REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 9 OF 2012

LESIIT, J.

REPUBLIC.....PROSECUTOR

V E R S U S

JOHN MWATHI MAJURIA.....ACCUSED

JUDGEMENT

1. The accused John Mwathi Majuria is charged with murder contrary to section 203 of the Penal Code. It is alleged that between the night of 3rd and 4th February 2012 at Matakiri Sub Location, in Tharaka South District, within Meru County murdered Rebecca Kagendo.

2. The prosecution called six witnesses. The facts of the prosecution case are that the deceased was the wife of the accused on the material night, PW2 Sarah, who lived 50 meters from the accused and deceased home, heard the deceased singing. It was around 1.10 am. PW2 then heard her screaming. PW2 did not do anything as it was night.

3. Very early next morning PW1, mother of the deceased was informed of the death of her daughter. She described the scene where the body was found lying as being full of blood, with blood soaked clothes on the bed. The body of the deceased was lying under the bed on her back with injuries on the neck and a panga and a bar next to her body with blood stains. The door to the house was intact.

4. PW4 the immediate former Sub Area of that area received a call from a police officer asking him to check on the condition of deceased as the husband, the accused in this case had reported of an attack by robbers. He went to their home to find deceased dead.

5. The doctor's finding was that the deceased died of head injury and asphyxia due to blunt trauma.

6. The accused gave a sworn defence. He denied causing the death of his wife. He stated that he was together with his wife at the place where he sold a local brew which he used to ferment himself. They sold the brew until 9 pm when they went home.

7. At night the accused said that he heard a bang on his door. He said he struggled to keep the door locked and when he could no longer hold back the intruders, he let go. He stated that three men entered. He struggled with one whom he later recognized was one Mutwiri Ntarorii. The accused stated that he managed to escape. That as he struggled with the intruders, he heard his wife scream then keep quiet. He went to AP camp where he reported the incident.

8. I have carefully considered the entire evidence adduced in this case together with submission by counsels. Mr. Nyenyeire for the accused and Mr. Mungai for the state.

9. The accused is charged with murder contrary to section 203 of the Penal Code. Under that section the prosecution must show that the accused caused the deceased the injury that led to her death and that at the time he inflicted the said injuries he had formed the necessary malice aforethought to cause either death or grievous harm to the deceased. The section provides:

> **203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**

10. Section 206 of the Penal Code gives the circumstances which constitute grievous harm as follows:

> **206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -**
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> **(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;**
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> **(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) an intent to commit a felony;**
>
> **(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

11. I have carefully considered the evidence adduced by the prosecution in this case together with the submissions by Mr. Nyenyire for the accused and Mr. Mungai for the State. There was no eye witness in this case. The evidence against the accused person is circumstantial. The way to test circumstantial evidence is now settled. 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."**

11. In **Sawe V. Republic 2003 KLR 234 the Court** held:

> **1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**
>
> **2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**
>
> **3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

12. Mr. Nyenyire urged that since there was no eye witness of the incident the case was not proved against the accused. He relied on **Republic V Harrison Wahome Nakuru Hccr No. 111/05** where the court observed.

"**There was no eye witness and the evidence against the accused is circumstantial**"

13. Mr. Mungai on his part submitted that the circumstantial evidence against the accused linked the accused directly with the charge.

14. The issue is whether the prosecution has cogently and firmly established the circumstances from which the inference of guilt is sought to be drawn and whether those circumstances unerringly point towards the guilt of the accused.

15. The circumstances the prosecution seek to rely upon are the fact that the accused and the deceased lived in the same house as husband and wife. They were together that night; that the accused went three Kilometers to report to AP Njue choosing to ignore his immediate neighbor, PW2 and her husband, and PW1, his mother-in-law who lived 400 meters away from his house.

16. PW2 the closest neighbor to the accused heard the deceased screaming. She did not hear anything else. At 5 am, PW4 was called by AP Njue and asked to establish whether the accused story to that officer that he had been attacked at his home was correct. PW4 said the officer wanted him to go to the house of the accused and to find out how the deceased was. He found her dead and soaked in blood and the whole place she was laying was full of blood.

17. The AP Officer to whom the accused reported the incident at 5 am on material night was not called as a witness. PW6 the Investigating Officer did receive a call from AP CPL Njue, same officer who had called PW4 also called him. The Officer informed PW6 about the report he had received from the accused.

18. PW6 stated he collected a bottle suspected to have poison, and a panga/sword with blood stains and handed them to Government Chemist for analysis. The exhibit memo from was exhibited Pexh2. The results of analysis were never received.

19. PW6 explained he took the poison because of accused report to AP Njue that attackers had forced him to take poison. Indeed PW6 produced the treatment notes on the accused by consent of the accused counsel as P. exh3. The hospital treatment notes shows that the accused was treated for poisoning as an in-patient at Tharaka District Hospital. The date of admission was 4th February, 2012 and date of discharge 5th February, 2012.

20. The accused did not object to the production of the Treatment Notes. He denied in defence that he was never admitted to any hospital, or treated for poisoning. That retraction came a little too late and the only explanation for it is that it is an afterthought. PW6 had no personal grudge against the accused, and the accused does not claim so in his defence. The two of them were strangers to each other. The only explanation one can make of accused denial that he was ever treated of poisoning is that he is not telling the truth. That does not assist the accused in his defence at all.

21. Mr. Nyenyire took issue with production of Exhibit memo Form P.exh 2, without the results and relied on **Hassan Abdalla Yusuf V. Republic Mombasa High Court Criminal Appeal No. 409 of 2010.** I agree that without the results of the analysis the Exhibit Memo Form does not say much except to show exhibits submitted to the Government Chemist for analysis. These exhibits were a bottle suspected to contain poison and a sword. The exhibits were still at the Government Chemist at the time PW6 testified, along with the results of analysis. Their absence is important but it is not fatal to the prosecution case.

22. In this case we do have treatment notes on the accused which establish that the accused was admitted on 4th February 2010, the day of the incident, with a case of poisoning. Even without results of

Government Chemist analysis on the bottle found at the scene, we do have evidence that the accused had ingested poison and was treated for same. The date of treatment was on the morning after the alleged attack on him and his wife.

23. As I observed earlier the accused denied he reported having been poisoned or having been forced to take poison. He also denied having been admitted or treated for poisoning. I consider accused denial as an afterthought as during cross examination of PW6, no question was put to him suggesting that the accused had no case of poisoning, or admission in hospital for poisoning or denying the authenticity of the treatment notes. I dismiss the denial as a sham. The accused was admitted for one day and treated for poisoning. Upon discharge from hospital, PW6 had him arrested for this offence.

24. The Prosecution has adduced evidence to show accused and deceased were in same house on the date of incident. Except the deceased who was heard screaming, no other voices were heard. That there was nothing else heard to suggest struggle or attack on the accused home rules out accused statement that he was under attack on the material night. It rules out any attack on the accused and his wife by outsiders on the night in question.

25. PW2 who heard the deceased screaming lived 50 meters from the accused house. If there was any other commotion in the home of the accused, PW2 should have been able to hear it.

26. The other fact is that PW2 was related to the deceased being a sister in law. That is the more reason the accused should have gone to PW2's home to report what had happened to him and the deceased. The accused did not go to PW2. The mother of the deceased lived 400 meters from the home of accused. The accused did not go to her either. The accused decided to walk 3 kilometers to the AP camp to report the alleged attack and poisoning.

27. It is strange that the accused did not go to his neighbor and in law PW2 who was only 50 meters away; neither did he go to his wife's relatives 400 meters away. The accused gave no explanation for that omission. The only explanation for his failure to turn to people near him is because they would have confirmed that his allegation there had been an attack on him and his wife would have been proved to be untrue. Further, he took four hours to reach AP Njue. There is no reason why he left those who were near him to walk for four hours to reach the AP. The only explanation is because he was covering up something which would have been obvious had he gone to PW2 or PW1.

28. The accused denied being admitted for poisoning. That denial is an obvious lie. Such an obvious lie can form corroboration for other evidence against an accused person. The court of appeal has had occasion to consider the effect of a finding that the accused told an obvious lie. I am guided by the court of Appeal case of **ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990,** the court of appeal observed:

> *"In **RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226**, **the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that**:*
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> *The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.*
>
> ***This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent evidence available".***

29. I find that the prosecution has shown that the accused was with the deceased when she was attacked. The prosecution has shown that only the deceased screamed calling for help at the time the incident took place, and PW2 heard her. The accused made no sound. The accused then walked for 4 kilometers to report to the Administration Police. He was then treated for poisoning, a fact he denied. I find that all these facts point irresistibly at the accused as the one who brutally attacked his wife, and then pretended it was an outside attack and that he too was a victim.

30. PW6 testified that he investigated the persons accused claimed in his defence that they had attacked him and found it was not true. PW6 testified that he concluded the reports by the accused were a cover up. I agree with his conclusion as the investigating officer.

31. There was a child PW4 found in the house next to that of accused. He/she was not called as a witness. It is reported he/she was 12 years old and that he/she told PW4 he heard nothing. Witnesses are called because they have evidence to give that would enable a tribunal arrive at a just conclusion. Those who have nothing to say need not be called. I do not consider it fatal that she/he was not called as a witness.

32. There was issue that accused and deceased were in good terms. Lack of a motive or lack of evidence of bad relationship does not exonerate the accused from this case.

33. I find that the prosecution has cogently and firmly established circumstances from which the inference of guilt is sought to be made in this case. I find that the circumstances taken cumulatively from a chain so complete that there is no escape from the conclusion that the accused was the one who murdered his wife.

34. I find prosecution has proved its case against the accused beyond any reasonable doubt. I reject accused defence, find accused guilty as charged and convict him accordingly.

DATED SIGNED AND DELIVERED THIS 31st DAY OF JULY, 2014

LESIIT J

JUDGE.