



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 23 OF 2008

REPUBLIC PROSECUTION
=VERSUS=
MBAJI MWAJOTA ACCUSED

JUDGEMENT

The accused **MBAJI MWAJOTA** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On 22nd day of August 2008 at Mkomani Village Ruruma Location in Kaloleni District within Coast Province murdered ZABIBU EMMANUEL KADZOGA”

The accused entered a plea of **‘not guilty’** to the charge and his trial commenced on 24th May 2008 before the High Court at Mombasa. The prosecution led by **MR. ONSERIO** learned State Counsel called a total of six witnesses in support of their case. The accused was represented by **MR. TINDI** Advocate.

The brief facts of the prosecution case were that on the night of 22nd August 2008 at about 10.30 p.m. **PW1 WILLIAM BARISA** and **PW2 EMMANUEL MBAJI HEPA** who were both neighbours of the accused heard the accused call out for help. Both men rushed to the house of the accused. There they found accused holding his 8 month old baby standing outside his house. The accused’s wife **ZABIBU KADZOGA** (the deceased herein) was seated by the door with blood oozing from a wound on her neck. The accused told **PW1** and **PW2** that his wife had tried to commit suicide by cutting herself with a razor blade. The two witnesses rushed the victim to Mariakani Hospital where she unfortunately died whilst undergoing treatment. The matter was reported to police who arrested the accused. Upon completion of police investigations the accused was charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He denied having murdered the deceased and said he merely came home from work and found his wife injured. It is now upon this court to determine whether the prosecution have proved their case to the required standard in law.

The offence of murder is defined in S. 203 of the Penal Code thus:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

From this definition the offence of murder requires proof of three main aspects:

- (1) That a death did occur
- (2) That the said death occurred as the result of an unlawful act or omission
- (3) That the unlawful act was committed by the accused person with malice aforethought

The fact of the death and the identity of the deceased person cannot be in any doubt. Both **PW1** and **PW2** told the court that the person whom they met bleeding from a wound on the neck was one '**Zabibu Emmanuel Kadzoga**' the wife of the accused. Both witnesses were neighbours and relatives of the deceased and they both knew her very well. In addition **PW3 EMMANUEL KADZOGA** who is the father of the deceased confirms that he went to the mortuary where he saw the body of his daughter '**Zabibu**' which body he did identify to the doctor for post-mortem purposes.

The question of the cause of death of the deceased is also well proven. **PW1** and **PW2** told the court that the accused told them that his wife (the deceased) had committed suicide by cutting her neck with a razor. Both witnesses confirm that when they saw the deceased that night she was bleeding from the neck. Conclusive evidence on the cause of death was tendered by **PW5 DR. NGALI MBUUKO** who performed the postmortem examination on the body of the deceased. He noted a cut wound about 11 cm long across the neck of the deceased. The cut wound was 5 cm deep and had severed the oesophagus (food pipe). In the expert medical opinion of **PW5** the cause of death was "**haemoragic shock due to severed neck vessels due to a cut throat**". The autopsy report is produced as an exhibit **Pexb1**. Further **PW5** opined that such a severe wound could not have been caused by a razor blade, but was caused by another sharp object like a knife or a panga. I therefore find that the death as well as the cause of the death of the deceased i.e. the actus reus of the offence of murder have been proved beyond a reasonable doubt.

Mere proof of the fact of death, however is not sufficient to prove a charge of murder. The prosecution must prove beyond a reasonable doubt that it was the accused who committed the unlawful act which led to the death of the deceased. In this case the unlawful act was the cutting of the deceased's neck causing her to bleed to death. There was no eye-witness to the events leading up to the death of the deceased. Neither **PW1** nor **PW2** who were the first to arrive at the scene were able to tell the court who cut the deceased on the neck. The accused told the witnesses that it was the deceased who inflicted the fatal wounds on herself in an attempt to commit suicide using a razor blade. Indeed **PW6 CORPORAL CHRISTOPHER MAGAIWA** of Bamburi Police Station who visited the scene told the court that upon conducting a search in the house of the deceased he did recover a razor blade. He produces the said razor blade as an exhibit **Pexb2**. However as discussed earlier it has been proved that the injuries which led to the death of the deceased could not have been caused by a razor blade. Even from the perspective of this court a razor-blade is too light and flimsy to cut through a human neck and severe cartilage and arteries. [this fact will become important later on].

There being no eye-witness to the offence the evidence against the accused is circumstantial. The law relating to the admission of circumstantial evidence is to be found in the case of **JAMES MWANGI –VS- REPUBLIC [1983]** where it was held:

"In a case depending on circumstantial evidence in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt"

This is a case where the deceased was alone in the house with the accused when she met her death. Neither **PW1** nor **PW2** mentions having seen or met any other person in the house. They only saw the accused, his bleeding wife and an 8 month old baby. Clearly an 8 month old baby could not have inflicted upon the deceased the serious injuries which led to her death. On his part the accused in an attempt to explain the injuries sustained by his wife stated that she had cut herself on the neck using a razor blade. This has already been proved to be an impossibility. It is instructive to note that in his unsworn defence the accused appears to change his story and states that he was away at work when his wife was injured. He therefore raises an alibi defence and implies that it was some person other than himself who cut the deceased. Firstly the accused did not tell either **PW1** or **PW2** that he had just arrived home to find his wife already injured. Instead he tried to explain her injuries using the '**cock and bull**'

story of suicide by use of a razor blade. Counsel for the accused did not raise this alibi in the course of his cross-examination of any of the prosecution witnesses. This alibi defence is clearly an afterthought as the only time it came up was during the defence. This attempt by the accused to distance himself from his wife's injuries (having realized that the suicide theory would not wash) shows less than noble intentions on his part. Why give one explanation to the witnesses who rushed to the scene, only to completely change his story upon defence? I dismiss this alibi defence as unconvincing.

PW3 the father of the deceased told the court that on the date when the deceased was being buried the police brought the accused (who was by then under arrest) into the compound. The witness saw the accused show police where he had hidden a knife which knife was recovered and was produced in court as an exhibit **Pexb3**. This evidence is corroborated by **PW6** who recovered said knife. **PW4 MISURI MWAJOTA MBAJI** a brother to the accused told the court in his evidence-in-chief that he was present when police came to search the accused's compound. He stated:

“On the day of the burial of the deceased police came with the accused. The police wanted to search their house. The accused showed police where he had hidden the knife in the roof of his younger brothers house. The police recovered the knife. It was a knife used for tapping wine”

The fact that the accused hid this knife is in itself very suspicious. The evidence is that the cut wounds on the deceased's neck were caused by a sharp object such as a knife. The accused in his defence told the court that he was a wine-tapper. It would therefore not be surprising or unusual that he would have in his possession a knife used to tap wine. However it raises eyebrows that this particular knife was hidden away. It is the accused who revealed where he had hidden the knife inside the roof of his younger brother's house. It is clear that the accused did not want this knife to be recovered at all. That is the reason why he hid it. The only reason why the accused would have so hidden the knife is because it was the weapon used to cut the throat of the deceased. All these factors point to the complicity of the accused in the murder of the deceased. The evidence available though circumstantial in nature points squarely at the accused as the perpetrator of this offence. The fact that the accused was alone with the deceased in their house at the time she met her death and the fact that accused revealed to police where the murder weapon was all point to the accused and no other person as the person who slit the deceased's throat on that night. The law requires that in order to prove a charge of murder there must exist evidence of malice aforethought which is the mens rea of the charge. Malice aforethought is defined in S. 206 of the Penal Code as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

- (a)***
- (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)***
- (d)***

There can be no doubt that the accused was fully aware that slitting the deceased's throat as he did would at the very least cause grievous bodily harm if not the outright death of the deceased. Indeed this is a reality which would have been evident to any reasonable man. The accused would not have committed such an act expecting there to be any happy outcome. I am therefore satisfied that the element of malice aforethought has been proved in accordance with the law. Based on the foregoing I am satisfied that the prosecution have proved the charge of murder against the accused beyond a reasonable doubt. I therefore convict the accused of this offence.

Dated and Delivered in Mombasa this 20th day of September 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Tindi for Accused
Mr. Onserio for State

18.10.2011

Before: Hon. Lady Justice M. Odera
Court Clerk – Mutisya
Mr. Jami for State
Accused in person

COURT: Sentence on 19th October 2011

M. ODERO
JUDGE

19.10.2011

Before: Hon. Lady Justice M. Odera
Court Clerk – Mutisya
Mr. Onserio for State

Mr. Tindi for Accused

COURT: I have considered the mitigation made by Mr. Tindi on behalf of the accused. I have also considered the probation report filed. The accused deliberately and in cold blooded way caused the death of his wife leaving her children motherless. From recent pronouncements of the Court of Appeal a death sentence is not a mandatory sentence. However a stiff punishment is called for. I therefore sentence the accused person to serve twenty-five years imprisonment.

Right of appeal explained.

M. ODERO
JUDGE
19.10.2011