



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL CASE NO. 28 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

RICHARD KIMWENO KORIRACCUSED

JUDGMENT

1. **RICHARD KIMWENO KORIR** (“the accused”) is charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 27th July 2018 at Chebulu village in Transmara East Sub-county within Narok County, he murdered **FLORENCE CHEPNGENO** (“the deceased”). After denying the charge, the prosecution called 5 witnesses while the accused gave sworn testimony in his own defence.
2. The accused’s brother, Nicholas Kimutai Korir (PW 1), recalled that on 27th July 2018 at about 10.00pm, he was walking home when he met the deceased who told him that she was unwell. He testified that when he reached home he woke up his brother, Emmanuel Korir (PW 2), who assisted him to take her to Tenwek Hospital while the accused was asleep in his house. He told the court that she died in hospital.
3. Bernard Kiplangat Chepkwony (PW 2) testified that he knew the accused as the brother to PW 1. On the material night, he was with PW 1 in his house when they were called by PW 1’s mother. When they went to the accused’s house, they found the deceased nursing head injuries. The accused was dressing her up and when he finished, they took her to Tenwek Hospital. He told the court that the accused declined to accompany them to the hospital as he complained of chest pains. In cross-examination, he stated that the deceased did not speak to anyone and she appeared drunk as she was smelling of alcohol.
4. PW 3 recalled that he was woken up by PW 1 who told him to come and assist him take the deceased to the hospital as she had been injured. As he was going towards PW 1’s house, he saw the deceased being taken out of the house. He accompanied PW 1 to take the deceased to hospital.
5. The accused’s son, VK (PW 1), gave unsworn testimony after a *voire dire*. He told the court on the material night he had dinner with his father, mother and younger sister then went to sleep. As he was sleeping, he heard his mother screaming, “*stop cutting me*”. He went where she was and saw blood oozing from her head. He also found that her legs had been tied to the seat. After a while his grandmother came and untied her and took her to her place. He recalled that she was taken to hospital by PW 1.
6. On 28th July 2018, the investigating officer, PC Jackton Ingolo (PW 5), was requested to investigate the murder of the deceased. He proceeded to the village where he found the accused had already been arrested. From talking to witnesses he established that the accused and the deceased were married and that on 27th July 2018 at around 8.00pm, the accused went home and found the deceased resting on the bed. He asked for supper and a quarrel arose between the two of them. He also established that the accused tied the deceased with a rope on both hands and started beating her with a blunt object. The accused’s brothers heard the screams and came to find out what was happening. The accused had left the scene by the time they arrived and they found the deceased bleeding profusely. The two brothers; PW 1 and PW 2, having seen the deceased, rushed her to Tenwek Hospital using a boda boda but she was pronounced dead on arrival. The deceased’s body was taken to Longisa Hospital mortuary where he arranged for an autopsy to be done by Dr Stanley. Biegon. He recalled that when he entered the accused house he found that the beddings and some utensils had blood stains.
7. The accused (DW 1) confirmed that the deceased was his wife and that they had two children including PW 4. In his sworn testimony, he recalled that on 27th July 2018, he had worked the whole day and arrived home at about 8.00pm when the children were already asleep. He asked the deceased to make for him ugali as he had bought maize flour but she told him to eat the left over githeri. He continued to demand that she cook for him the Ugali but she refused. She took the maize flour went out, poured it into the pit latrine and returned with the empty sack. As he was angry, he took a stick and hit the deceased as she tried to run away.

8. The accused further testified that PW 1 came back with her. Blood was oozing from her head and he tried to clean her up. He changed her clothes and told PW 1, PW 2 and PW 3 to take her to hospital. He went back to sleep and when he woke up in the morning, he was told that the deceased had passed away. The police arrived later and he was arrested. The accused stated that when he was quarrelling with his wife, the children were asleep in another room. He testified that he did not tie his wife with a rope and that he only hit her once or twice out of anger as she had poured the flour and that she ran out when he did so. He also stated that both of them had taken alcohol when they quarrelled.

9. The offence of murder is defined by **section 203** of the **Penal Code** as follows, “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The prosecution must prove beyond reasonable doubt the following three ingredients; the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

10. The fact and cause of death was in dispute. The post mortem report prepared by Dr Stanley Byegon on 3rd August 2018 was admitted without objection as evidence without calling the maker. At the autopsy, he recorded the following observations:

- There was a cut wound on the parietal region right side about 6cm in length.
- 2 deep cut wounds on the forehead measuring about 2cm.
- Degloving injury in on the left parietal region with the skin flap intact.
- Bruising on both forearms.
- Bruising on the ankle bilaterally.
- Fecal matter on the anal opening.

Internal examination of the deceased’s body revealed a haematoma below the scalp on the left side of the head about 5ml in volume. There was a deep cut on the forehead and a subdural haematoma on the parietal aspect of head about 100ml and fluid in the brain. Dr Byegon concluded that the deceased died from a severe head injury after blunt trauma to the head during assault.

11. Although the accused’s brother, PW 1, was cagey and tried to absolve him, the accused did not deny that he is the one who assaulted the deceased. In any case the evidence is clear that he was the only one who had the means and opportunity to do so as he was the only adult living in his house with two children. From the entirety of the evidence, there was no suggestion that a third person would have assaulted the deceased. I am satisfied therefore that the accused is the person who committed the unlawful act that the cause the death of the deceased.

12. When called upon to explain why he assaulted the deceased, the accused raised the defence of provocation. His case was that deceased angered him when she refused to cook for him ugali, took the flour from him and then proceeded throw it in the pit latrine. He also stated that both he and the deceased were drunk.

13. The defence of provocation under **section 207** of the **Penal Code** is to the effect that, “... *when a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only ...*”

14. The relevant part of **section 208** of the **Penal Code** defines provocation as follows:

208 (1) The term “provocation” means and includes...any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relationship of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the later stands in such relation as aforesaid, the former is said to give to the latter provocation for an assault.

15. Whether the accused was provoked to lose his self-control is a question of fact which the trial court has to determine based on the evidence presented. In **Peter King’ori Mwangi & 2 others v Republic MSA Criminal Appeal No. 66 of 2014 [2014] eKLR**, the Court of Appeal noted that a successful defence of provocation requires that two conditions be satisfied; first, the “subjective” condition that the accused was actually provoked so as to lose his self-control and second, the “objective” condition that a reasonable man would have been so provoked.

16. Whether the defence of provocation succeeds turns on the direct evidence of PW 4. PW 4 is a child who gave unsworn testimony. The law is that the court can only convict the accused based on unsworn testimony of a child if it is corroborated in material particulars as provided by **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which states:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an

offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

17. In **Bernard Kungu Kariuki v Republic NRB CA Criminal Appeal No. 362 of 2012 [2014] eKLR**, the Court of Appeal observed as follows regarding the unsworn testimony of children:

The fact that the evidence of the three children was unsworn does not in our mind render it valueless. The said evidence was admissible and credible...it is a settled principle of law that where a child of tender years gives unsworn testimony then that evidence ought to be corroborated before the trial court can rely on it to sustain a conviction.

18. The testimony of PW 4 was that he did not witness the accused assault the deceased. He heard the deceased screaming, “*stop cutting me.*” When he went where his mother was he saw blood oozing from her head and her legs tied. He recalled that it is his grandmother who came and untied her and took her to her place. In cross-examination, PW 4 told the court that the accused and deceased ate supper together with the children and while he did not see the accused assault the deceased, the deceased’s legs were tied on the chair and the hand tied with the ropes.

19. I find PW 4’s evidence was corroborated in material particulars. From the post mortem report, the deceased suffered bruising on both forearms and on the ankle consistent with being tied with a rope. It is worth noting that those injuries were apart from the head injuries sustained as a result of assault. PW 4’s testimony that it is the grandmother who came to untie the deceased is corroborated by PW 2’s statement that it is PW 1’s mother who alerted them that deceased had been injured. Further, PW 4’s testimony that the accused and deceased were drunk is corroborated by PW 2 and PW 3. PW 4 evidence that there had been some arguments is confirmed by what the accused himself stated. In addition to the corroborated aspects of PW 4’s evidence, I heard the child testify and I am convinced that he was telling the truth about what he saw. Nothing was put to him in cross-examination to suggest that he was not telling the truth.

20. While cross-examining the witnesses, counsel for the accused, suggested that PW 4 could not have seen the incident as he was sleeping in a separate room. In fact, PW 4 stated in cross-examination that he was sleeping in a different house and in examination in chief, he stated that when he came to the house, he did not find the accused. I do not think that this is necessarily inconsistent with the evidence as PW 4 came to where the deceased was crying.

21. Although I find that there was a quarrel between the accused and deceased and that the deceased became angry as a result, the fact that the accused went ahead and tied the deceased’s hands and legs negates any notion that he acted in the heat of the passion. Further, the nature of the assault betrays the accused’s intention as the deceased suffered at least two blows on the head. In **Tei s/o Kabaya v R [1961] EA**, the court held that:

In consideration whether the defence of provocation was sufficient to reduce the offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used.

22. There is also evidence that the accused was intoxicated at the time he assaulted the deceased hence it is necessary to consider this issue in light of **section 13** of the **Penal Code** which states as follows;

13. (1) *Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.*

(2) *Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—*

(a) *the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*

(b) *the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.*

(3) *Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) relating to insanity shall apply.*

(4) *Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.*

(5) *For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.* [Emphasis mine]

23. While intoxication is not in itself a defence, it may be taken into account in determining whether the accused had a specific intent to cause death or grievous harm (see **Manyara v R [1955] 22 EACA 502**). In determining whether the accused was intoxicated to the extent that the intent was negated, the court must have regard to all the facts. In **Richard Kamindu Ndungu v Republic NRB CA Criminal Appeal No. 194 of 2004 [2012] eKLR** the Court of Appeal gave such consideration as follows;

[20] It was not disputed that the appellant had taken some alcohol. By section 13(4) of the Penal Code, intoxication is a factor to be taken into account in determining in this case whether the appellant had formed an intention to kill. The alcohol may not have been so excessive as to interfere with the appellant’s mental faculties. Nonetheless, the alcohol appears to have been enough to produce in the appellant some element of aggression. We come to the conclusion that although the deceased died as a result of the appellant’s action, the appellant did not have the intention to kill her. We find that the superior court erred in convicting the appellant of the offence of murder when no malice aforethought was established.

24. While the accused states that he was intoxicated, I find that he was not intoxicated to the extent that he was not in control of his mental faculties. I accept PW 4's evidence that the family had dinner together on the said evening. I reject his story that he came in late and demanded ugali from his wife. Whatever issues he had with the deceased which may have provoked him, he managed to bind the deceased hands and feet and then assault her at least twice. He could not have managed to tie his wife if he was still in the, "*heat of the passion before time to cool.*" Nor do I find the act of dressing up the deceased, as evidenced by PW 2, after assaulting her exculpatory. It was probably an act of guilt and remorse and did not negate the clear manifestation of malice aforethought as the accused intended to cause grievous harm or indeed death within the meaning of **section 206(a)** of the *Penal Code* when he tied up the deceased and struck her.

25. I therefore find the accused, **RICHARD KIMWENO KORIR**, guilty of the murder of **FLORENCE CHENGENO** and I convict him accordingly.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISII this ___10th ___ day of JUNE 2019.

R. E. OUGO

JUDGE

Mr Ochoki, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.