



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 48 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**LKM.....ACCUSED**

**J U D G M E N T**

1. **LKM** (“the accused”) has been charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence are that on 8/7/2014 at Upper Chure in Imenti South District within Meru County the accused murdered **JMN**. She pleaded not guilty and the prosecution called 10 witnesses to establish its case.

2. **RM (1)**, then a class 8 student and son to both the accused and deceased recalled how his father came home that night and refused to eat. He was drunk and went to sleep. The next day he went to school and was later informed that his father had died. That later, his uncle **PW3** threatened him that unless he implicated the accused with the murder of his father, he should know where to live.

3. **MKM (PW2)**, a daughter to the accused and deceased, recalled how the deceased came home drunk on 7/7/2014. The following morning, she was asleep when the accused prepared **PW1** for school. The accused later asked her why she was asleep while she could be making tea. It is then when the accused went to her bedroom that she screamed. When **PW2** went there, she found her father dead. She called the neighbours while the accused was crying.

4. **SG (PW3)** a brother to the deceased told the Court that the accused and the deceased used to have intermittent disagreements. On the material day he left his home to go to send money by Mpesa in the nearby market. He found the accused with **Stella Ncurube** at about 7 am on his way to the market. After sending the money, he received a call from **Stella Ncurube** who told him to rush to the home of the deceased as something had happened. When he arrived at his brother’s homestead, he found the accused crying outside.

5. When they entered the house, they found the deceased lying on his bed and on close observation he saw a mark on his right side of the neck. When he touched him, the deceased had a high fever whereby they decided to take him to hospital. While on their way, they realized that the deceased had died because the mark on his neck became more apparent. They then went to report the matter to Nkubu Police Station and the body was taken to the mortuary.

6. **STELLA CURUBI (PW4)**, a neighbor told the court that on the material day, she met the accused in the morning coming from taking milk to the dairy while she was going to church to put off lights. Each went her way but she later received a call from **Kawira** to rush to the deceased’s home. When she reached the deceased’s home, she entered the room where the deceased was. The deceased was not responding. She told the accused that the deceased be taken to hospital. The deceased went to look for a vehicle while she, **PW4** went and called **PW3**. It was decided that he be taken to hospital.

7. **AK (PW5)**, a sister to the deceased recalled how on the material day at about 7.30 am, **PW3** came to her house and told her to accompany him to the deceased’s house. When they entered the house, they found the deceased on the bed. A vehicle was found and he was taken to hospital. Later at about 11 am, police officers from Nkubu Police Station but shortly left. She later learnt that he had died.

8. **ELIAS MWIRIGI (PW6)** a fellow casual worker would recall how they worked well with the deceased the previous day and parted at 5pm in good condition. **PW7 MARTIN KIOGORA**, a contractor who had employed the deceased recalled how the deceased was in good condition the previous day at his place of work. On the material day, he received information from his foreman that there were police officers at the site inquiring about the death of the deceased.

9. **PW8 DR MARIA MWANGI** testified and produced the postmortem report prepared by **Dr. Kihumba** who had performed postmortem on the body of the deceased. On examination, there were ligature marks on the neck, chest below the thyroid cartilage and an upward imprint toward the back of the neck. A bruise was seen on the right elbow and tongue was discolored blue. Internally, there was bilateral congestion of the lungs leading to the conclusion that the cause of death was asphyxiation due to strangulation with a cord.

10. **CLP ALI NZARO (PW9)** recalled that the material day at about 7.30 am, he was at the report office when the accused came and reported that she needed a note to take a sick person to hospital. This surprised him as patients are not taken to hospital with notes except those who are injured. She looked shaken and she told him that the sick person was in the vehicle. He suspected the reportee and informed the OCS inspector Otiende. They went and inspected the patient. He wasn't alive. He had marks round his neck.

11. **PW10 CLP HENRY MAKOKHA** investigated the case. On the material day at about 9.15 am, he was at the station when he received information that the accused had come to the station with a vehicle having a sick person. He established that the sick person was the accused's husband. When they examined the deceased he was unresponsive and had a mark in the posterior neck. They took him to hospital where the doctor declared him dead.

12. He summoned the accused children and they informed him that the accused had complained that evening that their father was not useful but only a drunkard. He visited the scene and on examination of the scene there was no break-ins and he also could not locate any rope that could have been used. He went to the construction and he was informed that the deceased had been fine the previous day. He attended the post mortem and also took photographs of the scene of the crime. He produced the photographs together with the report of P.C Musinga in respect thereof.

13. In her defence, the accused told the Court that in the month of April, 2014, the deceased's daughter by the name of **Kinya** had been admitted in Nyanyuki Hospital and later referred to KNH. The said **Kinya** had called to speak to the deceased but he failed to go. She died and the fact that she died before he could talk to her haunted him. He fell into depression as a result whereby he became a heavy drunkard.

14. She narrated how the deceased succumbed into the drinking habit to the extent of coming home at 3 am on 6/7/2014. On 7/7/14, he returned home at about 9 pm drunk. He refused to eat and said that should not be woken up the following day. They never quarreled that night. She denied having that they were frequently quarrelling as alleged by **PW3**. They would only quarrel when she would insist that he takes food or his medication for ulcers and diabetes.

15. On 8/7/2014, she woke up and prepared **PW1** for school. She milked the cows, washed the cow shed and took milk to the dairy. When she came back, she fed the cows. Before she could go to the farm, she decided to wake him up but he never responded. That's when she called N. This was not the first time he overslept as he could have bouts of low sugar. N was in the bedroom when she told her that her father was not responding. She managed to get a vehicle to take him to hospital as the deceased was not yet dead.

16. While going to the hospital which was about 5km away, **PW3** spoke to the chief who advised that they pass through the police before going to hospital. When they went to the police, she was placed in custody. She had insisted for a second postmortem, the cost of which one of her relatives was prepared to shoulder but **PW3** and the police declined. The deceased was buried at night to avoid a second postmortem. She denied killing her husband.

17. She pointed a finger at **PW3** as framing her as he wanted to take the deceased's land. When she was in custody, he had chased away her children, he had taken a portion of her land and sold her cow.

18. The accused faces the charge of murder. The is defined under **section 203 of the Penal Code** thus:-

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

19. From the definition, four ingredients of the offence arise which the prosecution must prove beyond any reasonable doubt. These are:-

- a) *the fact of the death of the deceased;*
- b) *the cause of death;*
- c) *proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, and lastly*
- d) *proof that the said unlawful act or omission was committed with malice aforethought.*

20. In **Republic v Ismail Hussein Ibrahim [2018] eKLR**, the Court stated:-

***“To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases, the Federal Court of United States in the case of United States V Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring) the court stated:***

***“The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable***

***doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.”***

21. On the first and second ingredient, the evidence of **PW2, PW3, PW4** and **PW5** was that in the morning of the material day, the deceased was found lying in his bed unresponsive. **PW10** told the Court that when they reached the hospital the deceased was declared dead. He attended a postmortem by **Dr. Kihumba** whose report concluded that the deceased died of asphyxiation due to strangulation with a cord. I am satisfied that the first two ingredients were proved to the required standard.

22. It was then up to the prosecution to prove beyond reasonable doubt that the accused was behind the death of the deceased. There was no eye witness and the prosecution relied on circumstantial evidence. In the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** the Court of Appeal held that:-

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”***

23. In **SAWE –V- REP [2003] KLR 364** the Court of Appeal held:-

***“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.”***

24. The prosecution case was that the deceased came home the previous day in good condition. He slept in the same bedroom with the accused. The following morning, he was found dead due to strangulation. That the accused had complained to **PW1 and PW2** the previous night that their father was good for nothing as he was a drunkard.

25. None of the prosecution witness said that he/she saw the accused strangle the deceased. When **PW3, 4, 5** and the police came to the bedroom, neither saw the rope nor the alleged cord that was used to strangle the deceased.

26. It is important to recall the events of that morning. The accused woke up early and prepared **PW1** to go to school which he did. She then milked the cows, took the milk to the dairy and when coming back met with **PW4** who was going to church to put off lights. When she arrived home, she gave fender to the cows then went to wake up **PW2**. She then proceeded to her bedroom and tried to wake up the deceased. It is then that **PW2** said she heard the accused scream.

27. There was no evidence that there had been any break-in. There was no evidence that anyone heard a commotion in the bedroom of the deceased at anytime. It was no clear whether the accused had locked the door when she left to go to the dairy.

28. What came out was that when **PW3, PW4 and PW5** went to the deceased’s bedroom, they found him unresponsive. **PW3** said that the deceased had high fever, meaning that the body was warm. That the deceased showed the signs of having died when they were on the way to the hospital when **PW3** decided to call the chief who advised them to pass-by the police station and take a note.

29. Further, the time of death was not established by postmortem. That leaves room to speculate that, with the testimony **PW3** that when he touched the deceased he had high fever, the deceased must have met his death the morning of the material day. If he had died at night, the body would have been cold by the time **PW3, PW4 and PW5** found him unresponsive on his bed.

30. The other issue was that the deceased had vomited the previous night. Although the postmortem report showed that there was nothing untoward in his digestive system, the accused had insisted that a second postmortem be undertaken at her cost. Both the police and **PW3** frustrated that eventuality. There was no explanation for that refusal which was a right for the accused. Indeed to cap it all, the deceased ended being curiously buried at night to defeat the eventuality of a second postmortem.

31. The foregoing notwithstanding, there was no evidence to seal the loophole that there could have been a possibility of someone else who may have come after the accused went to the dairy and killed the deceased. A doubt lingers as to what happened between 6.30a.m. and 8.a.m. when the accused was out of the house. It is unclear how the deceased met his death.

32. The Investigating Officer suspected the accused because she took the deceased to the police for a note to take the deceased to hospital. The decision to take the deceased to hospital was made jointly by the accused, **PW3, PW5** and others when thought the deceased was still alive, It is only on the way to hospital when **PW3** suspected that the deceased had passed on that he consulted the area Chief who advised them to pass by the Police Station. It was not the decision of the accused and she cannot be blamed for it. She never acted suspicious as the investigations officer wanted this court to believe.

33. The condition and safety of the deceased between the time the accused went to the diary and the time she returned to find him unresponsive in bed was not accounted for. When the prosecution relies on circumstantial evidence, it must tender compelling evidence to the effect that it must have been an accused who committed the offence and no one else. There must be no likelihood that someone else had the opportunity to do so. That was not the case here.

34. To this Court's mind, the circumstantial evidence offered by the prosecution did not unerringly point at the accused as the only person who had the opportunity to kill the deceased. That doubt has to be resolved in favour of the accused.

35. Accordingly, I find the accused not guilty of the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code CAP 63 Laws of Kenya** and I acquit her.

**SIGNED** at Meru

**A. MABEYA**

**JUDGE**

**DATED and DELIVERED at Meru this 20<sup>th</sup> day of February, 2020.**

**F. GIKONYO**

**JUDGE**