



REPUBLIC OF KENYA



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**Republic v Amoi (Criminal Case 60 of 2016)
[2024] KEHC 16225 (KLR) (17 December 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 60 OF 2016
HI ONG'UDI, J
DECEMBER 17, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

SAMWEL KIDIGA AMOI ACCUSED

JUDGMENT

1. Samuel Kadiga Amoi stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the 20th day of October, 2016 at Kamukunji Trading Centre in Rongai sub-county within Nakuru county murdered Anne Adhiambo.
2. The accused denied the charge and the case proceeded to full hearing with the prosecution calling five (5) witnesses with the post mortem report being produced by consent as P. EXB 1.
3. PW1 Lilian Akinyi a sister to the deceased lived in Rongai. She testified that on 20th October, 2016 at 8:00am she received a report from a neighbour's wife called Kamau. She informed her that her sister and her husband (the accused) had fought the previous night. Further that when Mr. and Mrs. Kamau woke up the next morning the deceased never came out of the house. However, the accused got out of the house and locked it. PW1 notified their parents and went for her mother with whom she came to the deceased's house. She followed the accused and got the house keys from him.
4. In the house she found the deceased lying dead on a mattress while covered with a mattress in their one bedroomed house. She stated that the deceased and accused used to fight.
5. In cross examination she said members of the public came with sticks and runigus ready to beat the accused. In fact, he was seriously injured, from the beatings.



6. PW2 – Margaret Omollo and PW3 – Rogers Isaac Odego Kadege are the deceased’s parents. They were notified of the incident by their daughter PW1. PW3 went to the accused’s house and confirmed the death. Both knew the accused as their daughter’s husband.
7. PW4 Ezekiel Kinyua Mwegeera the chief of Bisoi Location Rongai division rescued the accused from a mob that was beating him for killing his wife. This was on 20th October, 2016.
8. PW5 No. 51276 Cpl Evans Kahindi Kapombe testified that he received the death report from PW3. The accused who was badly beaten was then brought to Rongai Police station. They went to the scene and found the deceased’s body lying on the bed with a swollen neck. The accused had taken all his clothes and was running away. He had been arrested with a suitcase, which was not produced as an exhibit. Photos of the scene were taken but were equally not produced.
9. The post mortem report dated 28th October, 2016 was on 14th February, 2022 produced as (P EXB 1) by consent of both the prosecution and defence. PEXB 1 showed the cause of death as:

“Asphyxia with head injury due to pressure to the nose and mouth”. There was multiple blunt trauma to the head. The post mortem was done by Dr. Titus Ngulungu.
10. When placed on his defence the accused gave a sworn statement of defence without calling any witness. He testified that the deceased was his wife. On 19th October, 2016 morning (5:00 am) his wife woke up but informed him she was unwell. He went to light the jiko and a man came looking for her. He called her and she came but on seeing the man she closed the door and the man left. After tea they both left for the shamba. On the way he asked her to go back and rest. At 10:00am he saw her carried on a motorbike. On being asked where she was going she told him she was going to greet her parents.
11. Later at 1:00pm she came to the shamba and they collected the harvested maize which they placed in 2 bags and left for the house while carrying the maize on a different motor bike. While home he sent her to buy sacks for maize but she refused so he went to buy them. When he returned she was not there and the door was closed. He later went to the shops at Kamukunji of Rongai. He learnt that the deceased had been seen being driven on a bike to Salгаа. He too left for Salгаа.
12. Reaching there he called her but she never picked his call. Next, she picked his call but never spoke. He only heard the music. He followed and found her in a bar with a man. She bent down on seeing him. He passed by but she followed him. He later went to the stage where a certain man asked him if he knew the man who had been in the bar with his wife was an officer.
13. They later left on different motor bikes for home. The deceased apologized profusely and even untied his shoes which she had never done before. At 10:00pm they heard a knock on the door but she told him not to open. The man at the door spoke in dholuo which he does not understand.
14. At 4:00am she was up and warned him that if he ever followed her where she had gone they would not live together. She held the blanket and he woke up when he left to go and relieve himself she slapped him and took a sufuria with water and ugali crumbs which she poured on him. He turned and pushed her against the wall and she hit the back of her head and went to bed.
15. He left for the shamba and to return the sacks, and closed the door. When he returned he found the door closed from the outside but power was on. He entered and sat for 20 minutes after which he rose up to put off the lights. He found the deceased in the blanket and she did not respond to his calls. He checked on their neighbours but they were not there. He went to PW1’s place but they did not meet. He later saw her carried on a motorbike. The bike stopped as PW1 was shouting saying he had



killed her sister. He was thereafter attacked by a mob, but he was saved by the chief and taken to Molo police station.

16. It was his evidence that they lived well before the deceased started relating with men. He denied attacking PW1, nor killing the deceased or strangling her.
17. In cross examination he said him and deceased had been married for 16 years and they had four (4) children. They lived without the children as their son lived with his mother while their 3 daughters lived with his mother in law. He said the man who came to their house that morning was only known to him physically. This was not the one he had found the deceased with in the bar. He confirmed having been slapped that morning of 20th October, 2016 by the deceased. He admitted to not having tried to find out how she was doing. He denied ever having beaten her.
18. Both counsel filed written submissions.

Accused person's submissions

19. These were filed by Wachira Waiganjo and are dated 11th October, 2024. Counsel submitted that the evidence by the prosecution witnesses is not credible. He stressed that the suitcase and blood clothes referred to by PW5 and photos taken at the scene were never produced and the investigating officer did not testify. The wife of Kamau referred to by PW1 did not also testify.
20. On the accused's defence counsel submitted referring to sections 207 and 208 of the Penal Code which provides:

Section 207:

“When a person who unlawfully kills another under circumstances which, but for the provisions for this section, would constitute a murder, does the act which caused 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”.

Section 208:

- (1) 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 a woman who stands in 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.
- (2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
- (3) A lawful act is not provocation to any person for an assault.
- (4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing and assault is not provocation to that other person for an assault.



(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality”

21. He further referred to the case of *Tel s/o Kabaya V Republic* [1961] E.A which stated the circumstances which a court should consider in deciding whether one was provoked before doing a certain act. The court held thus:

“In considering whether provocation was sufficient to reduce offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used”.

22. On the same issue he further referred to the case of *Republic V Ali Duale* [2017] eKLR where it was stated:

“Having found that the crime defined as murder has not been proved by the prosecution and taking into account that the deceased died as a direct consequence of a vicious fight with the accused, and having found that the accused was provoked and also that he acted in self defence without the intention to kill the deceased, I will now consider the provisions of section 207 of the Penal Code which provide as follows:

“When a person who unlawfully kills another under circumstances which, but for the provisions for this section, would constitute a murder, does the act which caused death in the heat of passion caused by sudden provocation as hereinafter define and before there is time for his passion to cool, is guilty of manslaughter only”.

Also see: (i) *Republic V Hussein s/o Mohammed* [1942] EACC (ii) *Elphas Fwambato V Republic* [2009] eKLR. He thus submitted that from the accused’s defence he was provoked by the deceased’s actions into doing what he did.

23. The last issue he raised is whether the prosecution established its case and discharged its burden beyond reasonable doubt. On this counsel referred to the ingredients for proof of a murder charge as envisaged under section 203 of the Penal Code, which must be read alongside section 107 of the Evidence Act. Referring to the evidence adduced he argued that no ill intention was proved to have been present when the accused acted the way he did. Further that he should be acquitted of the charge of murder since none of the ingredients of the charge of murder was established.

Prosecution’s submissions

24. The same are dated 31st October, 2024 having been filed by Mrs E. Okok principal prosecution counsel for the prosecution. She referred to the prosecution and defence evidence. Counsel pointed out that in cross examination the accused stated that the deceased slapped him for the first time that day. That he never bothered to find out how the deceased was doing after he pushed her against the wall. There was no other person in their matrimonial home, she submitted.

25. On the defence of provocation brought up by the accused on the issue of extra marital affairs, and being slapped and poured water on by the deceased, counsel referred to sections 207 and 208(1) of the penal code on the meaning of provocation. She further cited the case of *Peter Kingori Mwangi & 2 others*



V Republic [2014] eKLR on the necessary ingredients to prove provocation as stated by the Court of Appeal Mombasa. These are:

- i. The 'subjective' condition that the accused was actually provoked so as to lose his self-control: and
- ii. The 'objective' condition that a reasonable man would have done so.

26. She submitted that the defence of provocation does not apply in this instance. She argued that had the accused reacted when he saw the deceased with a man that would have been provocation and not what he did later in the house. It is her submission that their case was proved to the required standard. She urged the court to convict the accused of murder as charged.

Analysis and determination

27. The offence of murder is defined under section 203 of the Penal Code which provides that:

“A person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

28. The offence of murder requires proof of the following ingredients beyond reasonable doubt.

- i. Proof of death and its cause.
- ii. Proof that the death was due to an unlawful act or omission – (actus reus) and the involvement of the accused
- iii. If accused caused the death was it with malice aforethought? (Mens rea)

29. On whether the deceased died as claimed, the record has the evidence of PW1, PW2 and PW3 who are the sister and parents of the deceased. They all confirmed that the deceased had died. PW5 a police officer from Rongai police station received a report of the murder while on duty. Together with others they visited the scene at Kamukunji. They found the deceased's body lying on the bed in their one roomed matrimonial house. The accused also confirmed the death. The post mortem was conducted by Dr. Titus Ngulungu who did not testify. The prosecution and defence counsel on 14th February, 2022 by consent had the post mortem report dated 28th October, 2016 produced as P EXB 1. The report as is stated at paragraph 10 of this Judgment confirms that the death was not a natural one.

30. The next issue is that of the killing which is the actus reus. In this case there is no one who witnessed the actual killing of the deceased. The available evidence from the prosecution is circumstantial. None of the neighbours and in particular Mrs. Kamau came to testify. However, the evidence from both the prosecution and defence is that the accused and deceased who were husband and wife lived alone in a one bedroomed house. They were blessed with four (4) children, three (3) of whom lived with PW2 and PW3 while their only son lived with the accused's mother. They had been married for 16 years which meant their children at the time of incident were minors. There must have been a reason why they were not living with these children.

31. Without going into a long story, the accused in his sworn evidence explained in great detail what allegedly happened between him and his beloved wife on the day prior to her death and on the early morning of 20th October, 2016 when she died. It is him who pushed the deceased against the wall in their house and she hit the back of her head on the wall. From there she went to lie in bed. He left her there, and never checked on her, to see how she was fairing on.



32. Upon his return to the house he found his dead wife in bed. The accused was the last person to be seen with the deceased while alive. His defence is a mere denial. The post mortem report (EXB 1) has confirmed the cause of death to have resulted from serious head injuries.
33. The accused cannot be allowed to blow hot and cold at the same time. He denied killing or strangling the deceased. At the same time, he admitted having pushed her against the wall causing her to hit the back side of her head on the said wall. Infact there is no evidence about strangulation in the prosecution case. There is no evidence of anybody else having come to their house after he left her after the incident.
34. With all the evidence on record, I find that the accused's unlawful act of pushing the deceased against the wall caused the injury that led to her death as found by the doctor who conducted the post mortem.
35. The next issue for determination is whether the prosecution proved the element of the intention to kill as is required by the Law. The accused had pleaded provocation as the cause of his action. The Penal Code defines under sections 207 and 208 what provocation is. This has been captured under paragraph of this Judgment. Further section 209 (1) of the Penal Code provides:

“It shall be manslaughter and shall not be murder for a person acting in pursuance of a suicide pact between him and another to kill the other or be a party to the other killing himself or being killed by a third person”.
36. The Black's Law Dictionary defines provocation as “such conduct or actions on the part of one person towards another as tend to arouse rage, resentment or fury in the latter against the former”. I am further guided by the Court of Appeal decision in the case of Peter Kingori Mwangi & 2 others (supra)
37. It is not lost to this court's mind that the accused and deceased were husband and wife. They lived alone in their one roomed house. The accused gave a narration of the happenings of 19th and 20th October, 2016. He accused the deceased of extra marital affairs. Besides stating that he found the deceased talking with a man at the bar he did not state what the two of them were doing that would have provoked him.
38. As for the man who allegedly came to their house early morning of 19th October, 2016 he said the deceased saw the man and closed the door. She had initially told him not to open the door. Why did he open it? He went on to state that she slapped him and even poured dirty water on him. According to him its after he was slapped and water poured on him that he pushed the deceased against the wall.
39. I have carefully gone through the evidence of all the witnesses (PW1 – PW5) and I find that at no point did the defence raise the issue of provocation in cross examination. PW1, PW2 and PW3 who are the closest family members of the deceased were never asked anything about the alleged conduct of extra marital affairs by the deceased during cross-examination.
40. This court is aware that this incident occurred in the presence of just the two parties being the accused and the deceased. Nobody witnessed the incident. Those who “heard” the scuffle did not appear to testify, and unfortunately the deceased is not here to give her side of the story.
41. It is only God, the accused and the deceased who know what transpired in the single roomed house on that early morning of 20th October, 2016 that led to the demise of the deceased. That aside, the fact is that it is the accused who fatally injured the deceased, by hitting her head against the wall.
42. It may be true that the deceased slapped the accused and poured water on him which is neither here nor there. Since there is no one who witnessed the incident, to confirm or rebut the accused's defence his allegations remain unchallenged. Having been a couple living alone no one may be able to tell exactly



what happened between them. What remains as a fact is that the accused's push of the deceased's head against the wall culminated in her death.

43. The post mortem report reveals that the cause of death was Asphyxia with head injury due to pressure to the nose, mouth with multiple blunt trauma to the head. Asphyxia means lack of oxygen or excess of carbon dioxide in the body that is usually caused by interruption of breathing and that causes unconsciousness, or death; suffocation.
44. Besides the asphyxia there was also multiple blunt trauma to the head. This was not anything accidental. After weighing all this evidence including the accused's defence, I find that the intentional killing has not been proved. The accused may have been provoked but he should not have acted the way he did.
45. I therefore reduce the charge against him to Manslaughter contrary to section 202 as read with section 205 of the Penal Code. He is thus convicted accordingly.

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF DECEMBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

