



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 19 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

PIUS ETYANG SHAPIL.....ACCUSED

JUDGMENT

1. **Pius Etyang Shapil** 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 the 25th day of August 2017, at **Kolanya** sub-location in **Teso** North Sub County of **Busia** County, murdered **Wycliffe Shapil**.
3. The prosecution case is that on the material day the accused went to the home while crying. He entered the house where the deceased was and a quarrel ensued. When his mother intervened, he chased her away. When she returned later in company of someone else, she found the deceased injured. When they were taking him to hospital he succumbed to the injuries.
4. **Pius Etyang Shapil**, the accused, in his defence contended that he was too drunk to know what happened on the material night.
5. The issues for determination are:
 - a) Whether it was the accused who inflicted the fatal injuries to the deceased,
 - b) Whether the accused was too drunk to know what took place on the material night; and
 - c) Whether the offence of murder was established.
6. **Mary Tata (PW2)** is the widow of the deceased and the mother of the accused. In her testimony she said that at about 7p.m. her husband returned home and she served him food in the main house and she went back to a detached kitchen. When she was going for the utensils she saw the accused coming from the upper side of their home. He was crying. He entered his house before going to the house where the deceased was. While she was still outside, she heard the deceased asking him what wrong he (the deceased) had committed against him (the accused). When she entered into the house she found the accused holding the deceased. She managed to separate the duo and the deceased went into his bedroom. The accused then pushed her out and chased her away.
7. When she returned with **Pius Mamai (PW3)**, they found the deceased lying on the floor and was in pain after sustaining injuries. They did not find the accused.
8. The evidence of **Mark Shapil (PW1)** was that when the accused was entering the main house where the deceased was, he appeared angry. This witness is a younger brother of the accused. He said he heard the sound of beatings while his father, the deceased was in his bedroom.
9. After the arrest of the accused from his house on the same night, two metal bars were recovered. They had blood stains. This was in the evidence of **Sergeant Janet Chiema (PW10)**. When these metal bars were analyzed by **Richard Kimutai Lang'at (PW11)**, the blood was established to be that of the deceased.
10. The prosecution has therefore proved beyond any reasonable doubt that the fatal injuries were inflicted on the deceased by the accused.
11. In his defence the accused contended that he did not know what transpired on the material day for he was very drunk. Section 13 of the Penal Code provides:

(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.

Subsection 2 of the section 13 lays the burden on the accused to prove that the defence of intoxication is available to him. In the case of **Maina vs. Republic [2007] 2 EA 279 (CAK)** where it was held that:

If an accused person seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove.

In the instant case I will endeavor to find if the evidence on record supports the defence by the accused.

12. The evidence of **Mary Tata (PW2)** was that when she intervened, the accused pushed her out and chased her away. Although there is evidence that the accused had taken alcohol on the material day, his conduct in chasing away his mother when she intervened does portray him as a person who had the presence mind and who acted rationally; he did not want interference.

13. After the act, the accused removed the murder weapons from the scene and went into hiding. He hid under the bed and probably enlisted some help to have his house locked from outside to give an impression that he had left. These were well calculated moves and could not have been effected by a person who was too drunk as to know what had transpired.

14. I therefore find that the defence of intoxication is not available to the accused.

15. In order to establish the offence of murder, in addition to establishing that the accused caused the death complained of, the prosecution must prove that an accused person charged with murder had malice aforethought. This is the requisite *mens rea* for the offence of murder. On malice aforethought section 206 of the Penal Code provides:

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.

16. We can glean from the evidence of **Mark Shapil (PW1)** and that of **Mary Tata (PW2)** that the accused confronted his father with some accusations. **Mark Shapil (PW1)** also testified that he had heard people saying that the deceased had talked ill of the accused. Beyond these facts, the court was not offered any evidence from which it could make a finding that the accused had malice aforethought or infer the same. Equally, we may not know how the deceased responded to the accusations. I therefore find that the prosecution has not proved malice aforethought against the accused. The offence of murder has not therefore been proved.

17. The prosecution has however proved the offence of manslaughter contrary to section 202 of the Penal code. I accordingly find him guilty of this offence and convict him of this lesser offence.

DELIVERED and SIGNED at BUSIA this 18th day of September, 2019

KIARIE WAWERU KIARIE

JUDGE