



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NUMBER 9 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

DAVID WAFULA MUKANDA.....ACCUSED

J U D G M E N T

The accused **David Wafula Mukanda** 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 the 9th day of February, 2016 at Mwalie village Malakisi Division within Bungoma County murdered **Roseline Nekesa Kundu**.

The prosecution case is that the accused and deceased were staying together as man and wife. The deceased however was staying in her own house and operating a kiosk. On 9.2.2016 **PW2 AJS** the son of deceased left the house at 6 a.m. going to school. She left the deceased in the house. On the way to school he met the accused at the kiosk the deceased was operating. While at the school which was about 100 meters from his home at 10 a.m. he heard screams from the directions of his home. He went there and found deceased on the bed with blood all over the place.

He saw 2 knives on the bed which were blood stained. She also had injuries on the head, neck and chest. Police came and took the body of the deceased to mortuary.

On being cross examination by Onkangi for accused, he stated that they were staying in his uncle's house and accused had stayed with the deceased for 11 months but that they used to quarrel.

PW2 Patrick Kundu Machosi the father of the deceased testified that in 2015 the accused married his daughter the deceased. They however never stayed in peace. At one time he had cut deceased on the hand and he arbitrated that dispute. They continued staying together. After a short time deceased came and reported more quarrels with accused. The father then told her to stay in his son's John Barasa's house. On 9.2.2016 he was called by Fred Ojali who told him to go to where deceased was staying. He went there and found the deceased on the bed having been slaughtered. There were 2 knives which were blood stained. He observed the deceased had cut wounds on the neck, back and hands. The accused too had cut wounds on the hands.

PW5 Boniface Mwindi Kamisi testified that he was at a meeting at ACK Malakisi church when Ruth informed him to go and counter check on information that deceased had been killed. He knew deceased who was also his relative. He went to the home of deceased and confirmed of the death. He called police officers who came and commenced investigations.

PW6 No. 46474 PC Bernard Ongori visited the scene of the murder and found deceased lying on her back in bed. She had cuts on the finger and head. They also recovered 2 knives and took the body to the mortuary.

PW7 NO. 75417 Segt Pashua Jumi was at Bungoma police station when the accused went there. He observed that accused had injuries on both hands. He reported that he had been assaulted by his wife. Upon inquiry he was informed that there was a report of murder at Malakisi police station. He arrested accused who was later transferred to Malakisi police station. He was later charged with present offence.

The accused elected to give affirmed evidence when placed on his defence. He testified that the deceased was his wife. They had separated. On 9.2.2016 he saw the deceased who called and invited him to go to the house where she was staying. He went to the house where she informed him that her uncle had advised her to go back to accused. While in the house she went and prepared the bed-room and prepared to have sexual intercourse. As he undressed and as he was prepared to have intercourse he noticed that she had a knife and wanted to stab him. He held the knife and they started struggling over it. The knife then cut her on the neck. He also sustained injuries and went to Webuye hospital. He produced treatment notes Dexh 1. He testified that the 2 knives produced belonged to the deceased. He also confirmed that deceased sustained injuries on the neck and that the clothes she was wearing were blood stained.

The accused called **DW2 Naomi Nekesa Naliacho** his sister as a witness. She testified that on 9.2.2016 accused called her and informed her

that he had been injured. She went to Malakasi where he was. He found he had cut wounds on left hand and human bite on right finger. She took him to Webuye District hospital where he was treated and discharged. He informed her that it is his wife who had inflicted the injuries and that she was dead. She accompanied him to the police station where he reported the matter.

From the evidence there are certain issues which are not disputed. There is no dispute that the accused and deceased were staying together as married couple albeit with domestic issues. It is not also in dispute that at time of the offence they had separated and deceased was accommodated in her brother's house. It is not in contention that the offence occurred in the deceased's brother's house where she was staying.

That the deceased is dead is not in contention. The accused indeed admitted that and reported to both his sister DW2 and to police that she was dead. The cause of death was proved by the evidence of **PW1 Dr. Haron Ombongi** who produced the post mortem report prepared by **Dr. Kosgei**. Dr. Kosgei's findings were that the deceased had deep cut wound on the neck, left mandible, and left side of the head. Upon opening the body, he found that the trachea and oesophagus were cut, and there was a fracture on the base of skull. He formed opinion that the cause of death was loss of blood due to injury to spinal code and cut wounds.

The accused admitted in his defence that he was with the dead on the material day and indeed she sustained the injuries indicated in the post mortem. He in his defence explained how the deceased sustained the injuries as follows.

“ On 9.2.2016 at 7.30 a.m. I saw the deceased on the farm. She saw me and told me she had good news for me. I stopped and asked her to come to where I was. She told me I go to her house. I went. In the house she told me her uncle had advised her to come back to me. I told her that was good. She then told me she will come after 3 days. I then held her hands and told her I had missed her. We agreed that we got to the bedroom. She went and prepared the bed room. I went into the bed room and undressed. For I was preparing to have sex I saw she had a knife. She wanted to stab me. We started struggling over the knife. And it cut her on the neck. I saw her bleeding. I also sustained injuries. I went to hospital at Webuye on 9.2.2016. These are the treatment notes. I wish to produce it as exh. DEXh1. I went to Malakasi police station and reported the matter.”

Upon cross examination by Mr. Thuo for state, he stated..

“ The incident occurred in the house of her brother which was along the road. The injuries were caused by the knife. She was injured on the neck. I don't know because we were struggling. According to post mortem it was on the neck and abdomen. She had invited me to have sex. She had undressed and also I had removed the shirt. She had black blouse and flowery skirt. They got blood stained. We had earlier separated because the former husband with whom they had 2 children was angry about her being married to me.”

While the accused in his defence admitted that the deceased sustained injuries inflicted by the use of knife, he contends that they were inflicted when they were fighting. The injuries inflicted on the deceased were a cut on the trachea and Oesophagus and fracture of the base of the skull. The accused contentions are that they were inflicted when they were struggling over the knife. The nature and extend of the injuries inflicted which were vicious and multiple were deliberately inflicted and not a chance cut as the accused would want to say. That it is accused who inflicted the injuries from which the deceased died.

In an offence of murder the prosecution besides proving the fact and cause of death, the unlawful act that caused the death, and that it is accused who inflicted the injuries causing the death must prove the all important element of malice aforethought or intention to cause grievous harm or death as per Section 206 of the Penal Code. In **R-versus- Tabere S/O Ochien (1945) EACA 63** the court of Appeal for Eastern Africa stated.

“In determining the existence of non existence of malice aforethought one has to look at the facts proving the weapon used, the manner in which it was used and the part of the body injured.”

In this case the part of the body targeted was the throat the nature of the weapon used was a knife and the manner of execution was vicious demonstrated by the severe stab wounds on the deceased. All these combined demonstrate an intention on the part of accused to cause grievous harm or death as it did in this case. The accused contention that it was self inflicted and not intentional is not true and I reject it.

After considering all the evidence I am satisfied that the prosecution has proved the charge of murder against the accused beyond any reasonable doubt. I therefore find the accused David Wafula Mukunda guilty of the offence of murder contrary to section 203 as read with Section 204 of the Penal Code and convict him accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 3RD DAY NOVEMBER, 2021.

S N RIECHI

JUDGE