



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 15 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

DON.....ACCUSED

JUDGMENT

1. DON is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the night of 18th and 19th day of April, 2020, at (name withheld) village, Ndhiwa Sub County of Homa Bay County, murdered MA.
3. The prosecution case is that the accused went and called a neighbour and his mother and informed them that his wife was unwell and that she was summoning them. When they went and checked on her, they found her dead and had a deep cut wound and the bed was full of blood.
4. DON, in his defence contended that his wife sent him to Mama Molly's home to withdraw some money. When he returned to his home, his brothers arrested him and prevented him from accessing his house. He denied any involvement in the offence.
5. The issues for determination are:
 - a) Whether the accused was involved in the death of his wife or not; and
 - b) Whether the offence of murder was established.
6. The incident in this case was too bizarre and one may be tempted to categorize it as fiction. The deceased and her husband were sleeping in one house with their youngest child while the rest of their children slept in a detached kitchen which was about 15 meters from the main house.
7. According to AAO (PW1), the couple's 15 year old daughter, after taking supper at 9 p.m. they went to sleep in the kitchen. At about 12 midnight, the accused went and woke them up. They went to the main house and in company of their father went to call Mama Molly (PW2). The accused went and called his mother (PW3) while she (PW1) went and called JON (PW3).
8. Caroline Anyango (PW2) testified that when the accused went to her home at about 3 a.m., he informed her that his wife was calling her. When they reached his home and enquired about her, he told her that she had gone out shortly. He went and called his mother. It was his mother who entered the bedroom and returned crying that the wife of the accused was dead.
9. This was what GAO (PW3) the mother of the accused testified to. She said that when the accused went to call her, he told her that his wife who had a headache was calling her.
10. The accused in his defence said that their cow was sick and that at 8:30 p.m. his wife sent him to Mama Molly to withdraw some money. He said he went with the children for he was unwell and could not go alone. When he returned to his house in company of Mama Molly, his brothers arrested him and tied him to a tree.
11. The defence of the accused is incoherent and does not make sense at all. I accordingly dismiss it. The prosecution evidence on record on the other side leaves no doubt in my mind that he was the author of his wife's death.
12. In order to found conviction on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law**

dictionary, 10th Edition malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called “abandoned and malignant heart”), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(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 of 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 be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

13. In the circumstances of this case, we do not know what happened between the accused and his deceased wife that led the accused to inflict the fatal injuries to her. Malice aforethought has not been proved. I therefore, find that the prosecution has not proved the offence of murder against the accused. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit him of the charge of murder. I find him guilty and convict him for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED AND SIGNED AT HOMA BAY THIS 6TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE