



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL MURDER NO.89 OF 2010

REPUBLICPROSECUTOR

VERSUS

MMN ACCUSED

JUDGMENT

1. The accused person herein, MMN is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars being that on the 13th day of October 2010 in Kuria East District, within Nyanza Province, he murdered SW. He denied the charge.
2. The facts of this case are that on the 13th October 2010, the accused person herein, had a quarrel with his wife SW, the deceased. During the quarrel, the accused person was armed with a panga and a hammer. The accused person proceeded to attack the deceased and fatally wounded her. The attack took place in the presence of the couples' daughter, AB, who was not called as a witness.
3. The prosecution called three witnesses. PW1 was Nyambari Mwita Wambura, Assistant Chief of Maeta Sub Location, Maeta Location in Kuria East District. He testified that on the 13th October 2010 at about 6.15 a.m., he received a telephone call from the accused person herein to the effect that he and his family had been attacked by thugs in the night, locked in the tobacco barn in the compound and that in the course of the attack, the thugs had killed the deceased. PW1 told the accused to remain in the home as he (PW1) was on his way to the home.
4. PW1 further stated that not long after he had talked with the accused person, he received another call from one Marwa Rianka, a neighbour of the accused person who informed him that he (the accused person) had killed his wife and was about to escape. On receipt of this information from Marwa Rianka, PW1 telephoned the AP officers at Maeta AP Camp and asked them to accompany him to the home of the accused.
5. On arrival at the home of the accused, PW1 found the accused had locked himself in the house. PW1 asked the accused person to open the door which he did, and on entering the house, they found the deceased lying on the floor in a pool of blood. PW1 also stated that he interviewed the couples' two children, AB and N who informed him that the accused and the deceased had quarreled before going to bed. According to PW1, the couples' children believed that the accused person murdered the deceased.
6. Thereafter, PW1 telephoned the OCS, Kehancha police station, Chief Inspector George Emojong and informed him about the incident. The OCS together with Number 65998 Police Constable Danvas Dante, PW3, proceeded to the home of the accused person and on arrival thereat, the officers found members of the public gathered there. The body of the deceased was lying in a pool of blood between two beds in the bedroom. The deceased had a crush injury on the left side of the head. According to PW1 and PW3, MN

(not called as a witness) was sleeping in the same room with her parents when the accused person started quarrelling the deceased. The accused was armed with a panga and a hammer. During the quarrel, the accused hit the deceased on the head with the hammer and she (deceased) fell down. The accused then turned to M and warned her that he would do the same to her if she screamed. M kept quiet until 6.00 a.m. when she made a report of the incident to her sister AB who had slept in a different house in the compound.

7. PW3 testified that he interrogated AB (also not called as a witness) who told him that the accused and deceased were always quarreling on allegations by the accused that the deceased was engaged in adulterous relationships and that prior to the deceased's death, the couple had quarreled for 2 days.

8. PW3 further stated that after interrogating the two girls, he collected the deceased's body and took it to Pastor Machage Memorial mortuary for preservation and postmortem examination. PW3 also re-arrested the accused from members of the public and took him to Kuria District Hospital for postmortem examination. He also took the accused for mental assessment. The P3 form was produced as **P. Exhibit 2**. The accused was found fit to stand trial. PW3 did not recover any suspected murder weapon although the accused person's house was full of many metals.

9. PW3 also testified that upon being arrested, the accused told him that he had been attacked in the night as he went out for shot call, taken to the tobacco barn and locked in there.

10. During cross examination, PW3 told the court that though he was the Investigating Officer in the case, he was being led in the investigations by his Senior Chief Inspector George Emojong. PW3 further stated that he could not say at what time and from where the accused person was arrested. PW3 further testified that the accused person informed him that he (accused) and his family had been attacked by robbers, but in spite of this information, he (PW3) had not dusted the doors of the accused's house for finger prints though he did not believe the accused's story. The witness admitted that his investigations did not assist him in determining how the deceased died and that he in fact did not know how the deceased died.

11. It was also PW3's testimony that none of the accused person's neighbours volunteered to record statements. The witness denied a suggestion by defence counsel that he carried out very shoddy investigations into the matter. PW3 produced the Mental Assessment Forms as **P. Exhibit**.

12. At the close of the prosecution case, the accused person was put on his defence. He gave unsworn evidence and stated that: On 13th October 2010, he was attacked by robbers. He had sold some cattle for Kshs.16,000/=. During the night, the deceased asked him for his torch and went out to answer a call of nature. On coming back into the house, she was accompanied by 3 people who had taken away the torch from her.

13. When those people entered the bedroom, they beat up the deceased and asked for the proceeds from the cattle sale. The accused pleaded with the people not to beat the deceased as he also showed them where the money was. The people took the money and also took him outside to the tobacco barn. He was locked inside the barn.

14. After the people left, the accused came out of the tobacco barn and telephoned the area Assistant Chief and informed him of the attack. The accused also made a report to the police. When the police came to his home, they arrested him and took him to the police station. He was thereafter charged with the present offence after recording his statement. The accused called no witnesses.

15. At the close of the defence case, Mr. Omwega, counsel for the accused urged the court to find that there was no sufficient evidence to show that the accused murdered the deceased, whether such evidence be direct or circumstantial. Counsel further submitted that the accused's defence of having been attacked by robbers on the fateful night had not been challenged, and urged the court to make a finding of not guilty.

16. After a careful analysis of both the prosecution and the defence evidence, the issue that arises for determination is whether the evidence by the prosecution prove the ingredients of murder as set out under **Section 206** of the **Penal Code**, namely that the accused person had the necessary malice aforethought as defined thereunder for the offence of which he stands charged before this court. In a case of this nature, the burden of proof never shifts from the prosecution to the accused person; it is not the duty of the accused to establish his innocence. See **Kioko -vs- Republic [1983] KLR 289**. This court must therefore carefully examine the evidence by the prosecution with a view to establishing whether that evidence meets the threshold of establishing the case against the accused person beyond any reasonable doubt.

17. In the case of **Karanja -vrs- Republic [1983] KLR 501**, the Court of Appeal held that the burden of proving the falsity of the defence was wholly on the prosecution, whether the evidence relied upon by the prosecution is direct or circumstantial evidence. Where the prosecution case depends entirely on circumstantial evidence, as appears to be the case herein, this court must satisfy itself that the circumstantial evidence is such as would be explainable only, upon the hypothesis of the accused's guilt and incompatible with any other innocent explanation. (See holding number 4 in the **Karanja case** (supra).

18. From an analysis of the evidence on record, and applying the above stated principles to the evidence, I find that there is no evidence to show that with malice aforethought the accused:-

- *had an intention to cause the death of the deceased;*
- *had the knowledge that the act or omission causing death would probably cause the death or grievous harm to some person;*
- *had an intent to commit a felony;*
- *had an intention by the act or omission to facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony.*

19. Though it is clear from the evidence of Dr. Aggrey Lidagiza Akidiva (PW2) that the deceased died as a result of excessive brain haemorrhage caused by a rugged compound fracture of the skull on the left lateral side of the head and a partial amputation of the left ear, there is no other evidence tending to link the accused person to those injuries. PW1, Nyambari Mwita Wambura told the court that he received a call from the accused on 13th October 2010 at about 6.15 a.m. to the effect that he (accused) had been attacked by robbers in the night and that in the course of the robbery, his wife, the deceased, had been killed. Immediately after he had talked to the accused, a neighbour of the accused, one Marwa Riankia telephoned PW1 and informed him that the accused had killed the deceased. Although both PW1 and PW3 told the court that the accused's children, AB and MN had informed them that it was the accused who killed the deceased after a quarrel, these two crucial witnesses, together with Marwa Rianka, the accused's neighbour were never called to testify to fill in the critical details between the time the accused and his wife went to bed and the next morning at 6.15 a.m. when the accused person informed PW1 that he had been attacked by robbers in the night and that the robbers had, in the process killed the deceased. What AB and MN told PW1 and PW3 regarding what may have transpired between the accused and the deceased on the material night remained mere hearsay evidence which has no probative value. If only the two girls had testified.

20. PW3 also testified that when he and other officers got to the scene, he interrogated A, M and other members of the public, among them a neighbour by the name Chacha who informed him (PW3) that there were no screams in the night to show that the accused had been attacked by robbers. Without Chacha having been called as a witness, what he told PW3 is also mere hearsay evidence which has no probative value.

21. I have also carefully considered the accused person's defence, and though the same appears consistent I do not believe a word of it. I have a strong suspicion that the accused herein murdered his wife, for whatever reason. But again, that remains mere suspicion and no matter how strong the suspicion, it cannot form the basis of a conviction. There must be solid, uncontroverted evidence establishing a nexus between the death of the deceased and those acts or omissions of the accused. That evidence is not before

me and as a result, the accused person must get the benefit of the doubt. If indeed he killed the deceased in the circumstances narrated by M to PW3, he has his conscience to deal with.

22. In the premises and there being no evidence linking the accused to the murder of the deceased, I find the charge not proved and accordingly acquit the accused under **Section 322 (1)** of the **Criminal Procedure Code**.

23. Unless he is otherwise lawfully held, the accused is to be released from prison custody forthwith.

Orders accordingly.

Delivered, dated and signed in open court at Migori this 4th day of August, 2014.

R.N. SITATI

JUDGE.

In the presence of:-

Miss Owenga for State

Mr. Kaburi h/b for Omwega for Accused

Mr. Oure - Court Assistant