REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL CASE NO.34 OF 2019

REPUBLIC.....PROSECUTOR

- V E R S U S –

JLK.....ACCUSED

J U D G M E N T

By the information dated 20/9/2017, the accused **JLK** was charged with the offence of **Murder Contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on 17/9/2017, at Veterinary Village, Laikipia West Sub-County in Laikipia County, murdered **MLE**.

The accused denied committing the offence and the case proceeded to hearing with the prosecution calling a total of seven witnesses.

PW1 EN, the father of the deceased, received a report of the daughter's death on 18/9/2017. He found the deceased's body already at the mortuary, Nyahururu. He noted injuries to the head, left hand was burnt and that when the head was opened up, he saw a lot of blood inside. He only heard that the deceased's husband, accused committed the murder.

MKL (PW2) a son to the accused and the deceased, aged about 12 years testified that on 17/9/2017, there was noise between the accused and the mother (deceased) who were both in their house; that the deceased had a panga wanting to cut the accused; that the deceased was drunk whereas the accused was not; that in an attempt to cut the accused with the panga, the panga hit one of the trasses in the house and the father got hold of the panga, threw it outside but the deceased picked it up again. When trying to cut the accused, she fell on the chair backwards and a piece of wood pierced her on the toe; that the deceased began to bleed on the forehead, they applied medicine and she breastfed the baby and they went to sleep. The accused slept on a mattress in her room but next day, she did not wake up. When PW1 tried to wake the deceased up, the accused informed PW2 that the mother was dead. Later, the accused was arrested. According to PW2, the mother was alleging the accused had other women or woman.

PW3, PLL is also a son of the deceased and accused, aged about 10 years. He told the court that on 17/9/2017 about 8.00 p.m., the mother wanted to cut the father with a panga but she fell and hit her forehead on the chair and got injured; that the mother was drunk and was demanding to know why the accused had other women. He parted with the deceased when she went to sleep on the mattress in her bedroom. Next morning, he heard the baby crying, went to check and found the mother had died.

The postmortem was conducted on the body of the deceased by **Dr. Boniface Miringu (PW4)** on 26/9/2016. He found that the deceased had sustained 2 cut wounds, on the mid forehead, 2cm longitudinal. Another cut wound on the right supra orbital eye region, it was deep and skull was exposed; diffused sub-scalpular haematoma on frontal region, fractured leg ankle and dislocated left patella bone. On opening up the head, PW4 found that there was subdural haemotoma covering both hemispheres on frontal part of the brain and parietal part. The doctor formed the opinion that the cause of death was severe head injury following blunt force trauma.

PW5, James Lorot told the court that on 17/9/2015, Lotodo told him that there was noise in accused's house. He proceeded to the house, found accused seated with his wife and children and there was no noise and the prosecutor applied to declare him as a hostile witness and the court did declare him as such and his evidence did not carry any weight.

PW6, Cpl. Edward Magoma, the investigating officer visited the scene of murder on 18/9/2017 after receipt of a report of murder. He found the deceased's body on a mattress and an injury to the forehead and a wooden broken seat – Ex.no.2. He drew a sketch plan of the scene and took the body to the mortuary.

PW7, PC Edward Esanya is a Scenes of Crime Officer took photographs of the deceased while at the mortuary. He produced the photographs as Ex.No.5.

The accused was placed on his defence. He gave a sworn statement. He stated that on 17/9/2017 he was home on leave and about 8.00 a.m. the wife left, came back about 11.00 a.m. drunk yet he had never seen her drink before. She was making a lot of noise. He went to the

neighbour's home and could hear deceased abusing him and the children. He went back home about 4.00 p.m. and did not get her. She returned at 8.00 p.m. and continued to abuse him. She was still drunk and fell at the door, then she took the panga and wanted to cut him but it hit the roof and it fell. Accused threw the panga under the table; that the deceased took the panga again and wanted to cut him. He moved aside and she fell and hit her forehead on the chair and started to bleed but she did not stop abusing him. She then took a mattress, put it on the floor and started to breastfeed the baby as accused and the other children went to sleep.

Next morning he found that the wife was dead. He denied killing her and that his brother even went to their house at 8.30 p.m. and found her making noise but she kept quiet on hearing a knock and when he left she resumed the abuses. He denied having ever quarreled with deceased before or seen such behavior.

At the close of the defence case, **Mr. Nderitu**, accused's counsel filed written submissions. The gist of the submissions is that the prosecution had not discharged the burden of proof and relied on the decision in ***Republic v Andrew Mueche Omwenga (2009) eKLR*** and ***Republic v Henry Obisa Auko (2018) eKLR*** which set down the elements that need to be established in a charge of murder namely:

> ***(a) The death of the deceased;***
>
> ***(b) That the accused committed the unlawful act or omission which caused the death of the deceased;***
>
> ***(c) That the accused had malice aforethought.***

It was the counsel's submission that the accused did not commit any unlawful act that caused the deceased's death and hence malice aforethought cannot be imputed against the accused. For malice aforethought, counsel relied on the decision of ***Republic v Henry Obisa Auko (Supra)***. He urged that there was no evidence to prove accused's intention to cause the death of the deceased.

Ms. Rugut, counsel for the State did not make any submissions.

I have given due consideration to the evidence on record, the submissions and even the case law relied upon by the defence counsel.

The deceased's death is not in doubt. PW1 was present during the deceased's postmortem. PW2 and 3 found their mother dead after she had an altercation with the accused the previous day. The postmortem revealed the cause of death to be severe head injury following blunt force trauma.

PW4, Dr. Mirungu who performed the postmortem on the deceased stated that he found two cut wounds on the deceased, one on the mid forehead, 2cms long; second one on the right eye supraorbital region which was deep and the skull was exposed. There was also diffused subscalpular haematoma and subdural haematoma covering both hemispheres on frontal and parietal regions. Deceased also sustained a fractured left ankle and dislocated left patella bone.

The next question is whether it is the accused who inflicted the fatal injuries on the deceased. According to PW2 and 3, the deceased kept abusing accused and accusing the accused of having other wives or being engaged in extramarital affairs. They denied that their mother and father used to quarrel or fight before this incident. The accused also claimed that they lived at peace with the deceased. If that is the case, for the deceased to go and get herself drunk and get so quarrelsome and out of control as described by PW2, 3 and accused, then something had gone very wrong.

According to PW2 and 3, it is the deceased who had a panga with which she tried to cut the accused but in attempting to cut accused, she fell on the chair (Ex.No.2) and got injured.

I have considered the evidence of PW2 and PW3 together with the accused's defence which tallies. However, their testimonies are inconsistent with the injuries found on the deceased. If the deceased fell on a chair, and injured her forehead as alleged, then the question is how did she come to fracture her left ankle and dislocate her left patella bone? When asked how such deep injuries leading to exposure of the skull and bleeding in the brain could have occurred, the doctor (PW4) replied that it needed a lot of force for one to bleed in the brain. If at all the deceased fell on a chair as alleged, and the fall was not from a height but when she was just standing, I doubt that such serious injuries leading to exposure of the skull and bleeding in the brain would have occurred. These very serious injuries must have been inflicted on the deceased using a lot of force, not a mere fall.

The serious injuries found on the deceased including injuries to the ankle and patella totally contradict the evidence of PW2, 3 and accused and it is my view that the court was not told the whole truth. It is the accused who had a quarrel with his wife on the night she met her death. Common sense demanded that the accused explains how and where the deceased may have sustained all the injuries found on her body, that is, the patella, fractured ankle and the various other injuries on the head. In ***Wilson Wanjala Nkendeishwo v Republic NKU CA.CR.APP.97/2002***, the Court of Appeal stated as follows:

> ***"As a general rule, the accused assumes no legal burden of establishing his innocence. However, in certain limited cases, the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge. For instance, Section 111 of the Evidence Act Cap 80 Laws of Kenya provides that in Criminal cases an accused person is legally duty bound to explain of course on a balance of probabilities, matters of fact which are peculiarly within his knowledge. The said Section is silent on what would happen if he fails to do so. But Section 119 of the same Act deals with presumptions of fact. A court is entitled under that section to raise a presumption of fact from the circumstances of the case that the appellant knew how the deceased died. The presumption being one of fact, is rebuttable."***

PW2 and 3 are the accused's children. They are children of tender age of 12 years and 10 years. After the accused was charged, the children

stayed with accused's father and when he was released on bond, accused stayed with the children even at the time they testified. I believe they were coached not to reveal the whole truth as to what happened to the deceased.

The injuries that the deceased sustained do not tally with the findings of the Doctor PW4, that is, the deceased falling on a chair as narrated by the witnesses and accused, I dismiss that narration as totally untrue. The accused had a duty under Section 111 of the Evidence Act, to explain what he knew on how the deceased sustained the injuries. The court presumes under Section 119 of the Evidence Act that the said injuries must have been inflicted on the deceased. It is the accused who was in the house with the deceased. It is accused who was allegedly abused and threatened by the deceased and there was some struggle over a panga. Accused should have given a plausible explanation as to how the deceased met her death which he did not do. I dismiss accused's defence as untrue.

Whether malice aforethought was proved:

In ***Nzuki v Republic (1993) KLR 171*** the Court of Appeal defined malice aforethought; that the act must be aimed at someone and in addition, must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- Intent to cause death;

- Intention to cause grievous bodily harm

- Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

In the case of ***Daniel Muthee v Republic CRA.No.208 of 2005 (UR)*** cited in the case of ***Republic v Lawrence Mukaria and another (2014) eKLR*** Bosire, O'kubasu and Onyango Otieno JJA, while considering what constitutes malice aforethought observed as follows:

> ***"When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code."***

Taking into account the above definitions, there is no evidence that the accused set out to kill the deceased. Malice aforethought was not proved. However, I believe there was a disagreement between accused and deceased and the accused must have inflicted serious injuries on the deceased which resulted in her death. In the case of ***Mbugua Kariuki v Republic (1976) 1 KLR 1085***, the court observed that adequate provocation especially when coupled with self defence can reduce a murder charge to manslaughter.

In the end, I find that the accused caused the deceased's death during an altercation between them. I find that the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code has been proved beyond any reasonable doubt as against the accused. I hereby acquit the accused of the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code and instead, I find the accused guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and he is convicted accordingly.

Dated, Signed and Delivered at Nyahururu this *4th* day of *June, 2020*

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mwangangi for the State

Mr. Nderitu Komu advocate for accused

Accused – present

Eric – Court assistant