



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 21 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS NYEKENYE SERIKALI.....ACCUSED

JUDGMENT

1. Julius Nyekenye Serikali 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 12<sup>th</sup> day of September 2017, at Esikulu sub location of Busia County, murdered Eunice Ojuro.
3. The accused and the deceased were husband and wife. When the incident occurred, the two were alone in their house. In the morning of the eventful night, the accused narrated that the two fought after he was not given food, but he did not intend to kill his wife.
4. In his defence, the accused contended that the deceased returned home at 11 p.m. while drunk and hit him with a stick she had. A struggle ensued and she fell on the table. When he woke up the following morning, he found her unconscious. He went and reported to the police.
5. The issues for determination are:
  - a. Whether the accused was provoked by the deceased;
  - b. Whether the accused fatally beat his wife; and
  - c. Whether the offence of murder was established.
6. Mary Akuku Nyegenye (PW1) testified that the accused went to her and showed her some currency notes that had been destroyed by ants. He told her that he had resorted to hiding his money outside for his wife was stealing the same to drink alcohol. He then told her that the previous night they had fought after he had asked her for food and she attacked him with a stick. He wrestled the stick from her and hit her. In the morning, he found her dead.
7. The version by the accused differed slightly. He testified that his wife returned home at about 11 p.m. while drunk. She had a stick and hit him with it. A struggle ensued and she fell on a table. The following morning he found her dead.
8. I am persuaded to believe the first version that was attributed to the accused for at this time the incident was still fresh. The second version he testified to in court is not true for it is not supported by the evidence on record.
9. In order for a conviction for the offence of murder to be founded 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).**

10. 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**

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**(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.**

11. The prosecution did not adduce evidence to show that the accused had malice aforethought. The evidence that is clear is that the deceased was a habitual drunkard. Mary Akuku Nyegenye (PW1) said that they had tried to intervene by counselling her without success. The prosecution did not therefore, establish malice aforethought against the accused.

12. I find therefore, 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 the accused of the charge of murder. I find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED and SIGNED at BUSIA this 8<sup>th</sup> day of April, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**