



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CRIMINAL CASE NO. 11 OF 2020**

**THE REPUBLIC.....PROSECUTOR**

**VERSUS**

**ENOCK GISAIRO ASIAGO.....ACCUSED**

**JUDGEMENT**

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

The particulars of the offence are that on 13<sup>th</sup> May 2020 at Bosiago village of Bonyungu Location, Masaba North Sub-county within Nyamira County the accused murdered Irene Kemunto.

The accused pleaded not guilty to the charge and the prosecution called eight witnesses to prove its case. At the trial the accused was represented by Mr. Bwonwong'a Advocate while the prosecution was led by Senior Prosecution Counsel Desmond Majale.

Briefly the prosecution's case is that the accused and the deceased were husband and wife who lived together with their children one of who testified in this case as prosecution witness 2(Pw2). The incident that culminated in the death of the deceased is alleged to have occurred at about 3am on the night of 1<sup>st</sup> May 2020 when the accused got out of bed and demanded to get the key to the room in which the deceased had locked herself. She had allegedly gone to sleep in a different house on that night and asked her children to lock the door on the outside as she feared the accused could turn violent as he had asked her for money which she was not willing to give him. Clinton Momanyi (Pw2), their son, testified that the accused demanded to be given the key of the house where their mother, the deceased was, proceeded to that house, opened the door and went in and started beating her. Pw2 testified that he looked through the window of that house and witnessed the accused hitting the deceased on the head and mouth. (Pw2) testified that when he saw she was bleeding on the head and mouth he ran to call their grandmother but on going back to the house with their grandmother they found the accused had secured the door of the house where the deceased was with a padlock and had gone back to the other house to sleep. Pw2 testified that he showed his sibling who was in the same house as the deceased how to open and that when they gained access into the house they found the deceased lying on the ground. Pw2 stated that on seeing this we went and called a neighbour called Winnie who went and wiped the deceased's blood. Then their Chief was informed and a decision was made to take the deceased to hospital. The Assistant Chief testified as Prosecution Witness 3 (Pw3). He testified that he went to the scene upon receiving a telephone call from Isaiah Omosa Amemba (Pw4), a community policing member, that the deceased had been assaulted by the accused. He testified that when he got to the scene he was told that the deceased had been rushed to a nearby clinic for treatment. He stated that he went to the clinic and confirmed the deceased was being treated and that she was bleeding on the head but was otherwise stable. He stated that the clinician gave the deceased first aid and then he referred her to Keroka General Hospital. Pw3 stated that it was he (Pw3) who took the deceased to Keroka General Hospital. He stated that he at the same time apprehended the accused who was still at the scene and took him to Keroka Police Station. Pw3 testified that while he was taking the deceased to hospital she confirmed to him that the deceased had assaulted her and that later that evening he met the deceased and her mother going home and they told him they had recorded statements regarding the assault at the police station.

Eslie Kemunto Rogito (Pw8) a clinical officer at Keroka Sub-county Hospital, testified that she indeed saw and examined the deceased at the hospital on 1<sup>st</sup> May 2020. She stated that the history given by the deceased was that she had been assaulted by her husband. Pw8 confirmed that the deceased had injuries on the head, upper limbs, back, lips and below the nose. She stated that she filled and signed the deceased's P3 Form on the same day she examined her and further stated that she classified the degree of injury as harm. She produced the P3 Form in evidence (Exhibit P4).

Corporal Mohamed Hassan (Pw6) testified that on 1<sup>st</sup> May 2020 he was detailed by the Officer Commanding Station (OCS) Keroka Police Station to investigate the deceased's assault complaint. He testified that the deceased told him that she had been assaulted by the accused when he went home drunk and demanded she give him money. He stated that she told him that at the material time she was hiding in an unoccupied house in their homestead and she had asked her children to secure the door with a padlock but the accused ordered the children to give him the key and found her there. Pw6 stated that he issued a P3 Form to the deceased and locked the accused up but later that evening the deceased who was accompanied by some villagers went and pleaded with him to release the accused so that they could go and settle the

matter at home. Pw6 testified that the deceased also asked to withdraw the complaint and when she was asked to do so in writing she wrote a statement which he produced in court as Exhibit P2. Pw6 testified that the accused was subsequently released on police bond and the two went home and the investigations into the assault were therefore discontinued.

The court heard that about two weeks later on 13<sup>th</sup> May 2021 the deceased was coming from the toilet about 100 metres from their house when she collapsed and died. When word reached Keroka Police Station the matter was taken up by the DCI (Directorate of Criminal Investigation) and was assigned to PC Victor Owino (Pw7). Pw7 testified that he joined the team that visited the deceased's home. He stated that when they got there they found the body of the deceased about 100 metres from the house. He stated that the deceased's teeth were stained with blood and she had a wound on the back of the head which had been sutured. He stated that after gathering evidence at the scene they took the body to the mortuary. Subsequently on 21<sup>st</sup> May 2021 a post mortem was conducted on the body of the deceased upon identification by two relatives, Charles Makana and David Swanya Mauti. Pw7 testified that he was also present during the post mortem which was conducted by Dr. Charles Ogachi Ogega (Pw1). Dr. Ogachi testified that upon examining the body he formed the opinion that the cause of death was due to lung asphyxia due to lack of oxygen secondary to an existing lung condition and moderate haemothorax secondary to head injury. In the post mortem report, Dr. Ogachi noted that the deceased had a laceration on the occipital (back) part of the head measuring 4cm and bleeding. He gave evidence that the deceased had cyanosis of the left fingers due to lack of oxygen and in the respiratory system there was fibrosis of the lungs and the left lung appeared bluish again due to oxygen deprivation. He also testified that the heart was moderately enlarged and that there was bleeding into the subdural bilaterally corresponding with the injury on the top of the head. During cross examination Dr. Ogachi was insistent that the deceased died as a result of the existing lung condition but stated that the injury to the head also contributed. The court heard that after the post mortem, the accused was re-arrested and charged with the murder of the deceased.

When this court put the accused on his defence he vehemently denied that he killed his wife and while conceding that she sustained injuries on the night of 1<sup>st</sup> May 2020 stated that she told him that the injuries were as a result of falling on a stone. He testified that on the material night the deceased chose to sleep in a different house separately from him because he was drunk. He stated that when their son Momanyi alias Babu (Pw2) told them that he had found the deceased bleeding he (the accused) and their other children went and confirmed that she was bleeding and Winnie was wiping her head. He testified that Isaiah, a vigilante, was also already at the scene. He stated that the deceased had a cut on the head and that Isaiah called a boda boda rider who carried the deceased to Motomiasi Dispensary for treatment. He stated that they were subsequently referred to Keroka District Hospital but upon arrival at Keroka he was taken to the police station while the deceased was taken to the hospital. He stated that it was after the deceased told the police that she had sustained the injury after falling on a grinding stone that he was released on a cash bail of Kshs. 5,000/=. He also stated that they stayed for about two weeks before she collapsed and died. He told the court that he was away but when he got a call that she had collapsed he immediately went home. He reiterated the doctor's opinion that the cause of death was the lung disease and the head injury. He denied that he assaulted his wife and stated that the reason the assault case did not go far was because she herself said he did not beat her. He further stated that the deceased had told him that it was not her who lodged the report against him and contended that the withdrawal statement produced in court was not authored by the deceased as it did not bear her signature. He stated that the statement produced in court initially was a photocopy which neither bore the deceased's name or signature. He contended that the signature on the statement produced in evidence did not belong to the deceased. He stated that he loved his wife dearly and would not have assaulted her. Asked about the testimony of their son Clinton Momanyi (Pw2), the accused stated that Pw2 may have been confused as to what he saw. He also contended that the report concerning the assault was made by Isaiah Amemba but not by the deceased. He however conceded to have been released after the deceased withdrew the complaint. He called as a witness, one of his other sons, Mark Gisairo (Dw1) who categorically denied that he (the accused) assaulted the deceased.

In his closing arguments Mr. Bwonwong'a Learned Advocate for the accused, submitted that the prosecution did not prove its case beyond reasonable doubt; that the evidence of the prosecution witnesses was contradictory; that Pw2's testimony was that he did not see the accused assaulting the deceased and further that it was confirmed by the doctor that the deceased had a lung problem which led to her death. Mr. Bwonwong'a further submitted that the statement that was allegedly made by the deceased to withdraw a complaint she had made against the accused was a photocopy and was unsigned and undated and its authenticity is therefore questionable. Counsel stated that it was not clear what the murder weapon was and further submitted that the defence had adduced evidence that was strong enough to rebut that of the prosecution. He urged this court to find that the prosecution did not prove its case beyond reasonable doubt and acquit the accused person.

There were no closing arguments on the part of the Prosecution Counsel. Mr. Majale intimated that he would rely on the evidence adduced.

The offence of murder is committed when a person of malice aforethought causes the death of another by an unlawful act or omission (*see Section 203 of the Penal Code*). In essence therefore the prosecution must prove the following elements beyond reasonable doubt: -

- (a) The fact of death of the victim.**
- (b) That the death arose from an unlawful act or omission.**
- (c) That the perpetrator was the accused person.**
- (d) That the perpetrator had malice aforethought.**

In the instant case there is no dispute that the deceased died as indeed the accused himself admitted that she was his wife and that she had died.

In regard to the cause of death the prosecution adduced evidence that the accused assaulted the deceased two weeks prior to her death. It was the prosecution's case that the head injury inflicted upon her by the deceased coupled with a pre-existing lung condition was what led to her death. It was the prosecution's case that Dr. Ogachi's finding that the deceased had bleeding into the subdural and brain matter bilaterally at the occipital area was consistent with the evidence of Clinton Momanyi (Pw2) that he had witnessed his father, the accused, beating his mother on the head. The accused however vehemently denied having assaulted the deceased and contended that she sustained the injury on the back of the head after falling on a stone. He called another of his sons (Dw2) who categorically stated that he did not see him beating the deceased. I have evaluated the evidence by both sides carefully and my finding is that that of the prosecution witnesses is more credible.

This is because it is evident that Dw2's testimony was confined to the day the deceased collapsed and died. Indeed, there was no allegation that the accused beat the deceased on the day she died. The evidence of Clinton Momanyi (Pw2) which I find more credible and reliable was relevant to the day the deceased sustained the injuries which the accused alleges she sustained from falling on a stone. It is my finding that Pw2's evidence is more reliable and trustworthy because it was also corroborated by evidence of other witnesses – the Assistant Chief (Pw3) and community policing member Isaiah Amemba (Pw4) – who both testified that the deceased was assaulted by the accused and she had told them so herself. It was also corroborated by Corporal Mohamed Hassan (Pw6) the investigating officer who received the deceased's complaint in regard to the assault. This witness testified that the deceased herself told him she had been assaulted by the accused and that following the report he locked up the accused in the cells and only released him after the deceased went to the station and requested to withdraw her complaint. To prove that was true Pw6 produced a withdrawal statement as Exhibit P2. The same was of course recorded by a police officer but it has the deceased's name and signature and this court has no reason to doubt its genuineness and hence finds that the deceased made a report of assault against the accused but subsequently withdrew it. The fact that the deceased was assaulted was also corroborated by Eslin Kemunto Rogito (Pw8) a clinical officer who treated her at Keroka Sub-county Hospital on the same day she was assaulted. Pw8 testified that she observed that the deceased had injuries on the head, upper limbs, back, nose and on the lips. Clearly these injuries are more consistent with an assault as opposed to falling on a grinding stone and I do not therefore believe the defence. To the contrary I find that the fact that the accused had beaten the deceased two weeks prior to her death was proved beyond reasonable doubt. The question then is whether given the time that had passed between the assault and death of the deceased and given the element of a pre-existing lung condition it can be said that the accused caused the death of the deceased.

The answer to the question regarding time is answered by **Section 215 (1)** of the **Penal Code** which states: -

**“(1) A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.”**

In this case the death occurred after two weeks of the assault and I need not say more on the issue.

In regard to the question whether the accused caused the death of the deceased in light of the pre-existing condition **Section 213 (d)** of the **Penal Code** states: -

**“213. A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases -**

.....

**(d) If by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death.....”**

It is my finding that much as the deceased had a pre-existing lung condition which would have caused her death there is evidence that the injuries inflicted upon her by the accused contributed to that death and hence hastened her death. Gender and domestic violence is illegal under our law and it is indeed a criminal offence and it is my finding therefore that the accused committed an unlawful act which contributed to the death of the deceased and for that reason I find that the accused caused the death of the deceased by an unlawful act.

What about malice aforethought? The same is deemed to be established by evidence proving any one or more of the circumstances provided in **Section 206** of the **Penal Code**. It is my finding that the prosecution did not prove beyond reasonable doubt that the accused had formed an intention to kill the deceased or to do her grievous harm. Neither did the prosecution prove beyond reasonable doubt that the accused had knowledge that the assault would probably cause or hasten her death. In the circumstances the prosecution did not prove the offence of murder but I find that as the accused unlawfully caused the death of his wife he is guilty of the offence of **Manslaughter contrary to Section 202 (1) of the Penal Code as read with Section 205 of the Penal Code** and convict him accordingly.

**Judgement signed, dated and delivered (Electronically via Microsoft Teams) on this 22<sup>nd</sup> day of July 2021.**

**E. N. MAINA**

**JUDGE**