



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

CRIMINAL CASE 89 OF 2004

REPUBLIC.....PROSECUTOR

VERSUS

NAHASHON OYOKO NYAWADE.....ACCUSED

RULING

(Under Section 306(1) of CPC)

The Accused in this case is charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63). It is alleged in particulars of offence that between 1st February, 2004 and 28th February, 2004 at Olepolos Reserve, Ngong in Kajiado District within Rift Valley province he murdered Maria Wayua Nguku.

The first witness called by the Prosecution was Dr. Mutuku Wambua who performed autopsy on the body of the deceased although he was not a Government Pathologist and performed the post mortem at the request of relatives of the deceased. No other reason was given to why he was specially called from Kenyatta National Hospital, Nairobi to perform the same at Machakos District Hospital Mortuary.

Be that as it may, as per his evidence the body of the deceased had a skin break at the vertex with blood clot around its Margins, approximately 8 cm. from Right external auditory canal and extending deep to skull bone. On internal examination he found a skull fracture (linear) over median saggital suture – massive sub-dural Haematoma and in Nervous System he found Herviation of Medulla cerebral tonsil through foramen magnum. After his examination he formed an opinion that the cause of death was compromise of vital centres as a result of increased intracranial pressure secondary to sub-dural Haematoma.

In cross-examination he stated that he was sure about his finding and further testified, and I quote:

“In this case there is trauma. It was not easy to get time of injury. But it was not of long time. I would put minimum of 2 days. It cannot be as old as of two months even 15 days is unlikely.

I understand the deceased was brought to Machakos District Hospital for treatment. Skin was broken. There was no stitching done. It was visible without shaving of hair. The patient with that injury had to be taken for treatment”

Against this evidence I shall deal with evidence of PW.4 James Ratego Wanyande and PW.5 Sarah

Wanyoike. PW.4 is son of PW.5 and the deceased was working as a house maid at their home.

PW.4 testified that in early February, 2004 when he returned home about 12 p.m. he found the deceased sobbing at the dining table. When he asked her what was the problem she complained of a headache. He took her to a nearby dispensary but could not be seen as doctor was not available. At the request of the deceased, he purchased some pain killers and they went back home.

Towards the end of the same month he was informed by the Accused that the deceased was not well. She was taken to Kenyatta National Hospital. Thereafter she was again taken to Kenyatta National Hospital by deceased's brother, his mother (PW.5) which according to him was a Friday. Next day on insistence from the brother, he dropped the deceased and her brother to Machakos Bus stage and saw them boarding a matatu. Later he was informed by the Accused that the deceased had died.

In cross-examination he emphasized that he did not see any injury or cut or blood on the head of the deceased when he took her to dispensary or to Kenyatta National Hospital or to bus stage. What he stated that the deceased was visibly weak as she had to be assisted while boarding matatu.

Similarly PW.5 the employer of the deceased testified that she took the deceased to Kenyatta National Hospital for X-ray. That was done and she was told nothing adverse was detected and that she was prescribed pain killers.

Later on again the deceased complained about her headache which she said could be due to her toothache. She went to a Dental Clinic in Ngong. As there was no relief she went back to Kenyatta National Hospital and was prescribed pain killers. On a Friday she was taken to a clinic in Zam zam as she was not feeling well and was given pain relieving injection. Next day under insistence of her brother the deceased went to Machakos. She learnt later that the deceased died.

She also confirmed that she herself did not see any visible injuries or cut or bleeding on the deceased up to the date she was taken to Machakos.

Apart from these two witnesses other witnesses did not shed any light on the commission of murder.

PW.2 Geoffrey Munyua identified body of the deceased to the doctor who performed Post mortem.

PW.3 Joseph Ngumbi Makau is a Senior Chief of Kola Location and together with a brother of the deceased they reported the matter to Ngong Police Station.

PW.6 Dr. Kamau checked the Accused for Assessment of age, mental capacity and also on any physical injury of him.

PW. 7 PC Isaac Kinoti who arrested the Accused at the place of his work in Ngong after identification from PW.2 Geoffrey Munyua.

This is the evidence before me.

There is a total variance between the medical evidence and evidence of PW.2 and PW.5 as to the injuries on the deceased. As per the two witnesses (i.e. PW.4 and PW.5) till the deceased left Nairobi to go to Machakos there was no visible injury on the deceased. Even PW.1 the doctor who performed autopsy on 6th June, 2004, categorically observed that, the injury on the deceased could not be old. He put it as 2 days and stated further it is unlikely that it could be even 15 days old.

Moreover, there is no evidence linking the Accused with this offence otherwise also.

I do not have to strain myself any further and I can safely find that as per Section 306(1) of C.P.C. the Prosecution has not led any evidence against the Accused so as to link him in any way with the same. I shall thus enter a finding of not guilty against him under Section 306(1) of the C.P.C. and direct that he be

released forthwith unless held in custody otherwise as per law.

Dated and signed at Nairobi this 23rd June, 2005.

K.H. RAWAL

JUDGE

23.6.05