



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 106 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

ISAAC NGIGE KAMAU.....ACCUSED

JUDGMENT

The accused was charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, (*Cap. 63, Laws of Kenya*).

The prosecution's case is that on 5th day of November 2007 at Gwakiongo Trading Centre in Nyandarua District, within Central Province, the accused murdered Mary Mumbi Kigotho.

To prove its case, the prosecution called seven (7) witnesses while the accused gave sworn testimony denying all the prosecution's evidence stating that the accused slipped backwards while mopping the floor, and hit her head against a hammer which was nearby on the floor.

To prove the offence of murder the prosecution must establish malice aforethought of the part of the accused person malice aforethought is established in any one or more of the following circumstances -

- (1) an intention to cause the death of or to do grievous harm to any person, whether that is the person actually killed or not,***
- (2) 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,***
- (3) an intent to commit a felony,***
- (4) 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.***

The question here as in all of these murder cases, is whether there are circumstances which establish malice aforethought on the part of the accused.

In this regard it was the evidence of PW2 and PW6 that point to the offence of murder. It was the

evidence of PW2, the step-son of the accused that that accused beat her mother with slaps on the face and pulling her hair and that later the pastor came and separated them, and that the deceased was later taken to hospital by the accused. The accused was not drunk when he beat the deceased, and he last saw his mother in a coffin. He was told by his father that his mother was taken to hospital after the pastor had intervened and he was asked to go and sleep elsewhere. He last saw his mother in a coffin.

The next vital evidence of that of PW4 who accompanied PW6, the Investigating Officer to the home of the accused and the deceased. According to his evidence, as soon as the accused opened the door he saw sports of blood. They also carried out a search and recovered a hammer hidden under the pillow. The hammer had a flat head and the other side round-head. He found remains of hair on both sides of the hammer.

PW4 also testified that the accused confirmed that the hammer belonged to him. In addition to the hammer they also found a sheet with dots of blood. Their search yielded blood on the sofa set and the cloth covering it was stained with blood. Both the hammer, the bed sheet, and the sofa cloth were identified by PW4 and were produced by PW6.

This witness also observed that the deceased had been removed from the bedroom and placed on the sofa as there appeared to have been bleeding from the back of the head, as there was signs of dragging of the deceased from the bedroom.

It was the testimony of PW5 that the accused went to report to the Police Station, that his wife, the deceased had died while the house, and that he had taken her to Nakuru General Provincial Hospital where she had died on arrival. This witness testified that upon informing his superior they went to Nakuru General Provincial Hospital where the body of the deceased. They found it lying face up, with blood oozing from the mouth. They went back to the station where the accused removed in their custody until the 17th November 2007 when he attended the post mortem carried out by a Dr. Wainaina where samples of blood were taken and forwarded to the Government Chemist Department for analysis.

As noted already PW6, was the investigating officer. He corroborated the evidence PW5 (*in relation to the fact the accused came to the station of his volition*) and informed that the previous day on 4.11.2007, at around 10.30 p.m. his wife (*the deceased*) had slipped and fell in the house and was injured, he had rushed her to Nakuru-General Provincial General Hospital where she had been pronounced dead on arrival.

PW5 testified that the accused had brought a small note from the Hospital that the deceased, who was a teacher at Matundiri Secondary School had been taken by her husband (*the accused*) and other good Samaritans to the hospital and that since the deceased had died upon her arrival at the hospital, the circumstances surrounding her injuries and death should be investigated.

PW6 corroborated the evidence of PW4 that they accompanied the accused back to the hospital to have a look at the body. He had a physical look at the body. She had a visible wound at the back of the head and had blood on the hair and bleeding from the nose.

PW6 testified after making those observations, he returned to the station with the accused whom he placed under custody awaiting the results of the postmortem.

Corroborating the evidence of PW4, he visited the house of the accused and the deceased. He found the house locked, so went back for the accused, who came with him and opened the door to the house. He observed that the house had been cleaned, and he became suspicious, and he inquired from the accused who had wiped the floor. His suspicion aroused, he went into the bedroom and found a well-spread bed. Upon removing the beddings he found a large rusty hammer placed between the pillows and the mattress well-concealed.

This witness testified what appeared to be blood-clots on the pillow and pieces of human hair. He also noted blood stains on the bed-sheets below the hammer and further a woven table-cloth. PW6 identified

the hammer, the bed-sheet and table-cloth.

PW6 testified that following the discovery of those items, the accused broke-down and started crying, and informed him (PW6) that he regretted, and claimed that his wife had provoked him into what he did, that his wife had confessed to him that she was pregnant by another man, and that he had been rejected by his in-laws particularly the mother to his wife - the deceased.

PW6 testified that he had no doubt that the accused should be charged with the offence of murder, and that he took the exhibits to the station, prepared the Exhibits Memo, organized for the taking of blood samples on the date of the post-mortem for purposes of cross-matching with the blood found on the hammer, the blanket and table-cloth, and had been taken for analysis by the Government Analyst.

PW1 was the Doctor who carried out the post-mortem on the deceased's body. He examined the body of the deceased. Externally the deceased had a swollen right temporal and occipital region of the skull with minor bruising and cuts, with extension of the abdomen suggesting a pregnancy. The doctor also found a large scar of the right occipital region of the scalp but no skull fracture. He also found a subdural haematoma on the right occipital region.

Further examination revealed an eight month pregnancy and the foetus was extracted.

The Doctor concluded that death was caused by injury to the head and he took both hair and blood samples for further analysis in the Government Chemist. He prepared, signed and produced the Police Form 3, in evidence. Upon cross-examination by Mr. Omwega learned counsel for the accused PW6 denied suggestions by counsel that a pregnancy predisposes a pregnant lady to sudden death or injury unless there were complications in the pregnancy itself, and a lady is not any more delicate because of a pregnancy.

The Doctor reiterated that death resulted from head injury as evidenced by internal bleeding, caused by external trauma - an external injury caused by external impact which lead to the bleeding in the skull tissue - which can be caused by any external force in the presence of external impact.

PW7, was the Government Analyst. He testified that he received from NO 7436, P.C. Derrick Omolo of Milangine Police Station. The following exhibits also described in an Exhibit Memo -

- (1) Item A - Blood sample of the deceased one Mary Mumbi Kigotho,
- (2) Item B - Hair sample of he same deceased,
- (3) Item C - a hammer,
- (4) Item D - A bed-sheet,
- (5) Item E - a light blue woven material,
- (6) Item "F" - an Hair Sample marked as collected from the Hammer.

The task of the Government Analyst was to compare the hair samples submitted, and establish whether the items were stained with blood and do grouping and ascertain whether they were related. His findings were -

- (1) the blood samples of the deceased Item "A" were found to be Blood Group "B",
- (2) the hair sample, Item "B" was found to be similar to the hair sample collected from the hammer Item "F",
- (3) the bed-sheet Item "D" and woven material, Item "E" were both lightly stained with human blood of

Group "B",

(4) there were no blood stains on the hammer, Item "C".

PW7 also observed from his findings that "the blood stains on the bed sheet Item "D" and woven material Item "E" matched in Group the blood sample from the deceased.

Based on this finding the Government Analyst also formed the opinion that those bloodstains would have come from the deceased after the injury.

He also found that the hair sample (Item "F") was found to be similar to the hair sample of the deceased (Item "B"), and that the hair sample could have come from the deceased.

Upon cross-examination by Mrs Ndeda learned counsel for the accused, PW7 testified that the hair sample were a match box labeled to have been taken from the hammer, and that hair and blood samples are destroyed after examination.

That was the prosecution's evidence. After being put on his defence, following an explanation of his constitutional and statutory rights as an accused person, the accused elected to give sworn testimony, but to call no other witness to testify on his behalf.

The accused's testimony was clear. He had married the deceased in June 2005. The deceased brought with her a son James Macharia (PW2). They lived in peace except for a few occasional disputes, but that was long ago.

He, his wife (the deceased) and son (PW2), had dinner together on 4.11.2007, and that he being a second-hand cloth dealer intended to travel to Naivasha. On 5.11.2007 so he had retired to the bed leaving his wife, to mop the floor, and probably clear the dishes. He did not say where the son or child was after the dinner.

After a little while, he heard the wife cry loudly and that he came out and found she had fallen on her back and that he lifted her and placed her on the bed. The accused explained that the deceased had fallen on a hammer which he had used sink the mast holding the aerial. He found her bleeding from the back of the head, and that her condition was bad, that he placed her on the bed, and went out to seek help from a neighbor Mr. Baba Muture or Pastor but he was not present. He however managed to hire a vehicle that took the deceased to Nakuru General Provincial Hospital where she died about 10 minutes after being admitted.

He was consequently given a note to take to the nearest Police Station and the body was taken to the mortuary. He did leave Nakuru until the next morning 5th November 2007, when he took the note to Milangine Police Station where he first met PC Kemboi (PW3) who reported the matter to his boss PW6. He corroborated the evidence of both PW4 and PW6 that they went back to the Hospital for the officers to view the body, and returned to the Police Station where he was arrested and detained.

He corroborated the evidence of PW4 and PW6 that they visited his house on three separate occasions, on 7.11.2007, 8.11.2007 and on 9.11.2007. the accused contradicted the evidence of both PW4 and PW6, that PW6 found the hammer and then "looked into the bedroom", and then asked for his and the cell-phone of the deceased which he gave.

On 8.11.2007, the officers "removed things from the bedroom, a table cloth, hammer, a jelly comb and bed-sheet. The accused testified all the items removed except the jelly comb were produced as exhibits. On the third visit to the house, the officers did not remove any other item to the house.

The accused denied having had a fight or quarrel with the deceased on that date and following his arrest his son was taken to live with his grandmother.

On cross examination by Mr. Omwega learned State Counsel, the accused admitted that the child James Macharia, was in the house during the incident, and that a lady Janet Ngure was one of those who assisted him in taking the deceased to the hospital, and denied ever being told by her that the deceased had three children, on an occasion when he and his wife visited the in-laws.

The accused corroborated the evidence of PW6 that his bed was well-spread, but denied there was a hammer below the pillow, but confirmed the evidence of PW4 and PW6 that "there was blood on the bed and the sheet: but insisted the hammer was found where she had fallen.

He did not report the matter to the Police allegedly because he was concerned with his wife treated first and found out what had caused the injury. He contradicted himself by stating that he met with the Police once on 7.11.2007, and not 3 times as he had said in his evidence in chief, but on re-examination went back to the evidence that the police visited his house on three consecutive days.

The accused insisted that the deceased fell on his hammer, that the hammer was found in the sitting room where he normally kept it, and that the deceased suffered injuries as a result of a slip and a fall on that hammer.

That was the evidence of the prosecution and the accused.

ANALYSIS OF THE EVIDENCE

It is observed that certain witnesses who might have shed some more light into the circumstances of the killing were not investigated, and consequently called to testify. These were the Pastor referred to by PW2, the drivers of the Nissan which is broken down, and the watchman of the Nissan. These people were referred to in the evidence of PW3 the Veterinary Doctor whose vehicle eventually took the deceased and the accused to the hospital. PW3 being a Veterinary Doctor might have taken keener interest in the condition of the patient, whose face was bound with a white sheet, who bound her, it may have been the accused.

It is not necessary to call a particular number of witnesses in order to prove any facts. There is no such law. The lack of evidence from those three possible witnesses does not however lessen the force of the evidence of the witnesses who testified.

As stated at the beginning of this judgment, the critical evidence against the accused in this case is that of the PW4 and PW6. But does not mean any other evidence is ignored. All evidence is important. There is the evidence of those who escorted the accused and the deceased to Nakuru General Provincial Hospital. Like PW3 (*Jacob Mwenje Ngure*) who together with the driver of the Nissan which the accused had originally hired, but failed in the market, and removed the deceased (*then alive*), and put her into his minibus and took her GPH, Nakuru, where they arrived at 3.00 a.m. He noticed the deceased had tied a sheet around her neck. She did not speak, and nobody spoke as to what had happened.

There was also the evidence of PW5 (PC Kemboi who the accused first approached with the facts of the incident, and who referred him to PW6, due to the gravity of what happened. He also attended the post mortem done by PW1 and he did not visit the house of the accused.

The accused insisted on his evidence that the deceased fell on a hammer and so severely injured her head that it caused what PW1, the doctor said were injuries to the right temporal and occipital region of the skull with minor bruises and cuts, and a large also to the right occipital region of the scalp but no skull fracture.

Anatomically, the temporal lobe is each of the paired lobes of the brain lying beneath the temples (*the flat part of either side of the head between the forehead and the ear*). The occipital is literally, the back of the head, which are usually in thick tissue. If any those areas are affected by heavy impact trauma, as PW1 the Doctor opined, then, it most likely cause contusions, leading subdural haematoma or serious internal bleeding into the skull tissue leading to death if, the bleeding is massive to the brain. The doctor

consequently concluded that the cause of death was injury to the head.

PW2's evidence that his parents quarreled and his step-father (*the accused*) (*his biological father was David Ndirangu*), and that his father beat his mother with fists on both sides of the head could not have caused massive subdural haematoma.

PW2's evidence is only useful to the extent that the Pastor came, and separated his father and his mother from quarrelling and appears to have either led him away or PW2 was terrified to testify against his step-father. He never referred to his mother's falling on her head, and injuring himself on a hammer.

Although the accused denied that he quarreled with the deceased on that night of 4.11.2007, it is quite clear from the evidence of PW6, that once he had recovered the hammer below the pillow and had noticed blood on the bedsheet, the accused expressed regret and claimed that he had been provoked by his wife's telling him that she was with a child by a man who was not her husband. It is strange the accused in his sworn evidence never referred to this incident. Probably he avoided doing so deliberately, not incriminate himself.

The accused admitted he was with the deceased. He stated on oath that he never quarreled with the deceased on that date. Would a fall on a small ordinary household hammer cause on the head of the deceased by a mere fall on it? They say, go tell that to the birds. The accused would have been strung up high on some and then let loose with some terrific velocity, to fall on such a hammer to sustain the injuries sustained by the deceased which led to death.

Such injury could only have been caused by what PW1 described as -

"external trauma - an external injury caused by an external impact which leads to bleeding in the skull/tissue. Such bleeding can be caused by any external force in the presence of external impact."

What is also clear from PW1's (the Doctor) evidence is that such force was applied systematically with sufficient impact to cause damage and contusion of the skull tissue leading to internal bleeding. That explains why there were merely dots of blood on the bed sheet, the table-cloth, and absence of blood from the hammer, but explains the presence of hair on the hammer according to the evidence of the forensic expert, PW7, the Government Analyst. PW7 also found that the sample of blood from the deceased and that found on the bed sheet and the table cloth were of the same Blood Group "B" which was the deceased's blood group.

Where the deceased received the injuries she succumbed to is really irrelevant. PW4 and PW6 testified that there was evidence of dragging from the bedroom to the sitting, and the accused testified that the blood on the table-cloth caused by his placing the accused on the sofa. Either way, the damage and injury had already been done to the deceased. The question is who had done it? The accused testified that he did not kill the deceased. If he did not kill her who else did? Motive is irrelevant in these cases.

The only person who had the strength over an eighth month pregnant lady is the accused. He had no other visit except the pastor PW2 said, came to separate. After the separation, he remained quite alone with the deceased. He completed his task causing such grievous harm, that she succumbed to such injuries and died.

Did the accused have malice aforethought? He certainly did. He had a hammer, he only could have applied it systematically to the back head of the deceased that some hairs stuck to the hammer and forensic analysis found that it was the hair of the deceased. The blood stains on the bed sheet, and the woven material matched those of the blood sample taken at the post-mortem of the deceased.

The intention to commit a felony were present.

PW6 referred to an emotional breakdown and regret on the part of the accused, that his wife the deceased had provoked. The accused himself never pleaded any such provocation, it was denial, denial throughout

his evidence, and cross-examination. That is not an accused who can be said to have been provoked. That is a person who with malice aforethought went out to take a hammer, batter his wife, and in a pang of remorse went out to look for treatment to take her to hospital with little hope of recovery.

For those reasons, I find the accused guilty of the offence of murder contrary to Section 203 of the Penal Code, and I convict him of the murder of MARY MUMBI KIGOTHO on the night of 4.04.2007/5.11.2007.

I therefore call upon counsel to address me on reasons why the accused should not be sentenced to death as prescribed by Section 204 of the Penal Code aforesaid.

It is so ordered.

Dated, signed and delivered at Nakuru this 30th day of March, 2012

M. J. ANYARA EMUKULE
JUDGE