



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NUMBER 11 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

PHILIP SASITA NDIWA.....ACCUSED

J U D G M E N T

The accused **Philip Sasita Ndiwa** was charged with offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on the night of 19th and 20th March, 2018, at Chemweisus sub location of Mt. Elgon sub Country within Bungoma County murdered Edith Cherotich Ndiwa.

On the night of 19-20th March 2018 at 3 a.m. **PW 2 Lucy Ndiema** the Chief of Kapsokwany Location received a telephone call from a person who introduced himself as Sasita who informed her he had cut his wife and has taken poison. On receipt of this information, she called Assistant chief. **PW 3 Jackline Chemchai** and directed her to inform the village elder and Nyumba Kumi. **PW 3 Jackline** called **P W 4 Gregory Kibausa Masai**, the Chairman of Nyumba Kumi and informed him. On receipt of the information **PW 4 Gregory Kibausa Masi** proceeded to the house of accused which was within his area of jurisdiction.

On arrival at the home of accused, Gregory found he entered the house and with the help of the solar lantern, he entered and in one room and found accused and deceased lying on a bed. On closer observation he saw the deceased had a cut round on the neck. He also saw accused was breathing heavily. In the room he also found 2 bottles of insecticide bottles. He called a neighbour called Mayolki who came together with other people. He informed the chief who informed police who came. They recovered an axe next to the door. The accused and deceased were taken to hospital where they were admitted. Deceased died 2 days later while undergoing treatment.

PW 6 PC Geoffrey Ngeno attached to Kapsoilwany Police Station received information about the incident at 5.00 a.m. he and colleagues visited the scene. On arrival they found accused and the deceased lying on a bed. On observation he saw deceased had cut wound on the head. There was also vomit which smelt of insecticide. He recovered an axe which was blood stained and bottles of insecticide. They took the accused and deceased to Mt. Elgon Hospital where it was confirmed accused had ingested insecticide poison.

PW 7 IP Joel Chelule attached to Chepkwony Police Station and investigating officer was with **PW 6** and testified on similar terms. He testified that he recovered a blood-stained axe which was forwarded to government analyst together with samples of blood of the deceased. He later received a report which confirmed that the bloodstains on the axe matches those of the deceased. He later caused accused to be charged with present offence.

The accused gave sworn evidence. He testified that the deceased was his wife. On 19th March, 2018 he was with the deceased asleep and at 12 a.m. he heard people outside who asked him to open the door. He opened the door and three (3) people entered the house and demanded money. He told them he did not have money. They hit him and he fell down and became unconscious. When he regained consciousness he found himself in hospital. He was later arrested and charged with present offence. In cross-examination he confirmed deceased who also admitted in the same hospital. He confirmed he owns an axe and keeps insecticide in the house.

The accused was charged with the offence of Murder Contrary to Section 203 of the Penal Code which provides: -

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

From these provisions the elements of the offence of murder are as stated in **R Vs Andrew Omwenga (2009) eKLR** where the court said: -

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

(a) the death of the deceased and the cause of that death;

(b) that the accused committed the unlawful act which caused the death of the deceased and

(c) that the Accused had the malice aforethought.

The prosecution in order to secure a conviction on a charge of murder must prove: -

- a) The fact and cause of death.
- b) The unlawful act or omission causing death
- c) The existence of malice aforethought and
- d) That it is accused who executed the unlawful act or omission that caused the death.

The standard of proof for a the charge in a criminal case is beyond reasonable doubt. This standard was expounded in **Miller Vs Minister of Pensions 1947 ALLER ER 372** where Lord Denning said: -

“That degree is were settled. It must not reach certainty bar it must ... a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law should prevail to protect the community if it is submitted tactful possibilities to defeat the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of cause it is in doubt but nothing short of that will suffice”

In **Woolmington Vs DDP 1935 AC 462** Lord Sanckey stated: -

“Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner’s guilt subject to... the defense of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

In all criminal cases except where there are statutory exceptions, the burden of proof beyond reasonable doubt in criminal cases remains and is the responsibility of the prosecution. These standards have been incorporated in our Judicial System by enactment of Section 107 and Section 107 and Section 109 of the Evidence Act provides: -

“Section 107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 109 States: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

It is therefore, the burden of proof of the prosecution to except where there are statutory exceptions to proof their case beyond reasonable doubt.

1. Fact and cause of death

The essence of the offence of murder is that there was a death of a person. The fact of death must therefore, be proved. The fact of death can be proved by direct evidence as where there is evidence of the person being injured and pronounced dead. Death can also be established by medical or Expert evidence. In **Ndungu Vs R 1985 KLR 497**, the Court of Appeal stated

“Though there are cases in which death can be established without medical evidence relating to its cause, as where there are obvious and grave injuries medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution.”

Concerning the same issue in **R Vs Cheya & another 1973 EA 500** it was held: -

“..... However, the absence of medical evidence as to death and the cause of it is not fatal because as I said at that stage post

mortem reports primarily are evidence of two things; the fact of death and the cause of death. Therefore it was open to the prosecution to produce and rely on other evidence to establish these facts.....”

Further, in *Ndungu Vs R 1985 eKLR* the Court of Appeal held: -

“Where the body is available and the body has been examined, a post-mortem report must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is cross-examined.”

In *Chengo Nickson Kalama Vs R (2015) eKLR* the Court of Appeal in Malindi stated: -

“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a postmortem examination report of the deceased.”

In this case, **PW 5 Winrose Nangila** the Mother of the deceased testified that she nursed the deceased at Mt. Elgon Hospital and they were advised to transfer her to Bunyore Hospital where she died. She then identified the body as that of the deceased to the doctor who performed the post-mortem.

Pw 1, Dr. Arun Ombongi performed a post-mortem examination on the body of the deceased on 7th April, 2018. On examination he found the deceased had multiple cut wounds on upper arm, and a cut wound on the neck on opening the body he found there was a cut on right side of neck affecting the veins. There as massive inherent bleeding leading to lung collapse. From the examination he formed opinion that cause of death was due to pulmonary arrest secondary to bleeding. From the evidence, therefore it was established the fact of death and also cause of death as pulmonary arrest or lung collapse due to bleeding.

2. That death was caused by unlawful act or omission

This is the second ingredient the prosecution must establish. Article 26(1) of the Constitution 2010 provides: -

“Every person has the right to life. The life of a person begins at conception. A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.”

However, there are exceptions where the killing of another is not unlawful and, therefore, not punishable. However, where the act is unlawful it is termed the *actus reus*. **Smith & Hogan in their book Criminal Law 14th Edition** at page 53 say of *actus reus*: -

“Murder, manslaughter, wounding the law is interested only in the result and not conduct bringing about the result. Similarly a well-known definition of actus reus is “such result” of human conduct as the law success to prevent. But a dead person with a knife in his back is not the actus reus of a murder. It is putting a knife in the back thereby causing the death that is the actus reus.”

The *actus reus*, therefore must be an unlawful act which is forbidden by law.

In this case, **PW 4 Gregory Kibausu Masai** testified that on arrival at the house of accused, he found the accused and deceased lying on the bed. He observed and saw accused was breathing heavily and lying on the side of the bed. He also saw the deceased lying on the other side of the bed with a cut on the neck. He called other people who came and they saw an axe which was blood stained and bottles of insecticide. They took both the deceased who had injuries and accused who appeared unwell to hospital.

PW 7, Inspector Joel Chelule, the investigating officer forwarded the blood-stained axe and sample of deceased’s blood to Government Analyst for analysis. He later received a report Exhibit 4 which confirmed that the blood stains extracted from the axe matched that of the deceased. This confirmed that the axe was the one used to inflict the injuries on the deceased and therefore, the murder weapon. The *actus reus*, therefore in this case was the inflicting of the cut wounds on the deceased, which were confirmed by witnesses and the results of the post-mortem examination.

The prosecution has to prove not only the *actus reus* but also their *mens rea*. *Mens rea* Latin for guilty mind denote an intention to kill or cause grievous harm. Intention is generally defined in terms of foresight of particular consequences of actions or omissions and a desire to act or not to act so that those consequences occur. These principles are captured in Section 206 of the Penal Code where malice aforethought is described: -

“(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.

In **R Vs Andrew Mueche Omwenga (2009) eKLR**, Maraga J, (as he then was) in stating the importance of *mens rea* said: -

What is “malice aforethought? Malice aforethought describes the mens rea or the mental element required for a conviction of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If ‘malice aforethought’ is lacking the unlawful homicide will be manslaughter.

He continued:-

It is clear from this definition that there are three broad elements of ‘malice aforethought’. They are express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape or robbery) or when resisting or preventing a lawful arrest, even though there was no intention to kill or to cause grievous bodily harm, he is said to have had constructive malice aforethought.

Malice aforethought being an intention and, therefore a state of mind can only be discerned by the actions of the accused. In **R Vs Tubere S/O Ochen 1945 12 EACA 63** to discern malice aforethought the court considered the following elements: -

- 1) Nature of weapon used
- 2) The manner in which it was used
- 3) The part of the body targeted.
- 4) The nature of the injuries inflicted either a single stab wound or multiple injuries.
- 5) Conduct of the accused before, during and after the incident.”

These elements of malice aforethought from which an intention on the part of the accused to kill the deceased have been expounded in various authorities among them **Nebart Ekalifa Vs R (1994) eKLR**, **Ernest Sami Bwire Abanga Alias Onyango Vs Republic**, Criminal Appeal No. 32 of 1999, **Karani & 3 others Vs R (1991) KLR 622**, **Morris Oluoch Vs Republic**, Criminal Appeal No. 47 of 1996.

The thread in all these decisions is that the court can easily discern an intention to kill by considering whether the weapon used was lethal or not, whether the injuries were aimed at vulnerable part of the body or not, whether the injuries were inflicted repeatedly or not, and finally the conduct of the accused, before, during and after the attack.

In this case, **PW 6 Corporal Geoffrey Ngeno** testified that in the bed where the deceased was he observed that the deceased had a deep cut wound on the neck. Both the accused and deceased were unconscious. At the door he found an axe which had blood stains. He also recovered 2 empty bottles of insecticide – Dudukill and Grendane. The blood stains in the axe were analysed and matched that of the deceased. This showed that the axe was the one used to inflict the injuries on the deceased. The post-mortem report showed that the deceased had multiple cuts on the upper limb measuring 5 cm by 5cm and one on the right neck region lateral aspect measuring 8cm by 8cm, the cut wound through the right neck affected both external and internal jugular vessels. He formed opinion that cause of death was due to pulmonary arrest with massive bleeding leading to lung collapse

The weapon used, an axe was a lethal weapon, the part of the body targeted was the neck a vulnerable part, there were multiple cut wounds which shows they were inflicted repeatedly. All these show that he assailant had an opportunity and time to inflict the extensive injuries. He targeted the vulnerable parts of the body because he had formed the intention to kill. Considering all these, I am satisfied that the prosecution has established the elements of malice aforethought in this case.

Did the accused execute the unlawful act or omission that caused the death of the deceased? This calls for the determination of the issues of identification. Positive identification of an accused as the person who committed the offence is important for two main reasons: -

- 1) It is the basis upon which guilt is premised. The finding of guilt is in respect to a person who committed the offence.
- 2) The law prescribes punishment to a person or entity in order to achieve the objective of sentencing or retribution, rehabilitation or reformation.

Identification of an accused can be by evidence

1) Direct evidence: Evidence of eyewitnesses where the person who saw the accused commit the offence testifies. Eyewitnesses play a vital role in identification of offenders. In some cases, this is the only evidence available on identification. This identification is based wholly on what a person said. This can be by identification or recognition in **Mwamunga Vs R. (1989) KLR 427** the Court of Appeal said: -

“Where the only evidence against a defendant is evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of conviction.”

2) The prosecution can also prove identification of the accused by circumstantial evidence. Circumstantial evidence is evidence that tends to prove a fact by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact in issue.

In **Moses Kabue Karuoya Vs R (2016) eKLR**, Mativo J

“Thus, circumstantial evidence can be defined as that relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the accused person who committed the offence. It is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence.

The Court of Appeal in **Eric Odhiambo Okumu Vs R (2015) eKLR** stated as follows: -

*“it has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone circumstantial evidence namely evidence that enables a court to deduce a particular fact from circumstances of facts that have been proved an form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed as stated in **Musili Tulo Vs R**.*

“Circumstantial evidence is as good as any evidence if it properly evaluated and as is usually put it can prove a case with the accuracy of mathematics”.

But for circumstantial evidence to form a basis of a conviction it must satisfy several conditions which are intended to ensure that the circumstantial evidence unerringly points to be accused person and to no other person as the perpetrator of the offence. In **Abanga alias Onyango Vs R Criminal Appeal No. 32 of 1990** this court tabulated the conditions as follows: -

“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 done must be cogently and firmly established.

ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of 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 accused and no one else.

See also **Sawe Vs R (2003) eKLR 364** and **GMI Vs R Criminal Application No. 308 of 2011 (Nyeri)**.

Before a court can draw from circumstantial evidence, the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances which would weaken or destroy the inference or guilt. (See **Teper Vs R (1952) ALL ER 480** and **Musoke Vs R (1958 EA 715)** in **Dhalay Sighn Vs R**, Criminal Application No. 10 of 1997 the court reiterated this principle as follows: -

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt then the case has not been proved beyond reasonable doubt and the accused is entitled to an acquittal.”

In this case, there was no eyewitnesses who saw the accused inflicting the injuries on the deceased from which she later died. The prosecution, therefore, is proceeding on circumstantial evidence.

PW 2 Lucy Ndiema the Chief of Kapsokonwy received a telephone call at 3.00 a.m. from a person who introduced himself as Sasita. That Sasita informed her that he had cut his wife and he was going to take poison. He then switched the phone off. PW 2 called the Assistant Chief Jackline Chemutai who directed **PW 4 Gregory Kibinisu Masai** the Chairman of Nyumba Kumi of the area to proceed to the home of Sasita. Gregory went to the home of Sasita and found the accused who is called Sasita. He found him on a bed together with the deceased who had injuries on the neck. When police came PW 6 Geoffrey Ngeno also found the deceased with injuries and accused also lying on the bed, unconscious. He recovered the bloodstained axe and empty bottles of insecticide from the room both accused and deceased were taken to hospital.

The accused in his defence admits that he was with the deceased on material day in the house. At 12 a.m. he heard people shout from outside that he opens the door. He went and opened the door. Three people came into the house and demanded money. They took Ksh.10,000/- by beat him and he became unconscious and only regained consciousness when he was at the hospital. He denied calling the Chief and giving her any information. He denied that he assaulted the deceased or that he took poison in an attempt to commit suicide. On cross-examination, he admits the axe belonged to him and the insecticides was found in his house.

The accused's defence is that he did not see how the deceased sustained the injuries. He alluded in his evidence that he was attacked by robbers who also hit him and he became unconscious. Though he denies that he called **PW 2**, the Chief, there is evidence that indeed he is the one who called her and gave her the information. I say so because he said his name, he stated that he had cut his wife, then stated that he was going to take poison. This is information the Chief acted on, and when **PW 4 Gregory** visited the home of Sasita, whom he knows as accused. He found the accused in the house with deceased. He found it true that the accused's wife, the deceased had been cut on the neck. He also found accused had drunk insecticide with empty bottles in the room. All this information was peculiar and only in possession of the accused and no other person. I did not accept the accused's contention that the injuries were inflicted by any other person other than him. The prosecution evidence placed him at the scene of crime. The call he made to the Chief, the information he gave being acted upon, the finding of the accused in the house with the deceased who had injuries using a murder weapon he admits he owned and taking poison in attempt to commit suicide are circumstances which taken cumulatively form a chain so complete that there is no escape from the conclusion

that within all human probability it is accused who unlawfully killed the deceased and no one else.

I am, therefore, satisfied that the prosecution led evidence leading to a convergence of *actus reus* and *mens rea* to lead to a finding of guilt of the accused. I, therefore, find prosecution has established its case against the accused. I do find accused **Philip Sasita Ndiwa** guilty of the offence of Murder Contrary to Section 203 ad read with Section 204 of the Penal Code and convict him accordingly.

Dated, signed and delivered in Bungoma this 7th day of May, 2020.

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S N RIECHI

JUDGE