



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NO. 25 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

DNM.....ACCUSED

J U D G E M E N T

The accused **DNM** is charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on the 30th May, 2019 at Tumyo village, Bisunu location in Bungoma West Sub-location within Bungoma County murdered **DWK**

The case for the prosecution is that on 30.5.2019 PW4 AWS was at his house at 8 p.m. when he heard children crying from the home of deceased **DWK**. He went there. On arrival he found the deceased lying down in his compound near a Mango tree. He observed that deceased was bleeding from the chest. The deceased pleaded with witness to take him to hospital as he had been stabbed by “ Mtoto huyu shemeji yangu D.” Another neighbor Tobias came and administered first aid. They looked for a motor cycle and took him to Sirisia hospital where he died while undergoing treatment.

PW5 TMJ was in his house when he heard screams by children from deceased house. He went there. On arrival he found many people present and deceased lying down. The deceased was able to talk. He said D had killed him. He dressed him in a shirt and they took him to Sirisia hospital where he died while undergoing treatment. In cross examination he said the children were crying that deceased was beating their mother Caroline. At the scene both accused and deceased wife Caroline were present.

PW7 PN a child aged 9 years and in class 3 and daughter of deceased testified that on the material day, they were in the house with her siblings when deceased came home drunk. The accused who was in the house asked him for money for stones. Accused told deceased that if he is not giving her the money he will not sleep there. Deceased told her that she is the one to go. Accused together with Caroline started fighting the deceased. Accused picked a knife and stabbed the deceased on the hip. He started bleeding. Accused then went and threw the knife in a pit latrine. They screamed and people came who took deceased to hospital. She later received information that her father had died. PW8 AW who was with PW8 testified on similar terms.

PW10 EWM responded to the screams from the home of deceased. She ran there. On arrival she saw the deceased fighting with his wife C near a store. The wife was lying down and deceased was on top of her. She saw accused at first throwing stones at deceased and then went removed a knife and stabbed the deceased on the chest. The deceased started bleeding. Many people came and took deceased to hospital where he died.

PW13 NO. 225254 Cpl Bernard Mulubi the Investigating Officer was directed by the DCIO to proceed to a scene of murder. He went to the scene. On arrival he found many people and was informed that accused was at home of the village elder. He observed there was a blood trail that led to a pit latrine. They followed it and using a magnet retrieved the knife. They then arrested accused. He took the knife, blood stained shirt of deceased, deceased blood sample and blood stained soil to Government Analyst whose report showed the blood on the items belonged to deceased.

The accused upon being placed on her defence elected to give worn evidence. She testified that the deceased was her brother in law being a husband to her sister CN. She had been staying with them since April 2019. ON 30.5.2019 at 7-8 p.m. she was in the Kitchen when accused came while drunk and started quarreling with his wife. The accused urged deceased to forgive his wife. The deceased then hit accused with a fist. She stood up and moved away. Deceased followed her. Deceased then pulled his wife to outside near the store and made her lie down. He then sat on her. He went to remove the deceased. He pushed accused who fell down. She stood up picked a stone and hit him on the armpit. He then followed her and hit her on the back and she fell down. He then heard the deceased fall down. They checked on him and saw he was bleeding from the chest. Neighbours came and she took a shirt and covered him to stop the bleeding. The incident took

about one hour and all the time the children were screaming. The deceased was taken to hospital while she accompanied the village elder to his home.

Mr. Wekesa for the accused filled written submissions. He submitted that from the evidence of the accused the deceased was drunk on that day he picked a quarrel with the wife, and fell her down, she stated that the deceased attacked her also and that while running after the accused, the deceased fell down and sustained injuries. He submitted that accused had no motive to kill the deceased and that the prosecution did not establish that she is the one who inflicted the fatal injury. He submitted that the prosecution case is porous, full of inconsistencies and contradictions and therefore it has failed to discharge its burden of proof and accused should be found not guilty and acquitted.

In a charge of murder the prosecution must prove beyond reasonable doubt the following elements;

- a) The fact and cause of death**
- b) The actus reus or the unlawful omission or act that caused the death.**
- c) The mens rea or malice aforethought**
- d) That it is the accused who caused the unlawful act or omission.**

PW1 Dr. Herun Ombongi who produced the post mortem report prepared by Dr. Nyongesa testified that the deceased suffered severe loss of blood, the nails fingertips and lips were bluish; on opening the body he found stab wound on the left chest cavity between the 5th – 6th rib. 6 cm deep. There was blood collected in the chest cavity and the stab wound had gone through the heart. He formed opinion that the cause of death was due to severe bleeding secondary to stab wound. This witness not only established the fact of death but also the cause of death. The unlawful act causing the death is the stabbing of the accused causing him to sustain stab wound on the chest.

Did the accused inflict the injuries on the deceased from which he died?

PW7 Patience Wanjala the daughter of the deceased in her evidence stated:

“My father came and D asked him about the money for stones. It is D who asked. My father told her he has not been given the money and he will give them the next day. My father was drunk. D told him if he does not give them their money he will not sleep there. My father told her she is the one to go. My father DW started fighting with my mother. The accused then went while armed with a knife and stabbed my father on the left part of hip. He screamed that she has killed me. He started bleeding.

The wife of Augustine came and she asked my mother to tie him. The accused then threw the knife in a pit latrine. Augustine came and took my father to hospital at Sirisia.”

PW8 AW the son of the deceased testified;

“ My father the deceased was drunk. They were quarrelling over money from stones. Dorcas is the one who told deceased to give her the money or he will not sleep there. They quarreled. A fight erupted between my mother and father. Accused then stabbed my father with a knife. She had removed it from utensils stand outside. She stabbed him on left side. I heard deceased scream that this child has killed me. He fell down. T and W came and took deceased to hospital.”

PW10 EW a neighbor who was attracted by the screams testified.

“When I arrived, I saw deceased fighting with his wife next to the store. The wife was lying down she is called Caro. The deceased was on top. I saw D throwing stones at deceased. Dorcas is the sister of Caro. I was among the first person to arrive there. I saw that deceased overwhelmed the wife. I then saw D the accused go there and removed a knife and stabbed deceased on left side of chest.”

All these witnesses testified that they saw the accused stab the deceased on the chest who then started bleeding. The accused in explaining the event of the night stated:

“ I went and held the deceased. He pushed me and I fell down. I stood up. I found a stone and hit him on the armpit. He stood up and followed me. I then felt being hit on the back. I fell down. He then passed me going to the road. I stood up and went to where his wife was. I then heard a person falling down. I went to check and found it was deceased. He was lying on his left side. The wife made him raise up. I saw blood bleeding from the deceased's chest.”

The accused contention though admitting that he hit the deceased with a stone, is that the fatal injuries were caused by a fall. She denied ever having a knife that day. However the prosecution witnesses were consistent that accused did stab the deceased with a knife, which as PW7 stated the accused threw into a pit latrine. This is the knife retrieved by police officers from the latrine where there was a trail of blood to. I do not accept the accused contention that the injuries were sustained in a fall by the deceased. I find that it is accused who inflicted the injuries on the deceased from which he died.

From the evidence of the prosecution witness and the accused, it is common ground that the deceased was or appeared drunk on that day. It is also common ground that there was a fight between the deceased and his wife C which drew in the accused over money for stones. The accused in her evidence testified that the deceased hit her on the back and fell her down. These circumstances in my view would amount to provocation to the accused by the deceased, first refusing to give her the money and secondly assaulting her on the back. I am satisfied that the accused in stabbing he deceased was acting under provocation.

Section 207 of the Penal Code on killing on provocation provides:

207. 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.

Under the Provision of Sec. 207 I find that the accused acted under provocation and is not therefore not guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code. I however find the Prosecution has proved the offence of Manslaughter contrary to Section 202 of the Penal Code. I therefore find the accused DNM guilty of the offence of manslaughter contrary to section 202 of the Penal Code and convict her accordingly.

DATED AND DELIVERED IN BUNGOMA THIS 2ND DAY OF JUNE, 2021.

S.N RIECHI

JUDGE