



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 18 OF 2016

REPUBLIC..... PROSECUTOR

VERSUS

STEPHEN WABWIRE BARASA.....ACCUSED

JUDGMENT

1. **Stephen Wabwire Barasa** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on diverse dates between 19th May 2016 and 27th July 2016, at **Mayore** village **Syekunya** Sub-location of Busia County, murdered **Spenzia Mrokota alias Anita**.
3. The prosecution case was that the accused and the deceased were husband and wife. After the deceased had gone missing, her body was recovered in a shallow grave behind their house. The prosecution contended that the accused killed and secretly buried her before disappearing from home.
4. The accused in his defence contended that he saw his wife alive on 18th April 2016. He left her at home and went to work. When he returned that day he did not find her. When he made enquiries, he learnt that she had gone to her parents. After one week he left for Uganda and returned home on 4th July 2016. He therefore denied any involvement in her death.
5. The issues for determination are:
 - a) Who killed and buried the deceased;
 - b) Whether the killing amounted to murder; and
 - c) Whether the prosecution proved its case against the accused.
6. Sad as this case is, it had its lighter moments. The discovery of her body in a shallow grave can aptly be describe as stranger than fiction. Jackeline Aol (PW1) was removing some cattle from her foot entered a "hole". She did not give it much attention and went on to complete her mission. When she was asleep at night, the deceased appeared to her in a dream. In the dream, the deceased told her to go and dig where her leg had entered a hole. She revisited the scene. She however did not dig as instructed in the dream. She noticed some flies and on closer scrutiny, she highly suspected that it was a grave and she therefore called other people who were of the same opinion. The matter was reported to the police and exhumation was done. The body of the deceased was recovered and to her, Jackeline Aol (PW1), surprise the deceased was in the same clothes she appeared to her in the dream. I do not know how to explain this phenomenon.
7. According to the prosecution, it was the accused who killed the deceased and buried her behind their house in a shallow grave. This was denied by the accused who contended that he had last seen the deceased on 18th April 2016 when she disappeared from their home.
8. Charles Wandera Juma (PW6) testified that on the 20th May 2016 he was attracted by noises emanating from a quarrel from the house of the accused. He identified the voices to be of the accused and his wife. His house was about 20 meters from that of the accused. The accused was demanding to know who bought alcohol for her. Apparently the quarrel degenerated to a fight and he was tempted to go and separate them but decided against it for this had become their habit.
9. Later the same night at about 2 a.m. he heard another quarrel between the accused and his wife. The accused was demanding to be told the truth before he left her alone. He opened his door and went to the verandah. He saw the deceased lying in front of their door. He was aided to see by the moonlight. The accused was still talking from the house. He ordered the deceased to stand or else he was going to hit her with a club again. He went back to sleep and on the following morning at about 6 a.m. the accused locked his house with a padlock and passed by his (PW6's) house and greeted him.

10. The evidence of this witness contradicted that of the accused who contended that he saw the deceased last on 18th April 2016. I have no reason on record to make me doubt the evidence of this witness.

11. Richard Kimutai Lang'at (PW10) is a government analyst who did analysis on the samples collected from the house of the accused. He testified that the blood stains on the bed cover and on the pillow case showed that the blood came from the deceased. This therefore corroborated the evidence of PW6 that there was a fight in the house of the accused on the night of 20th May 2016. This therefore displaces the defence of the accused that the last time he saw the deceased was on 18th April 2016.

12. At one point from around 12th July 2016 the house of the accused was occupied by Evans Oundo Saka (PW7). This witness testified that he went to the house as a tenant. He said he moved out after he learnt of an allegation of a person buried behind the house. According to the witnesses who testified, some weeds had started to grow on the grave by 26th July 2016. The discovery was about fourteen days after Evans Oundo Saka (PW7) had entered into the house. Chief Inspector Haron Mogere (PW8) testified that he estimated the grave to be between 1^{1/2} and 2 months. This coupled with the evidence that the body had badly decomposed rules out any involvement of Evans Oundo Saka (PW7) for the period he stayed in the house. The evidence point to a death that had occurred earlier than 12th July 2016.

13. The DNA conducted on the samples collected from the body of the deceased confirmed the identity of the deceased. I therefore find that the body that was exhumed behind the house of the accused was that of the deceased, the subject of this case.

14. It has come out clearly that the accused was the one who caused the death of the deceased on the night of 20th and 21st May 2016. For an offence of murder to be established the prosecution must adduce evidence to prove the following three ingredients beyond any reasonable doubts:

- (a) the death of the deceased;
- (b) that the accused committed the unlawful act or omission which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

In the case of **Republic vs. Andrew Mueche Omwenga [2009] eKLR**, D. K. Maraga J, as he then was, spelled out the ingredients as follows:

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.

15. Malice aforethought has been defined in Black's Law Dictionary, 10th Edition as follows:

The requisite mental state for common-law murder, encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life, (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

16. Section 206 of the Penal Code gives instances when malice aforethought may be deemed to be established. It states:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(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.

17. In the instant case the prosecution has proved to the required standards that the deceased died and that her death was caused by the accused. The evidence on record paint a picture of the accused as a person who was desperately trying to stop his wife from imbibing alcohol albeit using the wrong method. Charles Wandera Juma (PW6) testified that he used to visit the couple on a daily basis and that they quarreled often for the deceased used to take alcohol which the accused wanted her to stop. His narration on what transpired on the night of 20th and 21st May 2016 point to a domestic quarrel that degenerated into the unfortunate death. I therefore find that the prosecution has not proved malice aforethought.

18. The evidence on record however, prove the lesser offence of manslaughter beyond any reasonable doubt against the accused. I therefore find him guilty of the offence of manslaughter contrary to section 202 of the Penal Code and convict him accordingly.

DELIVERED and SIGNED at BUSIA this 3rd day of June, 2019

KIARIE WAWERU KIARIE

JUDGE