



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 9 OF 2017**

**THE REPUBLIC.....PROSECUTOR**

**=VRS=**

**BENARD OKEMWA NYAKUNDI.....ACCUSED**

**JUDGEMENT**

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on the night of 7<sup>th</sup> and 8<sup>th</sup> December 2017 at Kenyerere village in Masaba North Sub-county within Nyamira County, jointly with others not before court the accused murdered Zipporah Kwamboka. He pleaded not guilty to the charge.

Briefly the prosecution's case is that on 8<sup>th</sup> December 2017 the accused called his sister-in-law, Nancy (Pw3) and told her to go to his place. She complied and together with her brother Joseph (Pw2) they went to find out what he wanted. They soon discovered that their sister Zipporah, the accused's wife and deceased in this case, had disappeared. Joseph (Pw2) started questioning the accused as to where their sister could have gone but all he said was that he did not know. They asked him if he had reported her disappearance to the authorities but he said no. Joseph (Pw2) decided to take matters in his own hands. The first person he went to report to was the area village elder who advised him that the deceased had not informed him of any problem although she usually reported incidents between her and the accused. From there Joseph (Pw2) called his brother John (Pw6) who accompanied him to Keroka Police Station. They were not well received but instead were told that the missing woman's husband was the one who should have made the report but not her brothers. The officers referred them to Keumbu Police Station. They did not go to Keumbu. Instead they decided to go back to the accused so he could tell them the whereabouts of their sister, the deceased. This time they found the children who told them the accused was hiding behind the house. They went to look for him but they did not find him. They stated that they noticed some freshly dug soil and banana leaves behind the house. According to Daniel Asande Obwangi (Pw4) the presence of blood behind the house prompted them to look further. They continued their search. Pw4 stated that during the search he came across some loose earth. He poked it with a stick and unearthed a green dress and they soon discovered the deceased's body there. People started screaming. Nancy (Pw3) testified that she identified the body in the shallow grave as that of her sister because she knew the dress the deceased was wearing. Both she and Joseph (Pw2) testified that the deceased would occasionally go to their home after fighting with the accused but they would reconcile and she would return to her matrimonial home. Pw2 stated that he went to the scene about a kilometre from the accused's house and found their sister buried in a shallow grave. Soon police officers arrived at the scene and removed the body from the shallow grave and took it to Gucha Mortuary. A post mortem conducted by Dr. Morebu revealed that the cause of death was due to asphyxia secondary to manual strangulation. The doctor noted that the deceased had bruises on the face, scratch marks on the anterior neck and that the neck trachea and the thyroid gland were broken.

Thomas Momanyi Ndege (Pw5) the area Chief testified that he knew the deceased and the accused as they were his subjects. He stated that he had arbitrated their matrimonial disputes and reports of domestic violence on many occasions and once the same were settled the couple would continue with their married life. He recalled having received a report concerning the deceased's disappearance from Joseph (Pw2) and being called by him once the body was recovered. He confirmed that the body was in a shallow grave about 2 feet deep. He stated that he was present when it was exhumed by the police who he had informed of the occurrence. He stated that the accused would beat the deceased when he went home drunk or because the children did not go to school. He stated that the accused was nowhere to be found when the body was discovered.

Sergeant John Okoth (Pw9) told this court that he was the investigating officer. He stated that they were called to the scene by Chief Thomas Ndege (Pw5). He also confirmed that they found the body of the deceased in a shallow grave measuring about 2 feet deep. He also gave the correct estimation of the distance between the place the body was found and the house where the deceased lived with the accused as about 70 to 100 metres. He stated that the accused was apprehended as he tried to flee and handed over to Administration Police Officers at Gesima AP Camp and was thereafter handed over to Keroka Police Station. He produced photographs of the body and also confirmed that the body was taken to Gucha Hospital Mortuary. After the post mortem was conducted the body was released to the deceased's family for burial.

Seven-year-old Patrick Okemwa (Pw1) told this court that he lived with his parents (the accused and the deceased) and siblings at the time. He stated that the accused used to beat his mother a lot, and that on the material day while he and his siblings were sleeping in their room he heard and even saw his father beating his mother. He stated that although he was in bed he was awake and could see into the sitting room

where they were fighting because the room where he and his siblings used to sleep did not have a door and there was a solar lamp hanging on the timber rafters of the ceiling. He explained that the roof structure of the house was not covered and that the lamp was hung there to light the house. He stated that his bed was very close to the sitting room and that was the reason he could see. He testified that his father beat his mother with a stick and a panga and would not heed to her screams. He elaborated that the accused hit her on the neck with the stick. He stated that after some time, his father and mother carried the fight outside the house but when his father returned he was alone. That was the last time he saw his mother. He stated that he did not know where she had gone and that he told his uncles that much. He also told the police what he had witnessed on that fateful night. He contended that it was his father who killed his mother.

The accused elected to make an unsworn statement. He told the court he was a brick maker. He confirmed that the deceased was his wife but stated that he knew nothing of the day she died but knew of the day he was arrested. He stated that the day was 9<sup>th</sup> December 2017 and that he was on his way home from work but on reaching a place called Rigoma two old men told him that a certain police officer needed bricks. They led him to the police post where he found two police officers. One of the old men told the officers they had taken him there because it was rumoured he had killed his wife. He was later collected by officers from Keroka and arraigned in court on 11<sup>th</sup> December 2017. He contended that to date he does not know how the offence was committed. He urged this court to establish the truth.

After closing the defence case, Mr. Bwonwong'a, Learned Counsel for the accused submitted that the prosecution had not proved the charge beyond reasonable doubt. He submitted that the accused had clearly stated that he was not at home on the material day. He stated that the incident occurred at night and that the evidence of Okemwa (Pw1) that the accused hit the deceased with a panga and stick was discounted by the post mortem report which indicated the cause of death was as a result of strangulation. He contended that Pw1's evidence did not support the prosecution's case. He reiterated his submission that the incident occurred at night and stated that nobody witnessed it. He stated that in Kisii culture if one is found practicing witchcraft at night they are killed and because the killers never want to be discovered they enter the body. He stated that the deceased might have been found practicing witchcraft at night. Referring to the evidence of Pw1 he stated that the evidence had confirmed there was no electricity in their house. He urged this court to acquit the accused as he is but a suspect.

Mr. Jami, Principal Prosecution Counsel submitted that the prosecution has proved its case beyond reasonable doubt.

The evidence of the prosecution as a whole, the post mortem report and the photographs of the body taken at the scene leave no doubt in my mind that the deceased met her death by a human hand and by unlawful act and that whoever killed her intended to conceal what he had done by burying her body in a shallow grave deep into a tea farm. The injuries noted on the body of the deceased – bruises and broken trachea and thyroid gland which attests to strangulation are indicative of an intention by the killer to kill her or cause her grievous harm. This coupled with the concealment of the body afterwards prove there was malice aforethought. In other words, all the ingredients of murder were proved beyond reasonable doubt.

The only issue for determination is whether the person who murdered the deceased is the accused.

It is trite law that a case of murder may be proved either by direct or circumstantial evidence. In the case of **Mwangi Vs. Republic [1983] KLR 522** the then court of Appeal stated: -

***“An offence of murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed...”***

It is my finding that in the instant case there is direct evidence that the accused murdered the deceased. That evidence is in the testimony of Patrick Okemwa (Pw1) the son of the deceased and the accused. It is not lost to this court that at seven years the witness is a child. Before reception of his evidence I conducted a *voire dire* as required under **Section 19 (1) of the Oaths and Statutory Declarations Act** and was satisfied that he understood the nature of an oath as well as the solemnity of the occasion in which he was being called upon to give evidence. I also satisfied myself that he understood the duty of speaking the truth. He gave sworn evidence. Pw1 testified that on the material night he saw the accused beating the deceased and that at one point the two of them left the house only for the accused to go back alone. It was his evidence that he was in bed but awake and that he could see what was happening because the room he was in did not have a door and the house was lit by a solar lamp that was hanging from the ceiling. This court believed his testimony. I found him a credible witness because although he was young he remained calm and collected throughout. He was also very consistent. What he told his aunt (Pw3) and his uncles (Pw2, Pw4 and Pw6) is the same thing he told the police and repeated in this court and he remained unshaken in the face of rigorous cross examination by defence counsel. He knew his parents well and with the light of the solar lamp he could see all that was happening. I find that the prevailing circumstances were favourable for him to see what was happening. There was nobody else in the house that could have committed the offence other than the accused.

Be that as it may the law is that the evidence of this witness alone is not sufficient to convict the accused. **Section 124 of the Evidence Act** provides: -

***“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act where the evidence of a child of tender years 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.”***

I am however satisfied that there is other material evidence to corroborate the evidence of Pw1. To start with there was evidence which was corroborated not just by the deceased's siblings Pw2, Pw3 and Pw6 but also by the area Chief (Pw5) that the accused often abused his wife physically. Pw5 testified that wherever the deceased brought to him a report of the domestic violence she had endured he would arbitrate between her and the accused and they would go back to continue with their married life. I also find and hold that the accused's conduct in not reporting the disappearance of the deceased and his refusal to take part in the search mounted by her siblings implies that he knew where she was but believed that her grave would never be discovered. Thirdly the body was found in a shallow grave concealed in some tea bushes just 70 metres to 100 metres from the house the accused shared with the deceased. This was just a stone throw from the matrimonial home

meaning the accused had opportunity to kill her and inter the body without raising any suspicion. After all it was close to his house and nobody would have bothered to ask him what he was doing there. The deceased's brother (Pw2) and cousin (Pw4) testified that there was also some blood behind the accused's house. Although the blood was not tested it cannot be ruled out that it that is where the actus reus took place. Although in his defence the accused alleged to have been lured to the police station as he was coming from work the totality of the prosecution's evidence proves that he was fleeing from the area. The deceased's siblings had at first found him at home but when they went back from Keroka where they had gone to seek the assistance of the police they did not find him. He seemed to have pretended as if he was doing something behind the house because that is where his children thought he was and where they told their uncles they would find. His fleeing from the area infers guilt on his part.

Pw1's evidence that there was a solar lamp hanging from the ceiling of their house was corroborated by Daniel (pw4) who swore that he saw it. It is my finding that Pw1 is a credible witness and that his evidence is trustworthy and reliable. The defence mounted by the accused did not offer any rebuttal to this cogent evidence which I find was overwhelming. The charge against the accused was proved beyond reasonable doubt.

I find him guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**Signed, dated and delivered in Nyamira this 11<sup>th</sup> day of July 2019.**

**E. N. MAINA**

**JUDGE**