



234/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 51 OF 2011

REPUBLIC ..... PROSECUTOR

VERSUS

JONES NGUI NDOLO.....ACCUSED

JUDGMENT

1. **Jones Ngui Ndolo**, the accused, is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence being that on the **5<sup>th</sup> day of June, 2011** at **Masewani village Kangundo District** within **Machakos County** murdered **Rose Ndinda Ngui**.
2. The facts as presented by the prosecution are that the accused was a husband to the deceased. On the **5<sup>th</sup> June, 2011**, PW1, **Matheka Ngui** a son to the accused and the deceased was asked to boil some water that he intended to use to massage the deceased. He complied. He poured the water on a basin and gave his father a towel he used to massage the deceased. He left them as he went to prepare tea at the kitchen. A day later the deceased claimed that the accused had burnt her with boiling water. She sent him to call his aunt, **Ann Mueni**. The accused could not let him do it. Three days later the wounds on the deceased legs worsened. She told him to notify the chief. He did so. They went and took her to hospital. The deceased's sisters on learning that she was in hospital reported the matter to the police. He stated that although his mother told him that she had been burnt by the accused he did not hear her scream. The deceased was complaining to the accused that he had refused to take her to hospital. He saw the deceased often. The accused left going to work and she was okay. The wound the deceased had was caused by a thorn.
3. PW2, **Anne Mueni** talked to her sister while in hospital who told her that she had been burnt by the accused. She therefore reported the matter to the police.
4. PW3, **Emily Mutua** heard from the deceased that she had been burnt by the accused.
5. PW4, **Consolata Ndunge David** the **Assistant Chief** got a call from the deceased on the **13<sup>th</sup> June, 2011**. She found the accused and PW1 at home. The deceased had several wounds on the buttocks. She sought to know why the deceased had not gone to hospital. She (deceased) explained that she had been pricked by a thorn. The husband had bought some medicine and he was massaging her. She had also been treated while at home.
6. The accused on the other hand told her that the deceased had refused to go to hospital for treatment. Following her order the deceased was taken to hospital by the accused his brother and another lady. On cross-examination she said that the deceased did not tell her that she had been burnt by the accused.
7. The deceased on passing on, PW5 **Dr. Muoki James** performed a post-mortem on her body. The left lower limb had an extensive wound covering most of the thigh, with muscles exposed. Pus

- was seen on most parts of the wounds. There were minor wounds on the buttocks which were consistent with pressure sores. The right lung appeared haemorrhagic consistent to infective process (*pneumonia*). He formed an opinion that the cause of death was severe sepsis due to infected deep burns.
8. As a result of the findings, **PW6, No. 88262 P.C. Geoffrey Tweya** arrested the accused. He was charged with the offence.
  9. In his defence the accused stated that he lived with the deceased for **40 years**. They did not have a disagreement. Her leg was swollen having been stung by an insect. The leg started swelling but she did not go to hospital. On **5/6/2011** he took her to hospital with the **Assistant Chief**. He stated that the deceased had asked him to massage her using hot water. He massaged the wound using water that their son (PW1) had warmed. He would dip the towel in the water, squeeze it out and massage her. He denied having poured the water on the swollen leg. The wound had taken 7 – 8 days. She had sustained the injury while on the farm. He had asked her to go to hospital but she declined. After the deceased was taken to hospital he had a disagreement with her sisters. They reported him to the police. After she died they claimed he had killed her.
  10. Submissions were filed by the defence counsel. The state counsel failed to file submissions. I have considered the submissions filed.

### **Issues to be determined.**

- Whether the accused had malice aforethought?
  - Whether he caused the death of the deceased?
11. The onus was upon the prosecution to prove that the accused intended to either kill the deceased or at least cause her some grievous harm. Evidence adduced by the prosecution confirms that the injury the deceased had was sustained following an accident. She was pierced by a thorn according to PW1 and the accused.
  12. PW1 was requested by the accused to boil water that he could use to massage the deceased swollen leg. He took the water approximated as one (1) litre on a basin to his father. He left the accused using a towel to massage the deceased's leg. The accused explained that he would dip the towel into the water, squeeze it out prior to massaging the leg. PW1 left the accused in the process of massaging the leg going to the kitchen to prepare tea. It was the following day that the deceased alleged she had been burnt by the accused. However, he denied having heard her mother scream.
  13. On cross-examination he is the one who poured the water that remained on the basin. Although they quarrelled frequently on that day they did not quarrel. According to him, the accused had availed a doctor who treated his mother (deceased).
  14. The sequence of the events that transpired does not impute bad conduct on the part of the accused. In his own way he tried to ensure the deceased had some relief from the swollen leg.
  15. All the deceased's siblings alleged that the deceased told them the accused had burnt her, we have evidence of the Assistant chief whom the deceased called herself prior to even notifying her relatives. She sought to know why the deceased had not gone to hospital. She said she had been accorded treatment at home by a doctor. She also said her husband had bought her medicine and was undertaking the duty of massaging her.
  16. There is however medical evidence. PW5 formed an opinion that the cause of death was due to severe sepsis to the infected deep burns. On cross-examination he said that a thorn can cause a wound and massaging may enlarge a wound. The deceased had the wounds for three weeks. The fact that the wound at the first instance resulted into a swelling perse meant that there was some infection. It is evident that no investigations were carried out to establish what could have caused the wound that later developed an infection that was life threatening.
  17. It has been stated that the accused burnt her with water. The duty was upon the prosecution to prove that the temperature of water used to massage the wound was so hot, and that the accused was aware that it was capable of causing grievous harm but he did it intentionally to harm her. PW1 who took the water to him did not think so. If the accused was able to dip the towel into the water, remove it and squeeze the water out was able to withstand the heat. It cannot be concluded that he was capable of telling that the heat would be detrimental to the deceased.

18. Having analysed the evidence adduced it cannot be stated that with certainty that the accused intended to cause grievous harm to the deceased. There was no malice aforethought. Consequently there is no proof beyond doubt that the accused caused the death of the deceased.
19. In the premises the accused is acquitted of the offence of murder. He shall be released forthwith unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at MACHAKOS this 8<sup>TH</sup> day of APRIL, 2014.**

**L.N. MUTENDE**

**JUDGE**