



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 15 OF 2018

REPUBLIC.....PROSECUTOR

VERSES

BENARD WASIKE KHAEMBA.....ACCUSED

JUDGEMENT

1. The accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that **on the 9th day of August, 2018 at Nabeki farm in Chepchoina location within Trans Nzoia County murdered JANE NAFULA MALIMBE**.

2. The accused denied the offence and the matter did proceed to full trial where the prosecution called several witnesses to support its case. The accused when placed on his defence gave sworn evidence denying the charge but did not call any witness.

3. Before looking at the merit or otherwise of the matter it shall be expedient to summarise the evidence as presented during trial.

PROSECUTION'S CASE

4. **PW1 KENNEDY WEKESA MUTENDE** testified that he runs a posho mill and the accused was his uncle. He said that on the material day at around 7.30 am he was from the shop where he had gone to purchase a scratch card. He met the accused on the way and he told him that he had lost his phone. He then requested him to call his line and the same was ringing but he told him to disconnect. He told him that the deceased had it.

5. He then escorted him to his house and left but about 10 minutes thereafter he heard some screams emanating from the accused house. He said that it was the deceased who was screaming for he knew her since 2012. He went back and on inquiring what was going on the accused threw a rungu (club) at him. He succeeded in dodging the club.

6. At that time Ngeywa and Kitio arrived at the scene. He went on to state that the two people mentioned above were also attacked by the accused and each went there on way. The following morning he heard screams from the accused house and he rushed to the scene and found that the deceased had died.

7. On cross examination, he said that he knew that the accused was married with 2 children. He said that although he escorted the accused to his house he did not enter the house and he did not know whether there was someone else in the therein. He also said that he heard that the accused had leased his land and that he had been attacked by robbers.

8. **PW2 SIMON KITIO MAGWANI** testified that on the material day around 7.30 pm he was going home through the route that passed the accused homestead. On the way PW1 came running and told them that the accused was beating his wife and they could hear her screams. The accused came high on the heels of PW1 and began assaulting them.

9. Ngeywa was beaten on the head. They all dispersed and in the morning they heard about the death of the deceased. He went to the scene and saw the body and the injuries. The accused had been taken to hospital.

10. On cross examination he said that it was still early and they were able to see the accused who was also a neighbour. He however admitted that he did not see the accused assault the deceased.

11. **PW3 JOSEPH NGEYWA NDIEMA** also testified that he was with PW2 on the material night and on their way home when they met PW1 who told them that the accused was beating his wife. The accused while they were talking came and hit him with a club on the head. They each dispersed and went there way and in the morning he heard about the death of the deceased. He went to the hospital and saw the accused.

12. On cross examination he said that he knew the accused very well and that he was chasing PW1 at that particular time.

13. **PW4 DR. ALEX WANYONYI BARASA** produced the post mortem report which he performed on the body of the deceased and formed an opinion that the cause of death was haemorrhage secondary to deep cut wounds from assault.

14. **PW5 CORPORAL NICHOLAS ONYANGO** from Endebes CID office carried out investigation and preferred charges against the accused. At the scene they recovered 2 pangas and a rungu which had been used to assault the deceased. He said according to his investigation the cause of death was the accused phone taken by the deceased. He produced the 3 assault weapons as evidence in the case.

15. On cross-examination he said that the accused had been taken to hospital when he arrived. He said that there were bloodstains on the recovered pangas. He did not believe the robbery incident as claimed by the accused as it did not according to him make any sense.

DEFENCE CASE

16. When placed on his defence the accused as stated earlier gave sworn evidence in which he narrated his love affair with the deceased. He said that his wife had gone away and that they met with the deceased that evening and agreed that he comes and spends the night at his place which she obliged. He went on to state that during the night they were attacked by thugs who wanted money from him as he had sold his land. In the ensuing attack he gave them Kshs. 46,000 as well as the phone, but they still assaulted them.

17. As a consequence of the attack, he was injured and lost consciousness and did not know what happened and he found himself at the hospital. The deceased whom he could not defend during the incident sustained serious injuries and died as a result. He did not recognise the robbers as they were hooded. He did not know who took him to the hospital.

18. He said that he could not get the file from the hospital since according to him the file was taken by the police. He denied that the cause of death was the phone since she had given him back. The said phone was taken by robbers.

19. On cross-examination he did not produce any evidence that he had purchased the phone. He said that he was with PW1 that evening. He denied that he met PW3 on the material day.

ANALYSIS AND DETERMINATION

20. The court then ordered the parties to file written submissions after the trial and apparently the State alone did file the same and I have perused the same extensively.

21. It is clear that for the offence of Murder to be proved the three ingredients necessary are provided as ;

a) Proof of the fact and cause of death of the deceased.

b) Proof that the deceased met his/her death due to an unlawful act or omission on the on the part of the accused.

c) Proof that the said unlawful act or omission was committed with malice aforethought.

22. The above is derived from the definition as provided in Section 203 of the Penal Code Cap 63 of the Laws of Kenya.

23. The fact of the deceased death and the cause of her death is not disputed as per the report of the doctor and the production of the post mortem report. Nonetheless is the evidence as presented cogent enough to hold the accused liable?

24. There is no doubt and it is admitted that the deceased spent the night with the accused. The accused gave chronology of how they agreed with her to spend that night. The deceased body was found lying dead the following morning inside the accused house. The accused was not in and he said that he had also been admitted at the hospital.

25. What PW1, 2 and 3 stated in my view was not controverted by the accused. He admitted for example that he met PW1 that evening. PW1 on the other hand explained his movements with the accused to the extent of leaving him enter his house. He said that he used the light from his phone to shine the way for the accused.

26. No sooner had he left the accused than he heard the screams from the accused house and when he rushed to the scene he was chased by the accused. As he took off he met PW2 and 3 whom he explained what had taken place and suddenly the accused appeared and he assaulted PW3. They all parted ways till the following morning when they heard the sad news.

27. Is it possible that the three witnesses conspired to fix the accused? I respectfully do not think so for the simple reason that PW1 was not with the 2 but found them on the way as he escaped the wrath of the accused. The two were assaulted by the deceased and PW3 escaped with some injuries although no medical document was produced.

28. More importantly, the said witnesses heard the screams from the deceased although they did not manage to reach the house.

29. What of the story by the accused that they were attacked by robbers at around 1.00 am that night? The same does not add up. There was no evidence that their screams attracted any of their neighbours. There were no witnesses who took the accused to the hospital when he lost

consciousness. If indeed there were such good Samaritans they would also have taken the deceased as well.

30. At any rate there was no medical documents produced to back up the accused allegation that he was taken at the hospital and he did not bother to call any witness from the alleged hospital despite the fact that he was duly represented during trial.

31. The accused ought to have brought himself within the purview of **Section 111 (1)** of the **Evidence Act**, which states as follows;

“when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.”

32. Simply put, the accused although not physically seen assaulting the deceased was expected to explain why she was screaming from his house that evening and why he decided to chase PW1 whom he had just been with hardly 10 minutes ago. If it was the 1am the time he alleged that they were attacked by thugs, then PW1, 2 and 3 would have been the eye witnesses.

33. I find the conclusion reached by the investigating officer for the cause of the assault being plausible, namely that the whole issue revolved around the phone given by the accused to the deceased. It is not far-fetched to conclude that the accused assaulted the deceased and in an attempt to save her, the accused chased PW1, his uncle, and in the process PW2 and 3 were caught up in the mixed.

34. Circumstantially, this court finds the evidence as adduced by the prosecution irresistibly pointing towards the culpability of the accused. I so hold that the charge of murder has been proved against the accused. His defence did not convince this court. He may have admitted himself to the hospital although there was no prove. If indeed he sustained any injuries then most probably was as a result of the deceased defending herself.

35. Needless to state that there was no material evidence placed before court that the accused and the deceased that night were attacked by any robbers. There was no iota of evidence that he sold his plot or at all and thus the thugs were after the proceeds. In fact, the accused could not even recall his phone number or produce any evidence of purchase.

36. In the premises I find that the charge of murder against the accused has been proved beyond any shadow of doubt and I find him guilty under the provision of Section 203 of the Penal Code.

Dated, signed and delivered at Kitale this 16th day of October, 2019.

H. K. CHEMITEI

JUDGE

16/10/19

In the presence of:-

Mr Omoria for State

Vikundo holding brief for Karani for Accused

Accused – present

Court Assistant – Kirong

Judgment read in open court.