



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI

Criminal Case 20 of 2003

REPUBLICPROSECUTOR

VS

KHADIJA MWAKA YAWA ACCUSED

JUDGMENT

On the night of 31st January and 1st February 2000, the family of the deceased, comprising his wife, the accused and six children had dinner and retrieved to bed. At about 11pm, the deceased was heard calling the name of his first born, Halima (PW6) who rushed to his room only to find the deceased dead with a cut wound on the head. She alerted the rest of the family members.

Meanwhile, the accused was outside the house. She alerted the neighbours, who included Kaingu Reuben (PW&), James Kabochi (PW8) Baya Mramba (PW10) and Chira Kibanda (PW13). After investigations conducted by Cpl. Charles Kamau (PW1), the accused was arrested and charged with murder contrary to section 203 as read with section 204 of the penal code.

In her defence, the accused told the court how after retiring to bed, she left, the deceased in her bedroom as she went to the toilet, which was located some 30m outside the house. On her way back she learnt from her son, Mohammed Chilanga (PW3) that the deceased had been injured in the bedroom. She went in and confirmed this information. According to Dr. Kombo Powana (PW4) who conducted post-mortem examination on the body of the deceased, the body had a large deep cut wound on the right side of the head extending across the cheek. The cut caused a fracture on the underlying bones and the skull. It also caused brain damage. In his opinion the death of the deceased was caused by severe hemorrhage and brain damage. That constitutes, in summary the evidence adduced at the trial of this case.

From the medical evidence, the deceased died as a result of cut wounds and fracture of the skull which caused damage to the brain. Although there were eight people in the house where the deceased was murdered, there was no eye-witness to his murder. The case must, therefore, be decided on circumstantial evidence. But as is now well-established by case law, a conviction can only be founded on circumstantial evidence if the evidence adduced point irresistibly to the guilt of the accused to the exclusion of any other person. In addition, there must not be any co-existing circumstances, which would tend to weaken or destroy the inference of the accused person's guilt.

See **R V Kipkering arap Koske and another** (1949) 1 EACA 135 and **Musoke V R** (1958) EA 715 the circumstantial evidence in the instant case is that the deceased went to bed ahead of the rest of the family, who had dinner before going to bed. As the children went to bed the accused remained at the dinning table.

Briefly, after going to bed, Halima heard the voice of the deceased calling her. She rushed to the room

where the deceased was only to find the deceased dead with serious head injuries. One axe out of the 4 was missing from the room where Chizi Mijumaa Hassan (PW2) had kept them earlier on. It was later found with blood stain hidden outside the house. There were 2 doors to the house. There was also evidence that the accused was not pleased with the fact that the deceased had several women friends who would at times spend the night with the deceased in his matrimonial bedroom. These are the circumstances the prosecution has advanced to link the accused with the murder of the deceased.

In considering these circumstances, the court must bear in mind the defence of the accused that the deceased was attacked when she was out of the house. There is no dispute that the accused and deceased were in one room prior to the incident. It is in this room that the deceased was attacked and sustained fatal injuries.

Although the burden is on the prosecution to prove the case, against the accused, in circumstances of this case, this burden is shifted to the accused, under Section 111 of the Evidence Act, to show, on a balance of probability how the deceased came to sustain the injuries from which he died, considering that they shared the same room prior to the attack. If the accused does not discharge that burden, then the court is justified in drawing a presumption that she knew how the deceased met his death.

On the circumstantial evidence adduced, I am satisfied that the accused deliberately remained behind as the rest of the family retired to bed. The axe was stored inside the house with other farming implements. Apart from their children, there were no other people in the house. There was no reason for any of their six children to harm the deceased. Given the time the rest of the family went to bed and the time the deceased called out Halima, it is only the accused who had the opportunity to commit the offence. Otherwise, if there were intruders, the accused or her children would have seen or heard them. With the help of a torch light and using an axe, the accused attacked the deceased in bed hacking him to death.

Her version is not only far-fetched but also unreliable. Why did the intruder strike only when the accused was outside the house and not earlier or later? In a house with four rooms and at night, how would a stranger know in which room the deceased was sleeping? All these point irresistibly to the accused person's guilty. I find no co-existing circumstances tending to weaken or destroy the inference of her guilt. It is no wonder when the news of the deceased person's injuries were reported to her she did not appear surprised. In the result I find that the accused was responsible for the fatal injuries on the deceased. I also find that by remaining behind as everybody else went to bed and from the nature of injuries on the body of the deceased, that the accused had malice aforethought.

Although not explicitly raised as defence, it is clear that the accused was not pleased with the deceased's women friends who had no regard to her and her privacy. These women would spend the night in her matrimonial house with the deceased. Anytime they were visiting, the accused would be subjected to inhuman treatment by the deceased. She would be beaten and at times made to spend the night in a separate room when the deceased and his woman friend would sleep in her bedroom. Due to these differences, the parents of the couple came together to try and resolve these differences – but nothing came out of it as the deceased did not stop amorous manners. My understanding of what the accused was raising is that she was provoked. Do the circumstances outlined above come within the meaning of provocation as defined in section 208 of the penal code? Was the accused insulted by the deceased to such a degree as to deprive her of the power of self control? Was this a case of cumulative provocation? There is no doubt that the deceased was involved in two or three extramarital affairs, which did not please the accused. While this may have been evidence of provocation, law of the considered view that there was no justification on this occasion for the accused to have attacked the deceased. There is evidence that on the fateful night, none of the women in the deceased's extramarital life spent the night with the deceased. As a matter of fact the relationship between the deceased and PW11, according to the evidence of the accused, ended when the deceased beat up PW11. It was at this stage that he began another affair with a lady called Chizi, which affair also lasted for less than 2 months. It cannot, therefore, be true, as claimed by the accused that PW11 spent the previous night with the deceased in her bedroom. In her own evidence she confirmed that morning both her and the deceased went to work on their shamba together and that they were both happy.

From all this I find further that if there was any provocation, cumulative or otherwise, it was absent on the fateful night as the accused had long cooled off. All the three assessors' returned a verdict of not guilty. They were of the view that the accused was not linked to the death of the deceased and that since the deceased had many women friends, the possibility of their involvement could not be ruled out. Their opinion cannot be correct in view of the overwhelming circumstantial evidence that the accused committed the murder of the deceased.

For these reasons, I find that the prosecution has proved the case against the accused person beyond any reasonable doubt. The accused is guilty of murder, is convicted accordingly and sentenced to suffer death in accordance with law.

Right of appeal within 14 days explained.

[Dated and delivered at Malindi this 5th day of August 2005]

W. OUKO

JUDGE.

Before

W. Ouko –J

Mr. Shujaa for Mr. Machuka for Accused.

Mr. Ogoti for state

All assessors present

Accused present

CC - Gladys