



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 28 OF 2004

LESIIT J,

REPUBLIC.....PROSECUTOR

VERSUS

GEOFFREY KIREMA.....ACCUSED

JUDGMENT.

The accused is charged with murder contrary to section 203 as read with 204 of the Penal Code. It is alleged that the accused on the 10th Day of December 2003 at Lachathuriu Sub Location Athwana Location In Meru North District within the Eastern Province murdered Rose Makena.

The prosecution called three witnesses. Their evidence was as follows.

PW1 Janica Kioro was the mother of the accused. Her evidence was that on 10th December 2003, she was at home while accused was in his home about 100 meters from hers. She said that at 8 pm she heard screams coming from the accused home. She went there and found the door locked. She could hear the voice of her daughter in law Makena, the deceased in this case saying in Kimeru “wooi have died as if I will never give birth again?” Suddenly the door was opened and the accused came out with a 4 legged stool with one leg missing. PW1 said she held onto the stool and her daughter in law ran out of the house. Pw1 said that the accused released the stool and chased the deceased. He caught up with her and held her and stripped her of the clothes she was wearing. That the deceased ran away with her petticoat towards her, PW1’s house.

PW1 who was with her daughter Gladys PW3 followed the deceased to her home. The accused also followed them. That outside her house, the deceased agreed to go back to her house with her husband the accused and they left. PW1 testified that she sent old men to go and find out why the two were fighting.

PW1 said that she heard screams from accused house again and she went back to his house with PW3 and others. When they were unable to persuade the accused to open the door, she sent PW2 Kamaru and another to call the Assistant Chief. PW1 testified that eventually the accused called her to his house and that when she went there she found the deceased dead lying on their bed and covered. PW1 said that eventually the Assistant Chief came at 2 am same night and arrested the accused and took him to Tigania Police Station. The police later came for the deceased’s body.

PW2 Francis Kamaru said that he was a neighbor to PW1 and the deceased. His evidence was that on

the material day, at about 8 pm, he heard people arguing in accused home. He said that he did not react because those arguments were common between the accused and the deceased. He said that he retired to bed at 10 pm. At 2 am, Kamaru said that he was woken up by Ntokaibi Kirera, the accused, and that he was crying. PW2 said that the accused requested him to accompany him to his house. But he declined to do so. Kamaru said that he only went when the brother to the accused told him that it was their mother, PW1, who was calling him. Kamaru said that he went to the home of the accused where he found Makena, the wife to the accused, dead and lying on the bed. PW2 testified that he is the one who went to call the Assistant Chief in company of another. He also witnessed the Assistant Chief arresting the accused.

PW3 Gladys Thirikirwe was sister of the accused. Her evidence confirmed the testimony of her mother PW 1. PW3 testified that with her mother they went to the accused home and found the accused hitting the deceased with a stool as the two wrestled. She said that Makena, the deceased ran to their home and that eventually she returned with the accused to their home. Gladys testified that the accused had a stick in his hand and that he chased them PW1 and 3 away. Gladys said that she slept at 11 pm. That later that night the accused woke her and her mother up to go and see what had happened. Gladys said she did not go to the accused house fearing for the worst but that instead she started screaming. That she cried until 9 am the following morning when the police collected the body of the deceased.

The accused gave a sworn statement. In brief, he denied committing the offence. The accused stated that his wife took a jug and went to get tea from his mother, PW1's home because the family cow produced little milk and it had to be shared between the two families. The accused stated that he first heard a loud bang which woke him from sleep. When he woke up he found his wife fallen inside the house wearing only the petticoat. He said that he then called his mother and sent his siblings to call the Assistant Chief. Eventually he was asked to place his wife somewhere and that is when he placed her on the bed. He said that she was not talking. The accused said that when the Assistant Chief finally came, he took him to Tigania Police Station and told the police to arrest him for killing his wife.

This trial was conducted by the aid of assessors whose opinion was that the accused is not guilty of murder because the murder weapon was not found.

The accused is charged with murder. It is the duty of the prosecution to demonstrate through evidence, on a standard of proof beyond any reasonable doubt that the accused person committed the offence of murder.

The prosecution has to show that the accused caused the death of the deceased with malice aforethought. The prosecution has to show that the accused intended to cause death or do grievous harm to the deceased; or that he knew that his actions causing death would probably cause death or do grievous harm There was no eye witness who saw how the deceased met her death in the sense that no one witnessed the fatal blow being inflicted.

The prosecution is relying on circumstantial evidence that the accused was the last person to be seen with the deceased; that the deceased was last seen alive entering her matrimonial home with the accused person who also locked the door behind them.

The evidence of the mother, brother and sister of the accused PW1,2 and 3 respectively, was that the accused and deceased quarreled and fought so often that it was a normal part of their lives. However from the evidence of the mother and sister of the accused, the night in question was different as the accused had turned violent and was fighting his wife with a stool until it broke. They also saw him using a stick. The investigating officer did not testify. As a result there is no evidence whether the broken stool and stick were collected from the scene of the attack.

I have considered the evidence particularly of PW1 and 3, mother and sister of the accused, who witnessed the goings on between the accused and the deceased that night. I have no doubt in my mind that they were truthful witnesses. From their evidence they witnessed the accused using first the stool and later a stick to hit the deceased repeatedly with them until they broke. The failure to have the stick and broken

stool as exhibits is not in my opinion fatal to the prosecution case.

The two key witnesses (PW1 and 3) testified that the violent confrontation between the accused and the deceased started early that evening. Any attempt to calm down the accused to stop beating his wife fell on deaf ears. Calling PW2 to the scene did not help the situation as the accused resorted to locking himself and his wife in their house so as to beat her without interruption. PW1, 2 and 3 testified that they could hear the deceased screaming and crying for help. Unfortunately these witnesses could not help the deceased. PW2 especially considered the confrontation the usual fight he was used to from the two and so he found it not necessary to intervene.

In **ABANGA alias ONYANGO V. REP. CR. A NO. 32 OF 1990 (UR)** supra at page 5 where the learned Judges of the Court of Appeal stated:

“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.”

From the evidence before court, the deceased was last seen alive entering her matrimonial home with her husband after he got her back from his mother’s house where she had gone for rescue. The accused then went to PW2 crying and pleading with him to go and see what had happened in his house but PW2 was not persuaded to go until he learned that it was PW1 who was calling him. When the PW1 and 2 went to the accused home, they found the deceased lying dead on their matrimonial bed.

I find that there is sufficient evidence to establish that it was the accused that inflicted the fatal injuries on the deceased. I also find that there is sufficient circumstantial evidence to show that from the time the deceased and the accused entered their home and the deceased did not leave the home until she was found dead in their bed. I find that the circumstantial evidence establishes beyond any reasonable doubt that the accused and no one else had the exclusive opportunity to injure the deceased. I find that the evidence on record points irresistibly and directly to the accused person as the one who caused the death of the deceased.

The accused in his defence suggested that the deceased had gone to his mother’s house for milk and that she came back with serious injuries whose cause he did not know. I found that a made up story at a very late stage of the trial. PW1 was never asked that the deceased had gone for milk at her place. PW’s evidence negates that explanation as it is very clear from her testimony the deceased was harassed and seriously battered by the accused despite pleas to the accused to stop. The accused defence that the deceased was injured elsewhere and by another is not true. I am satisfied that there are no co-existing circumstances that would weaken the inference of guilt on the accused part.

I have mentioned of the witnesses the prosecution failed to call. The investigating officer was not called as a witness and I have stated the impact the lack of that evidence has to the prosecution case. There was other evidence left out. The prosecution did not adduce the evidence of a doctor to show what in his opinion the cause of death was. Death is however not disputed. The accused admits that his wife died inside their home and it was the reason he swung into action to round up his relatives and to send for the Assistant Chief. In the unique circumstances of this case, you may not require the doctor’s opinion as the fact that there was a death caused to the deceased is not in dispute.

I have come to the conclusion that the prosecution has proved that the accused beat the deceased to death on the night in question. The evidence is clear that the accused beat the deceased with a stool until it broke and then took a stick and continued to pound the deceased with it.

In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, BOSIRE, O’KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

I am satisfied that the prosecution has proved that the accused had formed the necessary malice aforethought to cause death or grievous harm to the deceased.

I reject the accused defence, find him guilty of murder contrary to section 203 of the Penal Code as charged and convict him accordingly.

Dated, Signed and Delivered this 26th Day Of May, 2011.

**LESIT , J
JUDGE.**