



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL CASE NO. 11 OF 2018**

**THE REPUBLIC.....PROSECUTOR**

**VERSUS**

**CHARLES GESEGWA OIGO.....ACCUSED**

**JUDGEMENT**

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 19<sup>th</sup> September 2018 at Nsicha Sub-location in Nyamira North Sub-count the accused murdered Veronich Masara Geseko.

The accused, who throughout the trial was represented by Mr. Bwonwong'a Advocate, pleaded not guilty to the charge. The prosecution then called seven witnesses to prove its case.

On his part, the accused made an unsworn statement in which he maintained his innocence and also asserted that he was not at home on the day it is alleged he killed the deceased. He stated that he learnt about the death of his wife on his way home the next day. Thereafter the court then heard submissions from Counsel for the defence and prosecution.

To prove murder, the prosecution must prove the following beyond reasonable doubt: -

- (a) That the accused person killed the deceased.**
- (b) That the accused killed the deceased by an unlawful act.**
- (c) That the accused killed the deceased of malice aforethought – (see Section 206 of the Penal Code).**

In this case the court heard that the deceased was the accused's wife. They lived together with their four children – two sons (Pw3 and Pw4) and two daughters. The court also heard that the accused and the deceased used to fight often and more so whenever they were drunk. On the material day their son RG (Pw4) then 11 years old, arrived home from school to find the deceased lying under a tree. According to him she did not respond to his pleas to wake up although when he had gone home for lunch earlier that day she had asked him to make her some sugarless tea and she had drunk it. In the evening however she could not wake up no matter how many times he called her. He and his sister, one T, even made porridge for her but she could not take it. Pw4 stated that as the deceased lay there the accused went and poured water on her and when she refused to respond to his calls to wake up he kicked her on the back but still she did not respond. They were soon joined by their brother PO (Pw3) who was thirteen years old. He too tried to wake her up but she did not respond. It was then that they informed their paternal grandmother Agnes Bonareri Oigo (Pw5) who together with some neighbours tried to give her first aid and when she completely failed to wake up they caused her to be taken to Ibara Hospital where she was pronounced dead. The matter was then reported to the police.

A team of police officers who included Chief Inspector David Mursoy (Pw6) and Police Constable Paul Kimwele (Pw7) were detailed to investigate the matter. They caused a post mortem to be conducted on the body of the deceased and the cause of death was opined to be head injury. The post mortem report states that the deceased was hit by a blunt object causing internal bleeding to the brain. Chief Inspector Mursoy (Pw6) told this court that when he examined the body he also noticed injuries on both shoulders. Joseph Osoro Momanyi (Pw1), a cousin of the deceased and Denis Moturi Marita (Pw2) her brother also confirmed that the deceased had an injury on the head. Joseph Osoro Momanyi (Pw1) described the injury as one that turned the head into a pulp. He stated that if one touched the deceased's head blood would ooze from the nose. The court heard that given the history of violence in the marriage between the deceased and the accused and evidence that he had poured water on her on the material day, the accused was arrested and charged with this offence. The investigating officers testified that they became even more suspicious because he fled his home after the occurrence.

From the above evidence it is clear that there is no direct evidence against the accused. Not a single witness, not even Pw3 and Pw4, claim to

have seen the accused assaulting the deceased on that day. It is my finding that even the allegation by Pw4 that he saw the accused kick the deceased on the back and that he saw him beating her and pouring water on her is suspect. I say so because this witness was less than candid when asked whether his mother used to drink. He claimed she did not yet all the other witnesses including his brother Pw3 said that it was drinking by both parents that was the major cause of the domestic violence in the home.

In the absence of any direct evidence the evidence against the accused person is therefore circumstantial. In the case of **Mwangi v Republic [1983] KLR 522** the Court of Appeal held: -

**“1. An offence of murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed.**

**2. In a case depending exclusively on circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused’s guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. “**

As the charge against the accused person depends exclusively on circumstantial evidence, the point for determination by this court is **whether the inculpatory facts are incompatible with his innocence and incapable of explanation upon any other hypothesis than that of his guilt and whether there are no other co-existing circumstances which would weaken or destroy the inference.**

The inculpatory facts in this case are that **the accused used to batter the deceased and was prove to domestic violence whenever the two went out drinking; that on the material day he was home alone with the deceased; that water had been poured on the deceased; that she died as a result of an injury to her head and that he fled his home on the same day she died.**

I have already stated that I did not believe the evidence of Pw4 that he witnessed accused beating the deceased and gave the reason for not believing him. His evidence which was not corroborated is rendered even more improbable by the fact that the accused person raised an alibi which although it could have been investigated to establish if it was true was not so investigated and therefore was not dislodged. That alibi juxtaposed with the evidence by Pw3 and Pw4 that they did not have any affection for the accused raises doubt as to whether the only reason they implicated him was because they disliked him for overworking them, not paying their school fees, claiming that he was not Pw3’s biological father and chasing him from home. This is more especially because the evidence of Pw5 was that the accused had not arrived home from work when all this was happening. Whereas there is no number of witnesses required to prove a case it is my find that the prosecution should have called T, the daughter of the accused and deceased, who it was alleged stated that the accused had gone home and left before Pw3 and Pw4 arrived. That she and the woman, who it is alleged tried to administer first aid to the deceased by giving her an egg and who would have confirmed if the accused was indeed at the scene when she did so, were not called as witnesses gives rise to an adverse inference that had they been called to testify their evidence would have been prejudicial to the prosecution’s case. Although Chief Inspector David Mursoy (Pw6) the lead investigator in this case stated that he confirmed that the accused was at the scene of crime he did not elaborate how he came to that conclusion. This is a case which rested mainly on the evidence of a single witness (Pw4) who was a child and whose evidence required corroboration. Chief Inspector David Mursoy did not bother to look for other evidence to corroborate that of Pw4. The evidence of Pw3 is that he was not at home and he did not know who killed their mother. As for Pw5 her evidence was that the accused was not at home at the material time. Pw6 also seemed to exaggerate when he stated the deceased had injuries on the shoulders yet that was not proved by the post mortem. Whereas there is credible evidence that the cause of death was a head injury there is no direct or even circumstantial evidence that the injury was inflicted by the accused person. The case against him is based on his past relationship with the deceased which raised suspicion that he might have killed her but suspicion alone can never sustain a charge. Accordingly, this court accords the accused the benefit of doubt, finds him not guilty of the charge and acquits him.

**Signed, dated and delivered in open court this 14<sup>th</sup> day of November, 2019.**

**E. N. MAINA**

**JUDGE**