



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL CASE NO.17 OF 2010

REPUBLICPROSECUTOR

VERSUS

WALTER EMURIA ATERERE.....
ACCUSED

J U D G M E N T

Walter Emuria Aterere, the accused herein was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 27th July 2007 at Kamuchuru Village of Teso District, the accused murdered Norah Amoiti (hereinafter referred to as the deceased). When the accused was arraigned before court, he pleaded not guilty to the charge. The prosecution called a total of six (6) witnesses in its bid to prove the charge against the accused. The case was heard by three (3) judges, namely Msagha Mbogholi J, Onyancha J and this court. The accused did not object to the subsequent judges taking over the proceedings from the previous judges. After the close of the prosecution's case, this court put the accused on his defence. The accused gave unsworn statement. He denied the charge and the allegation that he had committed the offence.

The prosecution's case is that the accused killed the deceased with malice aforethought. The deceased was the wife of the accused. According to the evidence adduced, the couple was blessed with three (3) children, all daughters, who at the time of the incident were all married. The deceased and the accused used to live with PW1, Millicent Icholya, the then sixteen (16) year old daughter of the late brother of the accused. They also lived with a three (3) year old son of PW1's sister called Eugene Emuria. According to PW1, on 27th July 2007 at 4.00 p.m. she arrived home from school. She did not find anyone at home. She changed into civilian clothes from her school uniform and went to the home one Timothy Ole. She found the accused and the deceased cutting grass. She assisted the deceased to carry the grass back home. The accused accompanied them back home. According to PW1, after taking supper, the accused and the deceased retired to the main house to sleep. PW1 usually slept at the kitchen. The kitchen was about 30 metres from the main house. She testified that the accused and the deceased used to sleep in different bedrooms. The deceased slept with the young boy, aged three (3) years. PW1 testified that about 10.00 p.m. she was woken up by screams. She identified the person who was screaming to be the young boy. She woke up and went out to investigate. It was then that she had the deceased screaming.

PW1 rushed to the nearby house of her grandmother, Monica Barasa, and informed her of what she had heard. She returned to the homestead with the grandmother. It was then that they found the body of the deceased lying under a tree next to the house. The deceased was already dead. She noticed that the deceased had sustained a fracture of the right arm. She was also bleeding from the mouth. She recalled that her grandmother went and called their neighbours Hellen Omanyala and Erick Murunga. Hellen Omanyala testified as PW2. She stated that on the material night she was called by Monica Barasa, the mother of the accused. When she reached the compound she realized the deceased was already dead. She

noticed the injuries that were described by PW1. She recalled that she screamed on seeing the body of the deceased. It was then that she saw the accused. She ran away but the accused followed her and caught up with her. He told her that he was drunk at the time and had only slapped the deceased once. He informed her that he had gone to report the incident to the Assistant Chief.

PW3 Hussein Murunga, a neighbour of the deceased testified that he was woken up at about midnight by Erick Murunga, his nephew. He had at the time heard people screaming. Erick Murunga told him that the accused had beaten his wife to death. PW3 accompanied by his wife went to the home of the accused. He recalled that there were many people at the homestead. The body of the deceased was lying under a tree. The right arm was fractured. The deceased was bleeding from her nose. He did not find the accused at the homestead. He decided to report the incident to the police. He took a motorbike to Malaba Police Station. The police accompanied him to the scene. On arrival at the scene he found, among others, PW4 Erneyo Majune, the Assistant Chief of Katama Sub-location. The police collected the body of the deceased. He accompanied the police to Bungoma District Hospital Mortuary where the body of the deceased was preserved. PW3 recalled that he later learnt that the accused had been arrested.

PW4 was informed of the incident by Erick Murunga and Bernard Erungat. He recalled that he was woken up at 2.00 a.m. and informed that the accused had killed his wife. He accompanied the two to the scene. He saw the body of the deceased. He informed the OCS Malaba Police Station of the incident. The police arrived at the scene at 4.00 a.m. He testified that at about 6.00 a.m., the accused was arrested and brought to the scene. He was present when the police removed the body of the deceased from the scene. He also identified the body of the deceased before postmortem was conducted. PW6 Sgt. Mike Opicho, then based at Malaba Police Station, investigated the case. He recalled that on 28th June 2007 at about 2.30 a.m., he received a report from PW3 to the effect that the accused had killed his wife. He went to the scene with other police officers. He saw the body of the deceased lying under a tree within the compound. He observed that the deceased had sustained a fracture on her right forearm. She had bruises around the neck. There was blood oozing from her nose and mouth. At the scene, he was informed by PW1 that the accused and the deceased had quarreled before she heard the deceased scream. She went to seek assistance but on returning the compound, she found the deceased already dead. PW6 entered the house of the deceased. He observed that the clothes and beddings were scattered on the ground. He concluded from the scattered clothes and beddings that there had been a commotion in the bedroom. He also found a metal bar and a chair sitter. He concluded that the two items may have been used by the accused to assault the deceased. There was however no sign of blood in the said items. The two items were produced into evidence as the prosecution's exhibits Nos.2 and 3. PW6 recalled that, while at the scene, he was informed that the accused was hiding in a nearby maize plantation. He went to the farm and found the accused. He arrested the accused and took him to Malaba Police Station. He also collected the body of the deceased and took it to Bungoma District Hospital Mortuary for postmortem. PW6 conceded that there was nothing visible in the exhibits that could connect the accused with the death of the deceased.

Postmortem was carried out on the body of the deceased by PW5 Dr. Habel Alwanga. He conducted the postmortem on 1st August 2007. Prior to the postmortem, the body was identified by PW4 and PW6. He noted the following injuries on the body of the deceased. There was swelling around the two eyes; there were multiple bruises on both sides of the neck; there was an obvious fracture of the right forearm with bruises on the back side of the forearm. He formed the view that this injury was a defensive injury; the back was covered with soil and there was bleeding from both nostrils and the right ear. On internal examination, he established that there was fracture on the right side of the skull, a linear fracture running through the three skull bones including the skull base. There was bleeding on the right side of the brain. The doctor formed the opinion that the cause of death of the deceased was cardiorespiratory failure due to increased intracranial pressure as a result of intracranial bleeding due to assault on the head by a blunt object. The postmortem report was produced as Prosecution's exhibit No.1.

When the accused was put on his own defence, he denied committing the offence. He narrated how on the material day he had worked with the deceased until the evening. He recalled that in the evening, the deceased made him tea. After taking the tea, he fell asleep outside the house. He was woken up by the deceased and requested to take supper. It was about 7.00 p.m. at the time. After taking supper, he went to

sleep in his bedroom. He recalled that he had left the main door open because he expected the deceased to lock up the same. He testified that at about midnight, he woke up to answer a call of nature. It was then that he realized the main door was open. He went outside and saw the deceased lying under a tree. He then realized that the deceased was dead. He decided to report the incident to the Assistant Chief but did not find him at home. He testified that on the following day at 7.30 a.m. he was arrested and taken to the police station where he was charged with the current offence. He told the court that he was not involved in the death of the deceased. He said that he loved the deceased.

After the close of both the prosecution's and the defence case, this court heard oral closing submission made by Mr. Okuta for the accused and by Mr. Obiri for the State. This court has carefully considered the said submission. The issue for determination by this court is whether the prosecution discharged the burden placed on it to establish the guilt of the accused to the required standard of proof beyond any reasonable doubt. No one saw the accused kill the deceased. The prosecution relied on circumstantial evidence in its bid to establish the guilt of the accused. In **Sawe –Vs Republic [2003] KLR 364** at page 372, the Court of Appeal held thus:

“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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which neither shifts to the party accused.”

In the present case, it was the prosecution's case that the accused was the person who was last with the deceased before her dead body was found. According to PW1, she heard the deceased scream. She woke up and informed the mother of the accused. The mother of the accused together with PW2 and PW3 arrived at the scene. They found the body of the deceased lying under a tree outside the house. PW2 told the court that she spoke with the accused on the material night. The accused told him that he had only slapped the deceased. When PW6 conducted investigations, he established that on the material night the deceased and accused had quarreled. It is this quarrel that led to the accused assaulting the deceased. This court took cognizance of the fact that the key witness, PW1, is a close relative of both the accused and the deceased.

In most probability, PW1 was not candid as to the circumstances that led to the death of the deceased. What can however be gleaned from her testimony is that indeed the accused and the deceased quarreled on the material night. The cause of the disagreement was not clear from the evidence. PW3 and PW4 testified that both the accused and the deceased used to take alcohol. But there was no clear evidence from the prosecution witnesses which established that the accused was drunk on the material night. What is without doubt is that there was no other person at accused's home on the material night that the deceased was fatally assaulted. There was no sign of break-in in their house. There was no evidence to suggest that any other person, other than the accused assaulted the deceased. The screams by the deceased that was heard by among others PW1 and PW2 were proximate to the time the deceased met her death. There is no doubt that it was the accused who inflicted the fatal injury on the deceased. The accused's behaviour in disappearing from the scene after the incident is incompatible with a behaviour of an innocent person. This court therefore holds that the prosecution did establish, to the required standard of proof beyond any reasonable doubt, on circumstantial evidence, that it was only the accused, and no one else who could have inflicted the fatal injuries on the deceased. The accused was the only person who was in the in the particular house with the deceased when she was assaulted and fatally injured. In his unsworn testimony, the accused confirmed that he was at the scene during the entire period. His defence did not exonerate him from the irrefutable presumption that he was the one who assaulted the deceased.

As regard whether the prosecution established *mens rea*, this court is of the view that the prosecution did not establish malice aforethought. From the testimony of the prosecution witnesses, particularly PW1, PW2 and PW3, it was evident that the accused and the deceased had a good marital relationship prior to the incident. The events that took place on the day before the deceased was killed, clearly showed that the

accused and the deceased related well. This court cannot speculate what caused the accused to kill the deceased. It may have been caused by a fit of anger. The prosecution was not able to illuminate what could have caused the accused to assault the deceased, to whom the accused was married for a long time. The deceased and the accused had three (3) adult daughters who were all married. There was no evidence to suggest that there existed animosity between the accused and the deceased.

In the circumstances therefore, this court holds that the prosecution proved the lesser but cognate offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. The accused is thus convicted of manslaughter.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF JUNE 2013.

F. TUIYOT

JUDGE