



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Criminal Case 29 of 2004

REPUBLIC STATE

VERSUS

NYERERE MARANYA ACCISED

JUDGMENT:

The accused 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 the 21st day of February, 2004 at Nyamware Sub-Location within Kisii Central District of the Nyanza Province, Nyerere Maranya, the accused, murdered Christine Mongina Nyerere, hereinafter referred to as “the deceased.”

This case was fully heard by Bauni J but he passed away before he could deliver his judgment. It therefore fell upon me the responsibility of perusing the evidence on record and prepare the judgment. That was done with approval of the accused.

The prosecution evidence was that the deceased was the wife of the accused. She used to take alcohol.

Denis Gichaba, PW1, a son of the accused who was about 12 years old when he testified, told the court that on 21st February, 2004 at about 8.00 p.m., he was sleeping with his younger brothers and sister in a separate house from the main one. Their mother (the deceased) was sleeping in the main house. The accused had not yet arrived home. PW1 heard a baby that was with their mother crying. PW1 went and collected the baby and slept with her. When he went to collect the baby, PW1 found the deceased asleep. By that time the accused had still not come. When he woke up the next morning, PW1 found his mother dead on her bed. PW1 found the accused outside the house. The prosecuting state counsel, Mr. Chirchir, applied that the witness be declared hostile because he was testifying contrary to a statement which he had earlier recorded with the police. The court allowed the application and Mr. Chirchir proceeded to cross examine PW1.

He admitted in cross examination that in his statement he told the police that he heard his father beating up the deceased. PW1 changed his evidence again and said that he did not see the accused attacking the deceased.

Cross examined by Mr. Soire for the accused, PW1 said that by the time he was going to bed, about 7.30 p.m., the deceased had not yet arrived home but later on he heard some noise from the main house where their parents used to sleep. He also heard someone crying. The house was locked and PW1 could not get in.

Priscah Kerubo Lumumba, PW2, the accused's sister in law, testified that on 22nd February, 2004 at about 7.00 a.m. she was told by the accused's son that their mother was in their house but was not talking. When PW2 went to the house, she called the deceased but she was not responding. PW2 also saw blood stains in the room. She started screaming. At that time the accused was not present.

Peris Bwari, PW3, the accused's mother, told the court that on 22nd January, 2004 at 7.30 a.m. she took milk to the accused's home. She was told by one of the accused's sons that their mother had fallen sick. When PW3 entered the house where the deceased was lying, the deceased told her "I am dying." She did not say anything else. PW1 saw an injury on the head of the deceased.

At that time the accused was not there. Shortly thereafter the deceased died. PW3 went and reported to the village elder.

Charles Mogere Isebe, PW5, was outside his house on 22nd February, 2004 at about 10 a.m. when he heard that the deceased had died. He went to the deceased's home and ascertained that the information he had received was true. The accused was not at home. PW5 was told that the accused had gone to a self-help group at a place known as Gitare to look for money. PW5 went with some relatives of the accused to look for him. They found him at Gitare with some members of the self-help group. He was waiting to be given money.

They asked when he had left his home and he told them early that morning. He further told them that he had heard that his wife had died. When they went with the accused to his home, villagers wanted to beat him up but PW5 restrained them. Instead the accused was escorted to a police station.

Thomas Masese, PW6, said that on 22nd February, 2004 at about 10 a.m. they were meeting at Gitare as a self-help group. The accused was their member and was present. The accused wanted to be loaned some money.

PW5 came and informed them that the accused's wife had died. They stopped their meeting and went to the accused's home. They tried to inquire from the accused what had happened but he did not tell them anything.

Dr. Ezekiel Ogando Zoga, PW7, performed a postmortem examination on the deceased's body on 1st March, 2004. He testified that the body had a cut wound on the right hand, bruises on the right side of the face, superficial stab wounds on the left and right ear, injury to both eyes, bruises on the back and both knees. There was also blood under the skull. The doctor concluded that the cause of death was cardio-pulmonary arrest following multiple trauma on her body.

In his unsworn defence, the accused said that on 21st February, 2004 he left home and went to his place of work as a night watchman. When he returned home the following morning he found his wife asleep. She told him that she was sick. He had no money to take her to hospital. He therefore decided to go and borrow money from a self help group. While there he got a report that his wife had died. He returned to his home and confirmed that she had died.

Thereafter he was arrested and charged with murder. He denied having committed the offence.

From the foregoing evidence, it is apparent that the only direct evidence that tends to connect the accused to the death of his wife is that of PW1. Although there was no Voire dire examination of the witness, he was allowed to testify under oath. Voire dire examination of children of tender years is important before a court determines whether the child will give sworn or unsworn evidence. In MOHAMED –VS- REPUBLIC [2005] 2 KLR 138 the Court of Appeal held that in conducting a voire dire, Section 19 (1) of the Oaths and Statutory Declarations Act requires the court to establish two matters: firstly, whether the child understands the nature of an oath. If the court comes to that conclusion, then it proceeds straight away to swear or affirm the child and to record the evidence.

Secondly, if the court is not satisfied on the first test, it should express its opinion, not only that the child is possessed of sufficient intelligence to justify reception of the evidence, but also understands the duty of telling the truth, before proceeding to record the child's evidence.

The evidence of PW1 required corroboration. Both PW2 and PW3 told the court that on the morning of 22nd February, 2004, they saw the deceased in a critical condition. They saw blood stains in the room where she was sleeping. She had a visible head injury. The accused was not there. Although the accused said that he had gone to the self-help group to seek funds to take his sick wife (the deceased) to a hospital, according to the evidence of PW6, the accused did not tell the members of the self help group that his wife was unwell.

In my view all the evidence points to the fact that the accused was the one who assaulted the deceased on the material day. Upon realizing that she was in a critical condition he went to look for money hopefully to take her to hospital but she died before he returned from his money finding mission. I do not therefore believe the accused's defence. It is trite law that in a case dependent on circumstantial evidence, in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilty of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. See NZIVO –VS- REPUBLIC [2005] 1 KLR 699.

Though the evidence of PW1 was not consistent, it is noteworthy that shortly after the death of his mother, he recorded a statement to the effect that on the night of 21st February 2004 he heard his father (the accused) beating up his mother, the deceased. PW2 and PW3 corroborated that evidence because they were among the people who saw the injuries on the deceased's body before she died. The accused's absence from his home that morning was telling.

Having evaluated the evidence on record, I find the accused guilty of manslaughter. It was not established that he had malice aforethought. Consequently I acquit him of the charge of murder but convict him of manslaughter.

DATED AT KISII THIS 31ST DAY OF MARCH, 2009.

D. MUSINGA

JUDGE.

MITIGATION: The deceased was a wife to the accused. PW1 was the eldest child of the couple.

The accused has been in custody since 2004. He is remorseful. He prays for leniency.

D. MUSINGA

JUDGE.

COURT: Sentence on 1/4/2009.

D. MUSINGA

JUDGE.

SENTENCE: I have considered the mitigating factors as stated by Mr. Soire. Though the accused is sorry for causing the death of his wife, he deserves a custodial sentence, though not a long one, considering that he has been in custody for nearly 5 years.

The accused is sentenced to imprisonment for a term of three (3) years.

DATED, SIGNED AND DELIVERED AT KISII THIS 1ST DAY OF APRIL, 2009.

D. MUSINGA

JUDGE.