



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 15 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WMM.....ACCUSED**

**RULING**

WMM, the accused herein, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The charge is framed as follows:

**WMM:** On the 19<sup>th</sup> day of March, 2017 at about 1500hrs at [particulars withheld] Phase V within Nairobi County murdered **SWN**.

The accused denied committing this offence necessitating this trial. The prosecution called a total of six (6) witnesses. At the conclusion of the prosecution case it is the duty of this court to consider the evidence and determine whether the prosecution has made out a prima facie case against the accused person to warrant his being placed on his defence as required under Section 306 (2) of the Criminal Procedure Code.

The evidence by the prosecution shows that the accused and PN (PW1) were living as husband and wife. Among the children the couple had were SW, the deceased and PS (PW3). The two were not biological children of the accused. At the time of this incident the family lived in [particulars withheld] Phase 4 in Nairobi. On 19<sup>th</sup> March 2017 in the morning, 9.00am, PW1 assigned the two daughters duties to fetch water and left. She returned at about 12.00pm and found that the deceased was not at home. She sought to know where the deceased had gone. PW2 told her that the deceased had left but no one knew where she had gone. The accused also arrived home that afternoon and asked the whereabouts of the deceased. On being told that no one knew where she was, the accused walked away. He returned later in the company of the deceased. He picked a piece of rubber (Ex. 4) and used it to hit the deceased all over her body. The beating took some time. Pleas by PW1 to the accused to stop the beating were not heeded. When the beating stopped, the deceased was seriously injured. The evidence shows that the immediately left after the beating to go to his sister's place at Mathare. It is said that he threatened his family not to say anything about the beating and threatened them not to mention him.

Evidence shows that the deceased went to lie down on a mattress inside the house. After some time she asked her mother for water to drink. PW1 told her daughter PW3 to give the deceased water. PW3 fetched water from a container and held the cup to assist her sister to drink the water. It is said that after the deceased took the water she slept. PW1 discovered later that the deceased had died. She went to report the matter to the police at Dandora Police Station. Her initial report was that the deceased had gone out and returned home having been assaulted. One P was mentioned as the suspect. PW1 recorded her statement to that effect. After a few days she called the police and reported that she had lied in her initial report that P had assaulted the deceased. She told the police that she had been threatened by the accused and had lied to the police. She reported that it was the accused that had assaulted the deceased and recorded her second statement to that effect. The accused was arrested and charged with this offence.

I have considered the evidence of PW1 and PW3 who were present when the assault took place. I have considered their evidence that the accused threatened them not to mention him as the one who had assaulted the deceased. I have considered the evidence of PC A O (PW6) to whom the report was made. He confirmed that PW1 made two reports one on 20<sup>th</sup> March 2017. PC O told the court that he was assigned the case and summoned the reportee who went to the Station with her husband and recorded statements. He testified further that PW1 returned to the Station on 27<sup>th</sup> March 2017 and told him that the first statement she had given was incorrect. She recorded another statement in which she implicated the accused. I have also considered the evidence of Dr. Peter Muriuki Ndegwa (PW4) who examined the body of the deceased. Dr. Ndegwa found subcutaneous haematomas the whole length of upper and lower limbs, the trunk both the front and back, face and head. He found subcutaneous contusions on global scalp and diffuse subdural haematoma. His opinion is that the deceased died due to traumatic shock due to multiple musculoskeletal injuries due to blunt force trauma consistent with assault.

I have considered the submissions by the accused through his counsel Mr. Otieno, Learned Counsel. In his submissions Mr. Otieno took issue with the two versions of the statements made to the police by PW1 stating that the evidence of PW1 is inconsistent because of that fact. He took issue with failure by the police to take the sample of the water the deceased took before she died hinting that had the water been examined perhaps the cause of death would have been found to have been different. He submitted that the evidence of PW1 based on her statement recorded seven days after the event was weak given that the corroboration came from the evidence of PW3, a minor who did not like the accused. He submitted that the prosecution has failed to prove malice aforethought on the part of the accused. Counsel cited **Ramanlal Trambaklal Bhatt v. Republic (1957) E. A. 332** and **R. v. Galbraith (1981) 1 WLR 1039**. I have read the two authorities and I understand the legal principles in them.

In my considered view the injuries found on the body of the deceased, which injuries covered her entire body are consistent with the evidence by PW1 and PW3. The two witnesses were present and witnessed the beating. PW3 was 17 years old at the time of her testimony. This court found her demeanour truthful. Her evidence is credible and this court has no reason to doubt her irrespective of her stating that she did not like the accused. She justified her statement by telling the court that she did not like the accused because he had assaulted the deceased. The doctor confirmed cause of death. Even though the water was not tested for toxicology this court harbors no doubt that the cause of death of the deceased has been determined. PW1 was subjected to thorough cross-examination on the issue of her two contradicting

statements. In my view she offered a credible explanation that she had lied to the police because of threats by the accused.

After careful consideration of the evidence in court, it is my finding that this court has been persuaded that a prima facie case has been made out against the accused person to warrant him to be called upon to tender his defence. I find and hold that he has a case to answer and proceed to place him on his defence. I hereby inform him of his right under Section 306 (2) of the Criminal Procedure Code to address this court on the manner he wishes to tender his defence and to inform the court whether he has witnesses to call. Orders shall issue accordingly.

**Delivered, dated and signed this 2<sup>nd</sup> day of May 2019.**

**S. N. Mutuku**

**Judge**