



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO 5 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

GKK.....ACCUSED

JUDGEMENT

Introduction

1. The accused is charged with murder contrary to section 203 and section 204 of the Penal Code (Cap 63) Laws of Kenya, in respect of the deceased, FC. He pleaded not guilty. The prosecution called five witnesses in support of the charge.
2. The accused made an unsworn statement and called no witnesses.

The case for the prosecution

3. The prosecution called AC (Pw 1), who is the daughter of the deceased. Pw 1 is a child of tender years, aged eleven years. After undergoing a *voir dire* examination, I allowed her to make an unsworn statement, because she did understand the nature of taking the oath. Pw 1 testified that on 28th May 2018 her mother went to Mulot town, to withdraw money from her mpesa account. The accused arrived at their home at 4.00 pm on the same day. On that same day at 11.00 pm the deceased arrived at her home and began to breast feed her infant, S. The deceased followed the accused into the bedroom. Pw 1 then heard two sounds of an assault in the bedroom. As she was entering the said bedroom, the accused was leaving it. She switched on the solar panel. She then saw blood on the temple part of the head, where she had been injured. She also saw blood on the bed. She then screamed running to their neighbour's home namely G, who is her uncle. G then went to call E. E, G and G then took the deceased to hospital. She further testified that she was able to see the accused due to the lamp light, which she described as being strong.
4. Furthermore, it was her evidence that the deceased told the accused to go and get a blanket. As a result, he hit the deceased. And as they were eating the accused quarreled with the deceased, which arose out of the failure of the accused to pay for the changaa he had drunk. Apart from the deceased, the accused and the child who was being breast fed, there was no one in that bedroom. She finally, testified that the accused was drunk when he was beating the deceased.
5. The prosecution then called EM (Pw 2). Pw 2 testified that the deceased and accused were living together as husband and wife. It was his evidence that in the night of 28th May 2018 at 11.00 pm he heard Pw 1 screaming "*ameua mama yangu*" (he has killed my mother). In her second scream Pw 1 called uncle G. In response Pw 2 went to the house of the deceased. Upon arrival at the scene Pw 2 testified that he saw a lot of blood on the bed. Pw 2 with G took the deceased to hospital, who was then pronounced dead on arrival. Pw 2 also testified that the deceased and accused were living as a husband and wife and were also brewing changaa. Pw 2 testified that the deceased had four children with the fourth child being that of the accused. Finally, he identified a wooden frame being which was produced as exhibit 3.
6. The prosecution also called WKK (Pw 3). Pw 3 is the brother of the deceased. It was his evidence that on 28th May 2018 at 11.00 pm, Pw 1 screamed saying that the accused has killed her mother. As a result, Pw 3 went and called Pw 2 and they then proceeded to the scene of crime. They found the deceased was breathing but was not talking. Pw 3 saw an injury on the left side of the head of the deceased. Pw 3 also saw a blood stained wooden stick on the bed of the deceased. They used torches to see it. The stick was produced as exhibit 3. They then took the deceased to Longisa hospital, where she was pronounced dead on arrival. A report was made to the police, who came and took photographs.
7. The other witness called was DKC (Pw 4), who on 5th June 2018 identified the body of the deceased to the doctor, who performed a postmortem examination on the body of the deceased.

8. Finally, the prosecution called No xxxxx Pc Molly Akinyi (Pw 5). Pw 5 was the investigating officer, who then was attached to Narok south CID office. Her evidence was that on 31st May 2018 she received information that the accused had surrendered to Nakuru police station. The accused was examined as regards his mental status and was found to be mentally fit to stand trial, which report was put in evidence as exhibit 2. Pw 1 told Pw 5 that the deceased and accused were living as a husband and wife. Pw 1 also told her that the deceased and accused quarreled and that she also heard a hit sound. Pw 5 then produced the postmortem report as exhibit 1.

The case for the accused

9. On 13th January 2018 the accused elected to give evidence on oath, but later on 30th April 2018 the accused changed and decided to make an unsworn statement. It was his statement that on 28th May 2018 they awoke up and he himself went to work in [particulars withheld] secondary school. In that school he works as a security guard. He worked until 4.00 pm, when he returned home and found only the children. Thereafter the deceased returned home and gave him a bottle of beer. He drank that beer. Thereafter they drank chang'aa. He testified that as he went out in answer to a call of nature he hit a table as a result chang'aa poured out. The deceased then stood and the child fell down. The accused then got hold of the child. The deceased also pulled the leg of the child. As a result, the accused pushed her aside and the deceased fell down landing on the seat. The deceased then stood and sat on the wooden frame.

10. The deceased then shouted at the accused saying that the accused had poured the chang'aa. As a result, the accused left deceased shouting. At 2.00 pm the accused suddenly found himself being rained upon. He awoke and returned to the house and found many people shouting and complaining. The accused got afraid thinking that the child had been injured. The accused then went to his uncle's home. He then told his uncle to advise the wife to stop drinking chang'aa. The uncle rang and two people arrived and they went to his home. While there they boarded a motor vehicle which took them to Narok town and was then put in police cells.

Submissions of counsel for the accused

11. Ms Adallah, counsel for the accused filed written submissions and urged the court to acquit her client, since on the facts, the prosecution had failed to prove the case beyond reasonable doubt. She cited the case of **Rex v. Tubere s/o Ochen (1945) 12 EACA 63**, in which the court held that in determining whether malice aforethought has been established the following elements should be considered. 1 the nature of the weapon. 2 the manner in which it was used. 3 the part of the body targeted. 4. The nature of the injury inflicted either a single stab wound or multiple injuries 5 the conduct of the accused, before, during and after the incident. She submitted that prove of malice aforethought is an important element in a charge of murder. Malice aforethought is deemed to be established in circumstances that are set out in section 206 of the Penal Code.

SUBMISSIONS OF THE PROSECUTION

12. The prosecution has no right of reply by virtue of section 310 as read with section 161 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

ISSUES FOR DETERMINATION

13. I have considered the entire evidence and the submissions of counsel for the accused. As a result, I find the following to be the issues for determination. 1 whether or not it is the accused who caused the death of the deceased. 2 whether or not the evidence discloses murder or manslaughter.

Issue 1

14. I believe the evidence of EMY (Pw 2) that the accused and the deceased were living as husband and wife. Furthermore, I believe his evidence that Pw 1 screamed twice saying that "*ameua mama yangu.*" I also believe the unsworn evidence of AC (Pw 1), that the accused assaulted her mother in the bedroom. It is only the deceased, the accused and S who was being breast fed that were in the bedroom, where the deceased was found with injuries. She was also able to see the accused due to light from a delight lamp. As a result, I find that the accused used the wooden stick, exhibit 3, to assault her mother. The cause of death according to the postmortem report, exhibit 1, was due to severe head injury inflicted by a blunt trauma to the left temporal area. Following the assault, the accused left the matrimonial home and thereafter surrendered himself at Nakuru police station according to the evidence of No. xxxxx PC Molly Akinyi (Pw 5), the investigating officer.

15. Following the assault, Pw 2 and one G took the deceased to Longisa hospital, where she was pronounced dead upon arrival.

16. I do not believe the evidence of the accused, which is a bare denial and has no ring of truth. He was with the deceased during the fateful night. He sought to distance himself from the killing of the deceased by suggesting that the deceased fell down and fatally hurt herself, when they were pulling the breast feeding infant, Sheila in opposite directions.

17. In the light of this evidence, I find that it is the accused, who caused the death of the deceased. This was due to the usage of the wooden stick by the accused in inflicting the injuries in the head of the deceased. The running away to Nakuru from the matrimonial home provides corroboration of the evidence of Pw 1.

ISSUE 2

18. The accused assaulted the deceased, because the latter told him to go and get a blanket according to the evidence of Pw 1. The attack was not provoked. The injuries were inflicted on the sensitive part of the body namely in the head. In the circumstances I find that the evidence discloses murder.

19. The upshot of the foregoing is that the prosecution has proved their case beyond reasonable doubt. I therefore convict the accused of murder contrary to section 203 as read with section 204 of the Penal Code.

Judgement dated, signed and delivered in open court at Narok this 8th day of July, 2019 in the presence of Mr. Omwega for the state and Ms Adallah for the accused.

J. M. Bwonwonga

Judge

8/7/2019