



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA A MERU

CRIMINAL CASE NO. 58 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JOSHUA RUITO KAUI.....ACCUSED

RULING

1. The accused herein is charged with Murder Contrary to section 203 as read with section 204 of the Penal Code cap 63 Laws of Kenya.
2. The particulars are that on 24th Day of August 2014 at Mtarikwa Village Ngusishi Location in Timau Sub-location within Meru County, murdered **Grace Kaimuri**.
3. This Court is now called to examine whether the accused person has a case to answer in accordance with section 306 of the Criminal Procedure Code.
4. The prosecution closed its case after calling three (3) witnesses. Does the evidence herein establish a prima facie case as to call him to enter his defence?
5. **PW1, Gitonga Njeru** is the area Assistant Chief. He testified that on 24/8/2014 he received a report from **PW2, John Mwanu Ikiugu** that the accused herein had reported that his wife had died on the road. He told the court that they went to the scene with the Ocs Timau P/Station and found the deceased by the road side. They also found the accused tied up in ropes by members of the public next to the body of his wife.
6. He stated that he talked to the accused who informed him that he did not kill her but he had disciplined her in the evening and left her on the road. He also told the Court that it was not the first time that the accused had beaten up his wife (the deceased herein).
7. On cross-examination he testified that the accused previously informed him that the deceased was always drunk. He also conceded that the accused had beaten his wife because she was not cooking for her children and for being drunk. He testified that the body was 1 km from where the accused lived and in a shamba some few metres from the road.
8. **PW2 John Mwanu Ikiugu**, the village manager corroborated the statement of Pw1. He stated that the accused went to his house when at 7:00 a.m. in the morning and told him that his wife was dead. He also confirmed that he was escorted by Pw1 to the scene.
9. **Pw3, Alexander Shikondi stated** that when he arrived at the scene he found the deceased with bruises on the head and both hands. He stated that it seemed the deceased was dragged on the ground. He testified that the scene was photographed and that he took the body to Nanyuki Mortuary and took the accused to custody on suspicion of murder.
10. He further told the court that he made efforts to have the post-mortem done but the doctor demanded five (5) relatives. He also stated that he is aware that the post-mortem was not done. He attributed the failure to perform the post-mortem report to challenges in tracing the relatives of the deceased. He produced Letters dated 21st January 2017 and 31st January 2017 from the Ocs Timau addressed to the Director of Public Prosecution that confirmed that the post mortem was not done as **PExh 2a & 2b** He also testified that none claimed the body hence the same was disposed by Nanyuki Hospital after overstaying.
11. PW3 testified that in the course of his investigation, the Area Assistant Chief made the report and he recorded and signed the initial report, the produced the report as **PExh 3**. He also recorded the statement of enquiry of the accused person after confirming that he is the one investigating the matter. He produces the statement as **PExh 4**. It was his testimony that he established that the accused had disciplined the deceased using a piece of wood and left her at the scene.
12. On cross examination he stated that the assistant Chief refused to identify the body. He also concluded that the doctor had agreed to

waive the fee upon him calling two (2) witnesses.

13. I have considered that the actual cause of death has not been fully established by the prosecution. The lack of filing of the post-mortem report raises a credible issue that I wish to address at this stage.

14. The prosecution had clearly been given considerable time to avail the post-mortem report. The only issue that posed a challenge was the identification of the deceased. This Could have been done by the accused person and another credible witness. The assistant chief's refusal to identify the body was not clearly explained. The investigating officer would also have identified members of the Community who would have positively identified the deceased in a situation like this where the relatives of the deceased failed to and/or denied to identify the deceased (this averment was also not substantiated with credible evidence). In the event that the above processes were not viable the Investigating officer being conversant with the scene of the crime would have also been a credible witness for purposes of identification. The deceased was not a "Jane doe" she was identifiable hence the name Grace Kaimuri. In this scenario it was incumbent upon the investigating officer and indeed the prosecution to avail the copy of registration records from the Register of persons. I believe this would have been satisfactory for the purposes of identification and performing the post-mortem.

1. A *Prima facie* case has been said to be;

"...one which a reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence". See RAMANLAL BHATT vs. R (1957) EA 332(CA)

15. I will gauge the above evidence on this scale. First, I am perturbed that no post-mortem was done upon the body of the deceased. I should think that a human body which is subject of homicide investigation should be examined to establish cause of death. I am not interfering with the workings of the Director of Criminal Investigations and the police, but this case is not an example of diligent investigations. The reasons given are not satisfactory at all as the husband of the deceased was available and could have identified the body for purposes of post-mortem examination. The IO could also have identified the body. The chief too. All these are government officials with a duty to serve public cause and interest such as this.

16. In saying these things, I am aware that the lack of a post-mortem report is not fatal to the prosecution case. And a person may be charged and convicted for murder even where medical evidence or the body is not available. See **Charles Tatiro Iresa v Republic [2015] eKLR** where the court relied on **WAHIIH & ANOTHER V UGANDA (1968) EA 278** where Spry JA had this to say.

"There have been cases in East Africa where persons have been convicted of murder although the body of the victim was never found and the case against the appellant depended entirely on circumstantial evidence. There may be other cases where medical evidence is lacking but where there is direct evidence of an assault so violent that it could not but have caused immediate death..."

17. In **Ndungu v Republic [1985] KLR 487** the Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial unless the cause of death is too obvious. The Court stated at page 493 as follows:-

"Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post- mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced."

18. There lies the ultimate test; medical evidence should be availed to establish that the nature of the injury sustained made death obvious outcome. In this case, there was no medical evidence of any kind. Surprisingly, the doctor who received the body or the mortuary did not give any medical notes on the state of the body and external manifestations or injuries thereto. Photos were not even produced to show any external injuries on the body despite the fact that they were taken. PW3 stated that photographs of the body were taken but he did not produce them. The circumstances of this case are such that the deceased may have died for any cause other than murder. No evidence that the discipline administered by the accused cause such injuries that death was the obvious outcome. There is no evidence also that the accused inflicted injuries talked of by Prosecution witnesses. Again, the time of death was not established. In light thereof, there is absolutely no evidence no evidence to support a charge of murder or which impels the court to call upon the accused to enter his defence.

19. In the end I do find that there is no evidence that the accused committed the offence herein. And after considering arguments which the advocate for the defence made, I record a finding of not guilty. The prosecution did not establish prima facie case against the accused that he caused the death of the deceased. The accused is hereby acquitted under section 306 of the CPC. He shall be released forthwith.

Dated signed and delivered in open court this 13th day of June 2019.

F. GIKONYO

JUDGE

In presence of

Mburugu for accused

Accused – present

Namiti for state

F. GIKONYO

JUDGE