



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 78 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ANN NGETA.....ACCUSED

J U D G M E N T

1. ANN NGETA (“the accused”) has been charged with the offence of murder contrary to *section 203* as read with *section 204 of the Penal Code Cap 63 of the Laws of Kenya*. The particulars of the offence was that on 27/10/2015 at Kariene village within Meru County, the accused murdered LAURENCE MURITHI (“the deceased”). The prosecution called six (6) witnesses to establish its case.

2. **PW1 Lillian Kagwiria**, a sister to the deceased, testified that on 27/10/2015 she spent the whole day in her farm. At about 7.00pm, she received a call from Makena informing her to go to the deceased’s home and take him to hospital. When she and her husband arrived, they found that the deceased had died. His body had an injury at the back of his head with some little blood that stained the mattress and the left side of the face had a black mark.

3. **PW2 WN**, daughter to the deceased and accused testified that, on the material day the deceased woke up well. She and her mother left him home as the two went to school to pay her school fees. Her mother left her at school and went home. Three days later she was informed that her father had died.

4. **PW3 IN**, daughter of the deceased and accused, testified that on 26/10/2015 the deceased came home at night drunk and found them in the kitchen. He quarreled her younger brother and then went to sleep. Her sister, **PW2**, took food to him and she only served him tea. The following morning she left for school. At about 4.20pm she came back home and did not find anyone. She changed her clothes and went to hospital for an injection. She returned back at 6.30pm and found the accused in the kitchen. After her studies, she took food to the deceased but found him lying on his bed unresponsive. She called the accused and they established that he was dead.

5. **PW4 Geoffrey Kimathi** stated that on 27/10/2015 at about 6.00am he went to the home of the deceased to see him. He found the accused who told him that the deceased had gone out. He left but later on at about 9.00pm, he was informed that the deceased had passed away.

6. **PW5 Bernard Kirimi Murugi**, the sub-chief of Lower Kiungone sub–location testified that on the material day, he received a call at about 7.30pm from Gacheri a neighbor of the accused who informed him that the deceased was dead. He went to the scene and found the accused who narrated to him that she had left in the morning to pay school fees for her daughter. That she had left the deceased home but when she returned, she found him sleeping. It is only later that she found that he was dead. **PW5** examined the body and found that the head had an injury on the left side with some little blood having dripped on the mattress. **PW6 James Kinoti** identified the body for post mortem on 29/10/2015 at the Nkubu Consolata Mission Hospital.

7. **PW7 No. 58808 PC Ethan Watachumo** testified on behalf of the investigations officer who had since retired. He told the Court that the police were called to the deceased’s home on the material date whereby they visited the scene. They found the accused and members of the public at the scene. The body was lying on the bed covered with a blanket. It had a cut wound at the back of the head above the neck. There were no blood stains either on the beddings or the clothing the deceased wore. They recovered the body and arrested the accused.

8. When placed on her defence, the accused gave sworn testimony. She told the Court that she had been married to the deceased for 20 years and they had 4 children. That on the material day, she left the deceased at 9:00 am and went with her daughter to pay school fees. When she returned at 4pm, she found him sleeping in his house. She carried on with house chores until her children returned from school. When she served food, she asked **PW3** to take it to the deceased. It is then that they discovered that the deceased was dead.

9. The offence of murder is defined under *section 203 of the Penal Code* as:-

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

10. From the definition, four ingredients of the offence arise which the prosecution must prove beyond any reasonable doubt. These are:-

a) the fact of the death of the deceased.

b) the cause of death.

c) proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

d) proof that the said unlawful act or omission was committed with malice aforethought.

11. With regard to the first and second issue, on the fact and cause of death, **PW3**, **PW5** and **DW1** who saw the body testified that the deceased had an injury at the back of his head. **PW6**, brother to the deceased identified the body at the mortuary for post mortem. **PW7** produced the post mortem report as **PEXh.1** which disclosed that deceased's neck was completely lax, presence of clotted blood over the right occipital region and that the cause of death was cervical spine fracture and intracranial hematoma. I am satisfied that the fact and cause of death of the deceased was proved to the required standard.

12. On the third issue, it must be proved beyond reasonable doubt that the deceased met his death as a result of an unlawful act or omission on the part of the accused. In this regard, the prosecution must adduce evidence to prove that it is the unlawful act or omission of the accused that resulted in the death of the deceased.

13. **PW2** told the Court that on the material day, she and the accused left home to go pay her school fees and they left the deceased at home. When **PW3** came home from school she did not find anyone. She went to hospital and when she returned, she found her mother, the accused at home. But when she went to serve food to the deceased, she found him dead.

14. From the evidence adduced, it would seem that it is the accused who was the last person to see the deceased. According to the doctrine of 'last seen', Lesiit J in **Republic v E K K [2018] eKLR** delivered herself thus: -

"Regarding the doctrine of "last seen with deceased" I will quote from a Nigerian Court case of Moses Jua V. The State (2007) LPELR-CA/IL/42/2006. That court, while considering the 'last seen alive with' doctrine held:

"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."

In yet another Nigerian case the court considering the same doctrine, in the case of Stephen Haruna V. The Attorney-General Of The Federation (2010) 1 iLAW/CA/A/86/C/2009 opined thus:-

"The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."

Quoting from another jurisdiction, to be specific India, the courts there have developed that doctrine further. In the case of Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh, JT 2006 (4) SC 16 the court held:-

"that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."

15. In the present case, it is the accused who must have been the last person 'to be seen' with the deceased. She is the one to give an explanation on how the deceased must have met his death. Unless she exonerates herself from the death, she will be culpable.

16. When placed on her defence, the accused explained how she and her daughter **PW2** left home at 9am of the material day to go and pay **PW2's** school fees. They left the deceased at home taking his traditional brew. When she returned that afternoon, she found the deceased asleep in his house. It was normal to find him asleep at such times when drunk. The accused proceeded to carry out her house chores and soon after, her children arrived from school. It was when dinner was being served that it was discovered that the deceased was dead.

17. There was evidence that for 10 years, the accused and the deceased slept in different bedrooms. The accused explained that that was because the deceased was a heavy drinker. The prosecution did not provide evidence from which to infer any guilt on the part of the accused. It was not suggested that the sleeping in separate bedrooms was caused by any ill will on the part of the accused.

18. Further, apart from the fact that the accused saw the deceased alive at 9:00am on the material day it was not clear if she came into contact with him after that. The deceased was alone between 9:00am and 4 pm when the accused returned home. There was nothing to show that the deceased was alive at that time. The time of demise was not proved.

19. In view of the foregoing, I am of the view that the prosecution failed to prove that the accused met his death as a result of an unlawful act

or omission on the part of the accused.

20. Accordingly, I find the accused not guilty of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya** and I acquit her.

DATED and DELIVERED at Meru this 14th day of November, 2019.

A. MABEYA

JUDGE