



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 26 OF 2006

REPUBLIC PROSECUTION

=VERSUS=

SAMMY MUNYAO NZOKA ACCUSED

JUDGMENT

The accused **SAMMY MUNYAO NZOKA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“Between 30th day of September 2006 and the 5th day of October 2006 at Kwa Kyala Village Ruruma Location in Kilifi District within Coast Province murdered PHILOMENA DAMA”

The accused entered a plea of **‘not guilty’** to the charge and his trial commenced before the High Court in Mombasa on 16th December 2008. The State led by the learned State Counsel called a total of six (6) witnesses in support of their case. The accused was represented first by **MR. ORUKA** Advocate, but later by **MR. MUSHELLE** Advocate.

The brief facts of the prosecution case were that on 30th September 2006 neighbours to the accused and the deceased who were a husband and wife reported having heard the couple fighting during the night. On 5th October 2006 the deceased left her matrimonial home and went to her parent’s home. She arrived there, weak, ill and barely able to talk. The deceased reported to her parents that she had been assaulted by the accused who was her husband. She died later that night. The matter was reported to police who came and removed the body to the mortuary where an autopsy was conducted. Upon completion of police investigations the accused was arrested and charged with this present offence.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He opted to make an unsworn statement in which he denied having assaulted his wife or having caused her death.

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

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

This definition establishes three crucial ingredients of the offence of murder

(1) That a death has occurred

- (2) That such death was caused by an unlawful act or omission
- (3) That said unlawful act or omission was committed with malice aforethought

The fact of the death of the deceased cannot be in any doubt. **PW1 GRACE KAZUNGU**, the mother of the deceased confirms that her daughter died in her presence. The accused who was the husband of the deceased also confirms to the court that he saw the dead body of his wife.

Evidence regarding the cause of death was given by **PW4 DR. LAWRENCE NGONE** a medical officer attached to the Provincial Coast General Hospital Mombasa. **PW4** told the court that he conducted a post-mortem examination on the body of the deceased. He recorded his findings in a report dated 11th October 2006 which report was produced in court as an exhibit **Pexb1**. In his testimony **PW4** told the court that upon internal examination he found there was a ***“fracture of neck vertebrae which also involved the trachea”***. **PW4** proceeded to conclude that ***“the cause of death was caused by cardio-pulmonary arrest due to neck strangulation”***. I am therefore satisfied that the prosecution has adduced sufficient evidence on the cause of death of the deceased.

The prosecution case is that it was the accused who assaulted the deceased and this caused her death. There was no eyewitness to the assault. **PW2 MWANAMKAZI** a neighbour to the couple told the court that she only heard the couple fighting. She could not however leave her room to intervene as her door had been locked from outside. It is only when the deceased opened her door and ran into her room for safety that **PW2** saw the state she was in. Likewise **PW5 HUSSEIN MWANZIA** who was also a neighbour to the couple told the court that he heard them fighting on the night of 30th September 2006 but did not bother to come out to check as he was himself unwell. It was not until the next morning that he noticed that the deceased had a swelling on her neck. Five days later the deceased was dead. Both witnesses told the court that the deceased told them that it was the accused who assaulted her.

I have agonized over this case. Whereas the deceased died a couple of days **after** having been assaulted by the accused I am not convinced that the cause of death as found by the doctor is supported by the evidence adduced by the witnesses. I am not a medical expert but it is common knowledge that upon strangulation and more especially where fracture of the neck vertebrae has occurred then death is most likely to be instantaneous. It is highly unlikely that the deceased would have been able to get up run to the room of **PW2** go to hospital, and even go to her parent's home 20 kilometres away all with a broken neck. There is evidence that the deceased went to seek medical attention after her assault. It is impossible that her broken neck would have been overlooked by medical personnel. This is a critical injury which in my view would require urgent medical attention. I also find it extremely unlikely (indeed it would be a medical miracle) for the deceased to have been able to walk the 20 kilometres to her parent's home with a broken neck. Since the broken neck was the cause of death this in my view could not have happened on 30th September 2006 as she would have died (or at the very least have been totally immobilized instantly).

It could well be the case that the accused did strangle the deceased but if he did then her neck bones could not have fractured on 30th September 2006. If the neck fracture occurred later, then when, how and where did this injury occur? No answers are provided to these pertinent questions. Though I am satisfied that the accused did assault the deceased on 30th September 2006 I am not convinced that this assault caused her neck bones to fracture, leading to her death a full five (5) days later. As such I have serious doubts as to whether it was the accused's action of assaulting his wife that was the direct and proximate cause of her death five (5) days later. The benefit of this doubt must be settled in favour of the accused. I find that the charge of murder has not been proved beyond all reasonable doubt. I therefore enter a verdict of ***‘not guilty’*** and I acquit the accused under S. 306(2) of the Criminal Procedure Code. The accused to be set at liberty forthwith unless he is otherwise lawfully held.

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

M. ODERO
JUDGE

In the presence of:
Mr. Were holding brief for Mr. Mushelle
Mr. Onserio for State