



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 62 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PNA.....ACCUSED

JUDGMENT

1. PNA is charged with murder contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence allege that on 28th September 2015 in Kakamega North Sub-County, within Kakamega County, he murdered DN, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 7th October 2015. The hearing of the prosecution's case commenced on 8th July 2015. The prosecution called six witnesses.

2. MM testified as PW1. She gave an unsworn statement. Her age was put at 14, and was said to be a Standard 7 pupil at [Particulars Withheld] Primary School. The accused was her father. She testified that she was at home on the evening of 28th September 2015, with the deceased, and her siblings, when the accused arrived from his drinking spree, and carried baby B to the sugar plantation, while saying he wanted to slaughter the baby. He was drunk. He was armed with a metal bar. The deceased then followed him, in an effort to rescue the baby. PW1 also followed. When they got to where the accused was, they discovered that a neighbour had rescued the baby. When the deceased asked the accused where the baby was, the accused hit her with the metal rod on the ribs, the chin and the top of the head. The deceased lost consciousness. The accused stepped on her stomach. PW1 started screaming as she went home for help. The deceased came to, got up and went back to her parents' home together with PW1 and another child. She was taken to hospital by her relatives, that evening, was treated and came back home. She again went to hospital at Malava the next morning. She never came back. PW1 was later informed that she had died.

3. NN testified as PW2. She was a child of the accused, whose age was said to be 11. She gave a sworn statement. She stated that on 20th September 2015, the accused took the baby, saying that he was going to slaughter him. He had come home drunk. He took him to a sugar plantation, and the deceased followed them, and PW2 also followed. The accused was said to have had a metal rod, which he used to split firewood with. The accused hit the deceased on the head with the metal rod, which PW2 described as a *tindo*. He also hit her on the chin and the hand. She fell down, whereupon the accused stepped on her tummy. She said that she was close to where they were, and she saw everything that transpired. She started screaming and rushed home for assistance. The accused ran away, while the deceased got up, and walked home. She later went to hospital, after she started experiencing pain on the spot where she was hit. PW2 was later informed that she had died. During cross-examination, she stated that the deceased and the accused did not fight at the sugar plantation.

4. PKS testified as PW3. He was a maternal uncle of the deceased. He stated that the deceased and her 3 children showed up at his doorstep on 21st September 2015. The deceased was very weak, but she could speak. She informed him that the previous night she had been assaulted by the accused. She showed him marks on her chin, saying she had also been hit on the head and the ribs. He then took her to a nearby clinic for first aid, and later to the Kakamega County Referral Hospital, where she was admitted. She later died on 28th September 2015, at about 1.00 PM. He was among those present at her post-mortem.

5. Dr Dixon Mchana Mwaludindi testified as PW4. He was the pathologist who did the post-mortem on the body of the deceased. He said that the body had lacerations on the left side of the chin, and evidence that there was medical intervention. Internally, there was a minor injury below the chin on both sides of the ribs. There was another injury on the part of the body which holds the intestines. The intestines were full of gas, but were not perforated. There was also a minor injury on the scalp, but there were no fractures. There was a massive swelling and bruise/contusion on the forebrain, with extensive blood clots involving both the lower and upper limbs and the back. He opined that the cause of death was the closed head injury, secondary to blunt force trauma, following assault.

6. No. 38454 Police Constable Ezekiel Musangi was PW5. He testified that the deceased had reported to him, on 20th September 2015, about the incident. She was bleeding, so PW5 referred her to the nearby health centre. On 29th September 2015, he received information that she had died. He was present when post mortem was done on her body. No. 63941 Inspector of Police Ibrahim Wasika was PW6. He was the

officer who investigated the matter.

7. The accused person was found to have case to answer, and was put on his defence, in a ruling that was delivered on 28th June 2017. The defence hearing happened on 28th January 2019. The accused person gave an unsworn statement. He testified that on 20th September 2015, he had left home in the morning for a *matanga* at his uncle's home. He then returned home at 11.00 AM and found the deceased and the children doing their usual chores. The deceased then said she had been asked by her uncle to visit him, he gave her some money and she left. She did not return home that day. On 21st September 2015, he left to buy cattle at Kabiyet, Nandi. When he returned home, he did not find the deceased. On 22nd September 2015, he escorted cattle to Samisi, Kabras, and upon coming back home, he did not find her nor his children. He then sent his father to go and visit her uncle to establish what might have happened. His father found the deceased at a salon there, and she informed him that her uncle had told her to wait. She never came home on 24th, nor on 25th nor on 27 September 2015. When he got home on 28th September 2015, he found that his houses had been burnt, and his mother told him that the deceased was dead. He then took himself to the police the same day. He was then charged with murder. He denied killing the deceased, saying that the witnesses lied.

8. Shamala Lucheli testified as DW2. He was a village elder. He said that the accused was before the court because he had beaten up a woman. He said that he had not received any complaint that the accused had assaulted the deceased at the time alleged. He said that the accused had been away buying cattle in the Rift Valley, but when he came home on 30th September 2015 he found that his houses had been burned down, and to secure him, his relatives escorted him to the police. He was among those who took the accused to the police, and he explained to them that he was the person they were looking for.

9. At the close of the oral hearing the parties agreed to make written submissions. In the end, no written submissions were filed.

10. The elements of the offence of murder, as defined in section 203 of the Penal Code, are the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought. See *Republic vs. Stephen Sila Wambua Matheka* [2017] eKLR (Nyakundi J). Section 203 of the Penal Code states as follows:

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

11. On the fact of the death, there is overwhelming evidence that the deceased died. She died in hospital, and her death was confirmed by all the prosecution witnesses. PW4 was the pathologist who carried out the autopsy on her body, after it was identified by, among others, PW3 and PW5. There is evidence beyond any doubt that she died.

12. On the second aspect of the crime, on the cause of the death, medical evidence was provided by PW4, the pathologist. He noted the injuries on the body of the deceased. Cause of death was said to be a closed head injury secondary to a blunt force trauma, following assault.

13. The third aspect is whether the death was caused by an act of the accused person. Two prosecution witnesses testified that they were present when the accused attacked the deceased. That is to say PW1 and PW2. They were eyewitnesses. They both said that they saw the accused strike the deceased on the head with a metal rod or *tindo*. The head injury described by PW4 is consistent with one likely to be caused by a strike on the head with a metal rod or *tindo* using blunt force. There is, therefore, evidence on record linking the accused person with the cause of the death of the deceased, or at any rate, with the injury that caused the death of the deceased.

14. The fourth factor relates to malice aforethought. Malice aforethought is defined in section 206 of the Penal Code, as follows:

“206. 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, where 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.”

15. Malice aforethought is the intention to be inferred from either some conduct or facts. Malice aforethought is linked to the third factor, the role of the accused in the causation of the death of the deceased. It was stated, in *Matovu Vincent vs. Uganda* Kampala HCCRC No. 1362 of 2000 (Lugayizi J) and *Chesakit Matayo vs. Uganda* Kampala CACRC No. 95 of 2004 (Mpagi-Bahigeine, Engwau and Twinomujuni JJA), that malice aforethought can be deduced from such factors as the weapon used, the part of the body injured, the extent of the bodily injuries, the manner of the killing and the conduct of the accused.

16. In this case, the act or conduct leading to the death of the deceased is the assault on the person of the deceased with a metal rod that was wielded by the accused. As stated above, PW1 and PW2 saw him strike the killer blow. The strike was strong enough to cause the injuries on the head, which damaged the brain of the deceased, and caused her death. The attack must have been vicious for it to have inflicted injury leading to death. The person inflicting the injury, that is to say the accused herein, must have intended to cause death or to do grievous harm to the deceased, or he must have had knowledge that a strike on the head of the deceased with a metal rod with the force applied in the circumstances would cause death or grievous harm on the deceased, or he was indifferent whether death or grievous injury would be caused.

The act or conduct of the accused person of striking the deceased in the manner described by PW1 and PW2 indicates that he must have had an intent to commit a felony. The background was that the accused had grabbed his baby son that evening and was taking him into a sugarcane farm, with the express intention of harming him, and the deceased was attacked when she sought to intervene to save the child. The accused appears to have had an intention to or bent on committing an offence of some sort, initially targeted at the baby, but eventually meted out on the deceased. There was merit on history of a frosty marital relations between the accused and the deceased, from the evidence that emerged from the witnesses. The said act or conduct, or that set of facts brings the matter within section 206(a)(b)(c) of the Penal Code. I find, therefore, that there was malice aforethought on the part of the accused person.

17. When the accused person was given a chance to defend himself, he set up a defence that the deceased was not at home at the time when it is alleged that he attacked her. He was at home, but the deceased had left earlier in the day to visit her relatives. She was, therefore, not available at the time for him to assault her in the manner described by the prosecution. That defence is, however, demolished by the testimonies of his children, PW1 and PW2, who were eyewitnesses to the crime. The evidence of PW5 is equally relevant, for the deceased visited the police station and made a report of the assault to PW5. After that, she went to PW3, her uncle, and narrated to him what had befallen her in the hands of the accused. PW1 and PW2 alluded to the accused being drunk at the material time, but the accused himself did not set up the defence of intoxication. There is ,therefore ,no need for me to consider it.

18. Overall, I am persuaded that the prosecution has mounted a case that proved that the accused person was responsible for the death of the deceased. I am, in the circumstances, moved to find that he is guilty of the offence charged of murder, and I accordingly convict him, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya, of the murder of DN.

19. For the purpose of determining the sentence most appropriate to mete out in the circumstances, I hereby direct the County Director of Probation, and allied services, to prepare a pre-sentence report, after interviewing the accused person and the affected families. The matter shall be mentioned thereafter for mitigation and sentence.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF SEPTEMBER, 2021

W MUSYOKA

JUDGE