



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 29 OF 2012

LESIIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

JONATHAN GITARI M'MITHIARU.....ACCUSED

RULING

1. The Accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of offence are that between the night of 3rd and 4th March, 2012 at Kiteretu Sub-Location in Igembe District within Meru County, murdered MIKELINE KAGENDO GITARI.
2. The prosecution called 5 witnesses. The brief facts of the prosecution case is that the deceased was the wife of the accused. The two of them are said to be heavy drinkers of alcohol. On the 3rd March, 2012 the deceased went home to her children carrying food. She gave it to her two daughters Evelyn PW1 and Faith PW2 to prepare the food for supper. She then went away. The accused person is said to have come home a little later and asked for his wife when he could not see her he entered his house and slept. According to the children both parents were drunk when they saw them that evening.
3. At about mid night the same night the accused person woke up his daughters and his son one Tajiri the older children and told them that he suspected their mother had drunk poison. They went to their house and carried their mother outside and tried to give her first aid. A mixture of water and soil. She could not drink because the mouth was tightly closed and was unconscious they then spoke to neighbours and one of the neighbours volunteered to take her to hospital. She was declared dead on arrival. Eventually when the postmortem was carried out it was discovered that the accused had multiple hematoma all-round the head and a depressed skull fracture on the front of the head. The cause of death was a head injury secondary to trauma. Dr. Guatai who produced the postmortem form on behalf of Dr. Mutuku ruled out a fall as the cause of the injuries the deceased had suffered.
4. The accused gave a sworn defence. He said on the material day when he went home that evening he did not find his wife at home. He stated that the children told him that she had been at home but had left for unknown destination. The accused said that he decided to sleep. He said that he woke up at around mid-night and he found the wife lying down on the ground near the door and when he turned her he saw foam on the mouth and next to her an empty bottle of pesticide. He said that he woke up the children and they tried to administer a mixture of soil and when that failed they took her to hospital. He said that he had never quarreled or fought with his wife.
5. The accused faces a charge of murder. The burden lies with the prosecution to prove that the

accused is the one who caused the injuries that lead to the death of the deceased and that at the time he did so he had formed the necessary malice aforethought to cause death to the deceased. The circumstances that constitute malice aforethought are set out under section 206 of the Penal Code as follows:

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

(a) an 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 death will

probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) ...

(d) ...”

6. I have carefully considered the evidence that has been adduced by both sides. The prosecution is relying on circumstantial evidence as there was no eye witness of the incident. The prosecution is relying on the facts that the deceased was found in the bed she shares with the accused with serious head injuries. Those injuries were so severe that by the time PW1 and 2 saw the deceased she was not talking. She died the same night.

7. Section 111(1) and section 119 of the Evidence Act creates a statutory presumption which is placed upon an accused person to rebut once that presumption can be applied in the circumstances relating to his case.

111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

...

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”.

8. In this case the deceased was found seriously injured in the same bed she shared with the accused. The accused had a burden to show how either the deceased was injured or give an

explanation that exonerates him. The accused defence is that when he woke up that night he found the wife lying down near the door. She did not speak to him and that he immediately called the children and he told them that their mother had taken poison. The accused claims that there was an empty pesticide bottle that was never recovered and was never brought before the court.

9. In **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** at page 5 the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

10. From the evidence on record the deceased came home earlier than her husband and was seen by PW1 and 2 looking drunk. She went away before the accused came home. It is the evidence of the two children PW1 and 2 that when the accused came home the deceased was not there. It is also their evidence that the accused went to sleep before their mother returned. At the time that the deceased came back home, neither PW1 nor PW2 saw her. The two cannot say the state in which the deceased was after she left them with the food that night.

11. The prosecution has a burden to prove that the accused had the opportunity to commit this offence. The prosecution has to establish the circumstances that would prove that it was the accused and no one else who fatally wounded the deceased. In this case the prosecution is unable to adduce any evidence which is incompatible with the innocence of the accused. I say so because even though PW1 and 2 saw their mother walk away whole that evening they could not say in what state she was when she returned. They also heard no commotion that night. Since she returned to the accused and there was no other witness there is a possibility that the deceased may have been injured elsewhere before coming home.

12. The chain of the circumstantial evidence against the accused is weakened by the fact no one else saw her return to the house that night and there was no evidence of any fight between her and the accused. The possibility that the deceased was injured elsewhere cannot be excluded from the circumstantial evidence adduced before the court. The circumstances of the case are capable of an innocent explanation other than that of the guilt of the accused.

13. The Assistant Chief of the area where both parties come from was PW3. He adduced evidence to the effect that the accused and the deceased quarreled often and blamed it on accused drinking habits. He said that he had cautioned the accused against heavy drinking which his wife had complained about to the Assistant Chief about. The evidence of PW3 was contradicted by the evidence of the children of the accused and the deceased. They said that their parent lived amicably and never fought. They also said that both parents drunk alcohol. It is therefore difficult to know whether the incident on the night in question had anything to do with the poor relationship between the accused and the deceased as alleged by the Assistant Chief.

14. PW5 the Investigating Officer tried to bring in a possibility that the children of the accused and deceased had witnessed a quarrel between their parents on the material night and even went further to claim that the quarrel woke up the children that night. PW5 retracted those allegations saying that the children were woken up by their father that night and that it was not a fight. PW5 said that he received a report of the incident from the son of the deceased and the accused and his uncle claiming that the accused and deceased fought and that was how the deceased met her death.

15 No weapon was recovered. Had any weapon been recovered capable of causing the nature of injuries found on the deceased then that would have been an advantage to the prosecution case. The alleged pesticide bottle the deceased claimed next to his wife was not recovered. That doesn't mean much because there is evidence that there was a heavy traffic of people moving up and down at the deceased home from mid night when she was discovered with injuries, and 10 am the next day when the police carried away the body.

16. Having considered this case I find the circumstantial evidence adduced against the accused was capable of an explanation other than that of the guilt of the accused. I also find that the circumstantial evidence adduced was destroyed by other co-existing circumstances which weakened the prosecution case. This circumstances include the fact that no one saw the deceased person return home that night and having been out most of the night the possibility of the deceased being injured during her night escapade cannot be ruled out.

17. Having come to the conclusions I have of this case. I give the accused person the benefit of doubt and acquit him from this offence.

DATED SIGNED AND DELIVERED AT MERU THIS 9th DAY OF APRIL 2014.

LESIT, J.

JUDGE