



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL CASE NO. 46 OF 2001

MOSESIAN LENA KAE.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

The Accused person before this Court is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63).

The particulars of the offence are that on the 9th day of April 2000 at Sosian Sub-location in Laikipia District of the Rift Valley Province murdered JEMIMA LANAKAE.

PW 1, STAMPO LEKOIWA, a neighbour of the deceased, was the prosecution's main witness. He testified before this Court that on the material day, when he returned home from his farm, a child from the Accused's house came to call him. He went to the Accused's house where he found him with his two wives. As they sat down to have tea that was served by the Accused's 1st wife the Accused informed him that his 1st wife had been sick and had had an abortion. They slaughtered a goat and the 1st wife was given some soup. During all this time the 2nd wife (deceased) was present. PW 1 did not notice anything wrong with her as she was helping in the household chores. However, her head was covered. She said she had fallen down, but he did not inquire into details.

Contradicting himself, this witness then told the Court that he remembers asking the Accused what happened to the deceased. The Accused admitted that she had fallen down sometime ago. Before PW 1 left the Accused asked him to return the following morning so that they could take his 1st wife to the hospital.

On 12th April 2000 PW 1 went to the Accused's Manyatta and found him seated. He inquired on the progress of the sick 1st wife and he was informed that she had improved. PW 1 spent a few hours before he left, during which time he did not see the deceased (Accused 2nd wife).

On the 13th April 2000 he recorded a statement at the Police station in which he stated that he was from the Accused's Manyatta but did not find him. He went to the Police station in the company of the Accused's 1st wife to report the death of the deceased. The body of the deceased had already been taken to the mortuary by the police by the time they went back to the Manyatta. He remembered seeing the Accused before he was arrested. In cross examination PW 1 told the Court that he could not find any member of the deceased's family for identification for postmortem.

PW 2 PC Julius Rimbere, told the Court that he was on duty on the 12th April 2000 at the Police station when PW 1 informed him that his neighbour (the Accused) had beaten his 2nd wife (deceased) after a quarrel. They went to the Accused person's Manyatta at about 6.00 p.m. in the company of the O.C.S. On arrival they found the Accused's 1st wife and the body of the deceased lying inside the

Manyatta with a visible head injury. It was a deep cut on the fore head which appeared dry, indicating that it could have been inflicted previously. They took the body to the mortuary and went back to arrest the Accused.

PW 3 I. P. Hudson Mukunji, told the Court that on 12th April 2000 he received a report that a woman had been killed in Mathira village. He went to the Manyatta in the company of other police officers. On arrival they found a woman lying dead on the ground. She had a deep wound on her head which was not fresh.

PW 3, I. P. Mukunji, testified that he had recorded a statement under inquiry before arresting the Accused. The defence objected to the admission of this statement. In a trial within a trial this Court found that the statement was admissible. In this statement the Accused admitted that following a quarrel with the deceased regarding her alleged infidelity, he, the Accused, had hit the deceased with a stick.

PW 5 Dr. James Mbogua Mburu, told this Court that he performed a post-mortem on the body of the deceased upon identification by Nganga. The body was decomposed and he could not establish the cause of death. He produced PEX 2 as exhibit in Court of the post-mortem result. He testified on behalf of Dr. Kariuki who had examined the Accused and who had found him fit to stand trial.

PW 6 PC Fred Amugu, testified before this Court that he arrested the Accused after being informed by other Police Officers that he was wanted for the murder of Jemima Lenankae the deceased.

PW 7 I. P. Mutune Maweu, told the Court that on the 29th August 2000 the Accused was arrested and taken to the Police station where he made a statement of confession. The defence objected to the production of this confession, and the Court ruled that the same was not admissible.

PW 8 PC James Nganga corroborated the evidence of PW 2 and PW 3. They found a stick in the Manyatta which the Accused confessed using to beat the deceased. The stick was produced in Court as PEX 4. The Accused person chose to give unsworn statement in which he denied killing the deceased. All he said was that the deceased was sick a day before her death. He did not escape after the death of the deceased but was herding as usual being a pastrolist. On return he found his 2nd wife dead. He narrated, in a long statement, how he acted in accordance with his Customary Rites and Rituals, in taking care of the deceased before his death, and how he could do no more.

In his Submissions Mr. Mutonyi argued that the Prosecution had not proved its case beyond reasonable doubt. There were contradictions in the evidence especially by PW 1 who was their key witness. The statement under inquiry did not point to the guilt of the Accused. Moreso it was a repudiated confession and the Court should treat it with caution. (See **Tuwamoi vs Uganda (1967) EACA 91**. Secondly the evidence does not meet the principles laid down in **Kipkering arap Koske & Another vs. R.**

Medical evidence is crucial to conviction except where it is patently obvious. He cited the case of **Kinshato ole Stololo vs. Republic Criminal Appeal No. 70 of 1995.**

In addition to that, the Accused person cannot be convicted where there is no evidence of cause. He cited the case of Ndungu vs Republic (1985) K.L.R. 487.

Mr. Mutuku, Counsel for the Republic argued that they had proved their case beyond reasonable doubt. The Accused's behaviour was inconsistent with his innocence. He disappeared for 31/2 years after the death of the deceased (his 2nd wife), and also identified the murder weapon. In the absence of the post-mortem the Accused must be deemed to have caused death by assaulting the deceased.

Now, let me comment briefly on the law relating to proof or cause of death. In this case there is no medical evidence on the cause of death. The doctor testified that the body of the deceased was so decomposed that he could not conduct a post-mortem and could not identify the cause of death.

Relying on the Tanzanian High Court case of R. v. Cheya (1973) E A 500 the Prosecution argued that

the death and cause of it could be established otherwise than by medical evidence, and that the Accused person's admission that he hit his deceased wife with the stick proved that the deceased died as a result of that assault.

Ondeyo, J. in *R. v. Peter Mwangi Kariuki* (Nakuru HCCC 37/2000) agreed with the Cheya decision and held that *"although the doctor who performed post-mortem was unable to ascertain the cause of death, the circumstantial evidence adduced, points to the accused as the person who killed the deceased person."* Justice Ondeyo came to this conclusion because, as she observed (on page 10) *"there were witnesses who saw the (accused) and others viciously assaulting the deceased and inflicting injuries upon his body."*

The Court of Appeal, in *Ndungu v. R. (1985) K.L.R 487* had the opportunity to review the Cheya decision, and said as follows:

"It is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the Judgment, that the Judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision."

The Court then laid the following principle, which must be applied to the case before this Court:

"That (Cheya) decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course, there are cases, for example, where the deceased person was stabbed through the heart or where the head is crushed, where the cause of the death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of the death in the circumstances relied on by the Prosecution."

In order for a Court to convict an accused person based solely on circumstantial evidence, the law as set out in the case of *Kipkering arap Koske vs Republic (1949) 16 EACA, 135* is that:

a) The inculpatory facts must be incapable with the innocence of the accused.

b) They must be capable of no other conclusion or explanation except the guilt of the accused.

Is the circumstantial evidence here so strong as to point irresistibly to the guilt of the Accused? The cause of the death is unknown, because no post-mortem was carried out. None could have been carried out because the body was completely decomposed. The one single piece of evidence that might implicate the Accused is his own admission that he assaulted the deceased with a stick following a domestic quarrel centered on the deceased's alleged infidelity. There is no evidence of where exactly he hit the deceased, nor of the fact that that was the fatal blow that killed the deceased. On the other hand, there is evidence of the fact that the deceased may have fallen down and hurt her head, raising the possibility that that head injury could have resulted in her death.

There are far too many questions unanswered, and this Court is far from coming to the conclusion that the case against the Accused has been proved beyond reasonable doubt.

Two Assessors returned a verdict of guilty of manslaughter, while the third returned a verdict of guilty of assault. I choose to disagree with them in entirety and I find the Accused Mosesian Lenakae not guilty of murder and order that he be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Nakuru this 29th day of July, 2004.

ALNASHIR VISRAM

JUDGE