unshaken under cross examination by defence counsel.

Aside from this evidence from the persons who were present inside the house, there is evidence of words uttered by the accused himself to other person immediately after the incident. **PW1** stated that he heard the accused's speaking on phone saying 'nimeua bibi yangu' i.e. 'I have killed my wife'. **PW6**, **G K**, a colleague of the accused testified that on the material day the accused phoned him asking for help. Accused told **PW6** in Kikuyu vernacular "It is as if I have killed my wife". Why would accused be fearing that he had killed his wife unless he had committed an act that would likely lead to her death?

In his defence the accused denies having stabbed and killed the deceased. He claims that they quarreled due to the fact that he had informed the deceased that he intended to consult a lawyer about a divorce. The accused stated that it was the deceased who pulled out a knife and stabbed him and that in order to protect himself he pulled the knife out of her hands. The accused goes on to suggest that in the course of their struggle over this knife, the deceased stabbed and fatally injured herself. However, this defence is not feasible for several reasons. Firstly, under cross examination by the state counsel, the accused admits that he did not include in his statement the fact that the couple had quarreled over his intention to seek a divorce. To my mind this was a crucial factor which had had it truly occurred, the accused would not have failed to mention in his statement to the police. Secondly, if the deceased had stabbed herself in the course of a struggle then she would have been more likely to have had only one stab wound. As it was the pathologist noted multiple stab wounds on the deceased's upper body, arms and back. There would have been no way the deceased would have inflicted multiple stabs on herself and certainly it would have been totally impossible for her to have stabbed herself in the back. For these reasons, I reject the defence raised by the accused as a pure fabrication.

From the evidence it is clear that the accused was seen standing over the deceased with a knife in his hands. The two were alone in the living room. There was no third party who could possibly have inflicted the fatal wounds on the deceased. The accused did himself make utterances suggesting that he had killed his wife. I am satisfied that the evidence on record proves that it was the accused who fatally stabbed the deceased. I find that the '*actus reus*' for the offence of murder has been satisfactorily proved.

The final ingredient requiring proof is the '*mens rea*' of the offence of murder which is defined as 'malice aforethought'. It must be shown that in stabbing the deceased as he did the accused acted with premeditation i.e. intent to kill. As stated earlier there already existed a strained relationship between the accused and the deceased. The couple did not share a bed and even took their meals separately. On the material night there is evidence that they quarrelled. It is clear from the evidence that the deceased told the accused he would not beat her again. That this attack occurred in the course of a fight is evidenced by the fact that the accused also sustained injuries to his person. **PW5**, the Chief and **PW9**, **PC Samuel Akach**, the investigating officer both confirm that at the time of his arrest the accused had a cut wound on his right hand. He was initially taken to a nearby clinic for the wound to be stitched before he was locked up in cells. As such the accused's assault on the deceased cannot be said to have been totally unprovoked. It is not clear from the evidence who out of the two had the knife nor is it clear who threw the first blow. The fact that the accused had no premeditation is proved by the fact that he himself called a friend, **PW6**, and asked that police be alerted of the incident. The accused made no attempt to escape or run away from the scene. He waited in the house until the chief came with the police. From the above, I find that the

ingredient of malice aforethought has not been proven to have been present. The accused probably stabbed and killed his wife in the heat of passion during a domestic fight. **Section 207** of the **Penal Code** provides that:-

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.:

Based on the above and based also on my analysis of the evidence I find that the charge of murder has not been proved as against the accused. I therefore acquit the accused of the charge of murder and instead impose a conviction for the lesser offence of manslaughter contrary to **Section 202(1)** of the **Penal Code**.

Dated in Nakuru this 22nd day of April, 2015

MAUREEN A. ODERO

JUDGE