



**Republic v Simiyu (Criminal Case 28 of 2019)
[2024] KEHC 3863 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 28 OF 2019**

DK KEMEL, J

APRIL 19, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

BABRA CARO SIMIYU ACCUSED

JUDGMENT

1. The accused herein Babra Caro Simiyu has been charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on the 7th day of August, 2019 at Mwangi "A" village Kibisi sub-location Bungoma North Sub County within Bungoma County she murdered Ronald Simiyu Wekesa.
2. The accused denied the charge and that the prosecution called six witnesses in support of its case.
3. Samuel Mukhwana Kakai PW1, testified that on the material date at around 8.00 pm the accused turned up at his house and informed him that she was preparing to leave for her parents' home and let her husband (deceased) live his own life. She informed him that her husband (deceased) was too drunk and was then lying down. He accompanied her to her house but on reaching there, she refused to enter the house. He entered the house and saw the deceased lying down on the floor while bleeding profusely. He raised alarm attracting the villagers. He testified that the deceased was groaning but could not talk and that he died afterwards. On cross examination, he stated that the deceased had been a drunkard in the area. He stated that the accused had been known to have mental problems for six years prior to the incident. On re-examination, he stated that the accused was not in good mental state but he could detect accused at times knew what she did.
4. Barasa Wekesa (PW2) testified that he joined other people in rushing the deceased to Lugulu Mission Hospital where he died on arrival. He stated that he visited the scene and saw blood stains on the floor. He finally added that the accused used to suffer from mental illness.



5. George Nyongesa Wekesa (PW3) testified that the deceased was his brother and that he visited him at Kibisi dispensary and saw injuries on the nose, mouth, face and head. He added that the accused used to have mental problems.
6. Wekesa Bonaventure (PW4) testified that the deceased was his brother and that he rushed to the scene and found him unconscious and bleeding profusely. He added that they rushed him to hospital but he was pronounced dead on arrival. He finally stated that the accused used to have mental problems.
7. Dr Reuben Kere Nyongesa (PW5) testified that he conducted a post mortem examination on the body of the deceased and noted a fracture of left leg as well as bruises on the face plus a distorted left ear. He also noted some fractures on the parietal and skull bones. He also noticed blood oozing from the ears and nose. He also noted blood inside the brain. He formed the opinion that the cause of death was critical head injury due to blunt injuries as a result of physical assault. He produced the post mortem report as exhibit 1. On cross examination, he stated that he could not tell if the injuries had been inflicted by a mob or one person.
8. No. 80326 PC Philip Kibet (PW6) testified that he visited the scene and saw blood stains on the wall. That he proceeded to the mortuary and noticed injuries on the head and chest that a post mortem examination was conducted on the body. That he later escorted the accused for mental assessment in which the doctor indicated that she was not fit to stand trial and was placed on treatment and when she got well, she was allowed to proceed with the trial.

On cross examination, he stated that it was Chief inspector Mutie who conducted the investigations.

9. Thereafter, the prosecution closed its case. Learned counsels for the parties opted to rely on the evidence so far adduced at this stage of the proceedings and left the court to decide on the singular issue of whether the prosecution has established a *prima facie* case against the accused. A *prima facie* case was later established to have been made out by the prosecution and that the accused was placed on his defence. She opted to tender a sworn testimony.
10. Babra Caro Simiyu (DW1) testified that she is a resident of Tongaren and that the deceased had been her husband. She stated that she did not plan to kill him and that her husband had taken away her only Kshs 2000/ which was meant to assist her children. That the accused used to be an alcoholic. That on the material date the deceased arrived home from his drinking spree and that on confronting him over the money, he became violent and used a piece of wood and attempted to hit her but she blocked it and that a second attempt hit her and that she fell down. That she managed to get up and hit him with the said piece of wood on the head and neck and that he became unconscious. That she rushed out and alerted her neighbour one Samuel Kakai over the matter and who organized to rush the deceased to hospital while she was escorted to the police post. That she agrees with the evidence of Pw1 who had confirmed that the deceased had been an alcoholic as well as a drug addict and a violent person. That she was actually defending herself. She also stated that in the past she had mental challenges as confirmed by doctors and that she used to take medication.

On cross-examination by the learned prosecutor, she stated that she had lived with the deceased for six years and were blessed with six children. That she had a troubled marriage as the deceased was an alcoholic and who abused drugs. That she was not happy about the conduct of the deceased who was always violent towards her.

11. Learned counsel for the defence filed submissions while the prosecution opted to rely on the evidence so far tendered. Miss Wakoli for the defence submitted that the accused pleaded not guilty to the charges after she had been taken through a long period of medication. It was submitted that none of the prosecution witnesses gave evidence to the effect that they witnessed the incident and that the accused



formed the requisite intention or motive to kill the deceased. Counsel submitted that the accused did not possess the required mental capacity capable of understanding what she was doing or knowledge that she ought not to do or make the omission leading to the death of the deceased. It was submitted that the initial mental assessment report did confirm that the accused was not fit to stand trial and was put on medication for a long period of time. Reliance was placed in the case of *R Vs Tubere S/o Ochen* [1945] 12 EACA 62.

12. It was further submitted that since there was no eyewitness account of how the incident took place, the court ought to believe the version of the accused in that she acted under provocation and in self defence. Reliance was placed in several cases namely *Peter Kingori Mwangi & 2 Others Vs R* [2014] eKLR, *Mabanga vs R* [1974] EA 176 *Lucy Mueni Mutava Vs R* [2019] EKLK. Learned counsel submitted that the defence evidence left no doubt that the accused had been provoked by the actions of the deceased who took all her hard-earned money and attacking her when she demanded for it and that the acts of the deceased caused the accused herein to lose sudden self-control and hence the incident. It was finally submitted that the prosecution did not prove the charge of murder beyond any reasonable doubt against the accused.
13. I have considered the evidence tendered by both prosecution and defence and the submissions presented herein. It is trite that the burden to prove the ingredients of the offence herein falls on the prosecution in all cases save only for a few statutory offences. The standard of proof in all criminal cases is that of beyond any reasonable doubt. Proof of beyond reasonable doubt has however been stated not to mean beyond any shadow of doubt. The standard is discharged when the evidence is so strong that only a little doubt is left in his favour. See *Miller vs Minister of Pensions* [1947] ALL ER 372. In discharging the burden cast upon it by law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since she/he does not have the burden to prove his/her innocence or to justify his/her alibi. The four ingredients that the prosecution is required to discharge in a charge of murder are; that there was death of a human being; that the death was unlawfully caused with malice aforethought either directly or indirectly by the accused.
14. As regards the fact of death, there is a post mortem report produced by Dr Reuben Nyongesa Kere (Pw 5) who conducted the autopsy on the body of the deceased and who noticed bruises on the face, fractures on parietal and skull bones as well as blood oozing from the ears and nose and that there was blood in the brain. He formed the opinion that the cause of death was critical head injury due to blunt injuries as a result of physical assault. This ingredient was proved by the prosecution.
15. As regards the identity of the accused as the assailant, the evidence of the prosecution witnesses placed her at the scene of crime as she was the wife of the deceased and had lived with him. The accused is the one who rushed to her neighbour (Pw1) who escorted her back to her house where the deceased was found already injured and who organized to take him to hospital while the accused was escorted to a nearby police post. The accused in her defence evidence gave a vivid account of how the incident happened and that she gave a blow by blow account of her encounter with the deceased as soon as he arrived home on the fateful night. The accused duly admitted to have assaulted the deceased in self defence after he had struck her with a piece of wood. She was and was thus placed at the scene of crime. Hence, this ingredient has been proved by the prosecution beyond any reasonable doubt.
16. As regards the unlawful nature of the death, the law presumes all homicides to be unlawful unless it occurs as a result of an accident or is one authorized by law or where circumstances make it excusable. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property. (See *Guzambizi Wesonga Vs R* [1948]15 EACA 65).



17. The offence of murder that has been preferred against the accused is found in section 203 of the [Penal Code](#) which provides that any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder. The ingredient of malice aforethought is found in section 206 of the [Penal Code](#) which provides as follows:

Section 206

- (a): an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not
 - (b) Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not happen.
 - (c) an intent to commit a felony
 - (d) an intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony.
18. Miss Wakoli, learned counsel for the defence has submitted that the accused ought not to be blamed for the offence for two reasons namely, that she was not in good mental state at the time of the incident and secondly that she was acting in self defence after the deceased who was then visibly drunk, had attacked her with a piece of wood. The two issues raised by counsel appear to be germane regarding the circumstances of this case as it has emerged from the evidence that the accused has had some mental challenges for which she had to undergo treatment for quite some time before being confirmed fit to plead to the charges. It also emerged from the evidence of the defence that the accused was acting in self defence after being attacked by the deceased who was her husband. All these defenses must be seen through the prism of the requisite ingredients provided under section 206 of the [Penal Code](#).

As regards the mental attributes of the accused, it is worth looking at the provisions of section 12 of the [Penal Code](#) which provides as follows:

“A person shall not be criminally responsible for an act or omission if at the time of doing the act or making the omission he was through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

Flowing from the above provision, the defence have submitted that the prosecution did not discharge its duty of establishing beyond any reasonable doubt that the accused had the requisite mental capacity and intention to cause death or grievous harm to the deceased. The record shows that indeed, the accused could not take plea at the time she was arraigned in court and had to undergo treatment for sometime before she become mentally fit and was allowed to plead to the charge of murder herein. The record shows that the accused has been able to participate in the proceedings up to the close of her defence case. I am not persuaded that the accused was under any mental incapacity at the time of the incident in that as soon as she had attacked the deceased, she went to her neighbour (Pw1) and alerted him about the same and further led him back to the scene where the deceased was found. Pw1 stated



that on reaching the scene, the accused was hesitant to enter her house. All these actions appear in my view to be those made by one who knew what she was doing. This is notwithstanding that the accused used to have some on and off mental challenges in the past. I am therefore not persuaded by the defence claim of mental incapacity at the time of the crime. It is highly likely that the accused had the requisite mental capacity at the time of the incident.

18. As regards the second issue raised by the defence counsel namely that the accused was under provocation at the time of the incident, it transpired from the evidence that the accused and deceased used to have a tumultuous marriage full of frequent fights as the deceased was a known alcoholic and a drug addict. The accused's main line of defence is that she had been attacked by the deceased with a plank of wood and that she had to defend herself by hitting him back. She was thereby raising the defence of provocation. Provocation is stated under section 208(1) of the *Penal Code* as follows:

“The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

The above provision gives the circumstances under which provocation as a defence can be resorted to. The accused and the deceased had lived as wife and husband for a long period and had been blessed with children. The two had frequent fights owing to the conduct of the deceased as a known alcoholic and a drug addict in the area. The accused in her defence and with emotions recounted the incident and maintained that the deceased arrived home while intoxicated as usual and upon being confronted by the accused about the whereabouts of the accused's Kshs 2000/ that he had snatched earlier in the day, he became violent and assaulted her with a piece of wood and that she was compelled to defend herself by hitting him with the same weapon and then rushed to alert her neighbour (Pw1) about the incident and led him to the scene. Under those circumstances, it is highly likely that the accused who had been assaulted frequently could not hold any longer and decided to retaliate. It has been held in the case of <http://kenyalaw.org/caselaw/cases/view/103428/> Peter Kingori Mwangi & 2 Others Vs R [2014] eKLR that for provocation to exist, certain conditions must be established namely; the subjective condition that the accused was actually provoked as to lose his self-control and the objective condition that a reasonable man would have been so provoked. Again, the Court of Appeal in the case of Elphas Fwambataok Vs R [2009] eKLR on the issue of provocation held as follows:

“In our view once a person is provoked and starts to act in anger he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case several injuries can be inflicted within a very short time particularly if one has a panga- we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims...”

Going by the above authority, it is clear that a defence of provocation is available in certain circumstances such as in defence of oneself or property. In homicide cases, a court is under a duty to consider whether there was provocation so as to decide whether or not an offence of manslaughter had taken place. Under section 207 of the Penal Code, certain circumstances which on the face of it could suggest an offence of murder can turn out to be manslaughter. The section provides that when a person who unlawfully kills another under circumstances which, but for the provisions of this section, would



constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

19. Looking at the evidence of both prosecution and defence, what emerges is that the accused and deceased lived a troubled marriage full of frequent fights. Prior to the incident, the deceased had squandered the accused's hard earned Kshs 2000/ and the situation was worsened when the deceased assaulted her with a plank of wood and in which she retaliated by hitting him with the same weapon. I find the circumstances obtaining did not establish the ingredient of malice aforethought on the part of the accused to lead to a charge of murder. I find this was something like a spur of the moment and in anger. I find the action by the accused was due to provocation and that she had been pushed to the limit by the actions of the deceased in attacking her for confronting him over the misuse of Kshs 2000/. There was thus a temporary loss of self-control on the part of the accused leading to her killing her husband of six years. I find under the circumstances, the evidence adduced supports a charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code.
20. In view of the foregoing observations, it is my finding that the prosecution has not proved the charge of murder beyond reasonable doubt but that it has proved a charge of manslaughter against the accused contrary to section 202 as read with section 205 of the Penal Code. I Find the accused herein Babra Caro Simiyu guilty of the offence of manslaughter and is convicted accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF APRIL 2024

D.KEMEI

JUDGE

In the presence of :

Babra Caro Simiyu Accused

Sabwami for accused

Miss Kibet for Prosecution

Kizito Court Assistant

