



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL (MURDER) CASE NO. 53 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMMY KIMEU KIOKO.....ACCUSED**

**JUDGEMENT**

1. The accused herein **SAMMY KIMEU KIOKO** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the 16<sup>TH</sup> day of August, 2011, at Syiathani village, Wamunyu location in Mwala District within Machakos County murdered **SUSAN NDUNGWA KIMEU**.

2. The prosecution called 16 witnesses in support of its case. The brief summary of the case is that relatives and villagers to the accused herein **Sammy Kimeu Kioko** learnt that he had deserted his home in Wamunyu area. He was traced around Masinga area in the company of his three young children and was at the time trying to cook for his children in a thicket. The villagers based in Masinga area found the accused's actions rather weird and the clan elder was alerted who in turn communicated with his counterpart at Wamunyu area and it was then discovered that accused's spouse one Susan Ndungwa Kimeu had been murdered. The accused was apprehended and escorted to Masii police station. The accused's house was visited and the body of the deceased herein was discovered. The body was taken to Machakos Level Five Hospital mortuary. A post mortem was later conducted on the body. The accused was later charged with the present offence. The court found that a prima facie case was established against the accused and he was put on his defence

3. The accused testified that the deceased was his wife with whom they married in 1989 and parted ways in 2011. He denied being near the scene of crime on the material day. He indicated that the deceased was engaged in extra marital affairs. On cross-examination, he testified that he rented a house at Kakuku and moved in on 9.8.2011 and reiterated his displeasure with the deceased's affair. On re-examination, he testified that he was unable to get defence witnesses because he was new in the area.

4. Learned counsels for the parties herein agreed to file written submissions. I have considered the said submissions together with the evidence presented by the sixteen (16) witnesses. The burden of proving all ingredients of the offence beyond reasonable doubt falls on the Prosecution in all cases save for a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. (**Miller v Minister of Pensions {1947} All. E.R 372**).

5. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, a court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

6. The four ingredients that the prosecution is required to prove in an indictment for murder are that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person.

7. As regards the aspect of death, a majority of the witnesses who hailed from Wamunyu area did visit the home of the accused and saw the body of the deceased covered with a bedsheet and placed underneath a bed. The police officers who visited the scene saw the body and had it ferried to Machakos Hospital Mortuary. Hence there is no dispute that the deceased indeed died.

8. On the issue of the cause of death, Dr. Frederick Otieno Okinyi (PW.13) conducted the post mortem on the body of the deceased. He noted a skull fracture on the left temporal parietal area of the head. The doctor formed the opinion that the cause of death was head injury to the left temporal skull caused by blunt trauma. Indeed the police who visited the scene recovered a metallic hammer near the body of the deceased and which was produced as an exhibit.

9. On the issue the unlawful nature of the death, and identity of the accused, the law presumes every homicide to be unlawful unless it occurs

as a result of an accident or is one authorized by law. The evidence of PW.5 and PW.6 who are children to both accused and the deceased stated that they saw the accused assaulting the deceased with the use of a hammer and that the accused wrapped the body with a bedsheet and placed it under a bed. I observed both PW5 and PW6 when giving evidence in Court and I was more persuaded by their truthfulness and consistency in stating what they saw. This evidence clearly placed the accused at the scene of crime. The two witnesses further stated that the accused washed them to rid them of any bloodstains and took them to Masinga area. The deceased denied killing the deceased and he said that he was nowhere near her. This was not backed by any supporting evidence hence I find it safe to presume that the death was unlawful and I find the assault by the accused caused the death of the deceased who was his wife.

10. I have carefully evaluated the alibi evidence adduced by the accused who testified that on the material day he was at Kakuku. However the prosecution evidence notably from Pw5 and Pw6 who saw the accused strike the deceased with the hammer placed him at the scene of crime and hence the alibi has not dislodged the prosecution's evidence. The recovery of the metallic hammer near the deceased squarely links him to the crime and discredits his alibi as there is no explanation as to his movements that day save that he was new in the area and could not marshal defence witnesses; this does not dislodge the direct evidence together with the circumstantial evidence that implicated him.

11. On the issue of malice aforethought, courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is used on the victim and the conduct of the assailant before, during and after the attack. As it transpired from the evidence that the accused and deceased had had a strained relationship owing to allegation of infidelity on the part of the deceased the involvement of the accused in the crime could not be ruled out as he was not happy about the conduct of his philandering wife. Prior to the attack, the accused and deceased are reported to have exchanged words. The conduct of the accused in hitting the deceased with a hammer and then placing the body under a bed and leaving with the children left no doubt that he had malice aforethought stemming from the deceased's infidelity. It is noted that even after the deceased had been seriously injured, the accused did not even bother to seek for any medical assistance for the deceased. He placed the unconscious deceased under the bed and covered her with a bedsheet and showered the children and took off with them to Masinga. The matter of the attack upon the deceased left no doubt that the accused intended to inflict upon the deceased grievous injuries which led to the death. It can safely be inferred that death was the desired outcome of whoever the assailant was. It is clear that the cuckolded accused could not stand the deceased's infidelity and decided to end the life of the deceased. The defence evidence has not shaken that of the prosecution which is overwhelming against him. The two children who testified came out as honest, candid and truthful in their testimonies and remained unshaken even on cross examination. They had no reason at all to frame their father over the death of their mother.

12. In the result, I find that the prosecution has proved its case against the accused herein beyond any reasonable doubt. I find him guilty of the charge of murder contrary to Sections 203 as read with 204 of the Penal Code Act and I accordingly convict him.

It is so ordered.

**Dated and delivered at Machakos this 18<sup>th</sup> day of September, 2019.**

**D. K. Kemei**

**Judge**