



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL CASE NO 1 OF 2019

REPUBLIC..... PROSECUTION

VERSUS

KENNETH RUTO CHOKER.....ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Charge

1. The Accused herein KENNETH RUTO CHOKER is charged with ***murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya***, the particulars thereof being that on the 12th day of January 2019 at ENDOW VILLAGE in Ptlam Sub-location within Pokot Central Sub-County of West Pokot County, he murdered ROSALINE CHEPOCHKRUP SAWIL. The accused person denied committing the offence.

The Prosecutions case

2. From the seven witnesses called to testify in this case, the prosecution case is as follows:- The deceased herein and Wilson Sawil, PW3 (Wilson) got married in 1992 and got their first child in 1993. Sometimes in 2003, the deceased became ill when she was 3 months pregnant, suffering episodes of extreme high blood pressure. She was admitted at the Moi Teaching and Referral Hospital for one year before being discharged, and thereafter attended monthly clinics. In the year 2006, the deceased's condition worsened. The situation became so bad that all the house helps Wilson employed to assist her ran away. In 2016, Wilson hired the accused person herein, to assist the deceased with farm work, and also to keep an eye on her.

3. On 12.1.2019, Wilson received information from his brother Stephen Pseret Sawil PW6 (Stephen) that the deceased had been taken ill and was at the local clinic. Wilson made arrangements to visit the deceased at the hospital and on arrival thereat, the deceased told him that Kenneth Ruto, the young man he had hired to assist her had assaulted her. Since the accused person was also at the hospital, Wilson interrogated him about the deceased's allegations. The accused person told Wilson that he had done so so that the deceased could fear him. The deceased also vowed not to eat anything from the hand of the accused person who had hit her with a jembe on the neck and right hip.

4. On 13.1.2019, the deceased was transferred to Kapenguria County Referral Hospital for further treatment. She was also taken to Moi Teaching and Referral Hospital for specialized tests such as CT scan and MRI. She also underwent surgery to fix her broken spine. She died at the Moi Teaching and Referral Hospital on 18.1.2019. After the deceased died, Wilson advised the accused herein to surrender to the police for his own safety. Wilson had already made a report of the assault to the police on 15.1.2019. Haron Poghio Kiyer who testified as PW3 (Haron) stated that on 12.1.2019, at about 8.00am, he saw the accused person herein standing outside Wilson's house and appeared to be talking to someone. Haron went to the said house and found the accused person standing out there, while the deceased who was referred to as Mama Asha, was lying on the ground. The accused person was holding a stick. Haron cautioned the accused person not to beat Mama Asha.

5. After some hours of work in the shamba, Haron returned to Wilson's home and found Mama Asha still lying on the ground. The accused person was still around and this time round he was carrying a jembe. Haron went his way when the deceased told him to go away. Later he rang the accused person to find out what the matter was, but the accused person responded that nothing was wrong. Later, Haron learnt from the accused person about the deceased's death at Moi Teaching and Referral Hospital. The accused also informed Haron that he was at Kapenguria Police Station. Haron confirmed that he had no grudge with the accused person who was his friend. Haron also told the court that the deceased who suffered from some mental illness was always quarrelling the people in the village.

6. PW4 was Delvine Chesista Aaron, a farmer from Endow. She testified that on the morning in question, she was together with her

husband, Haron when Haron started running towards the deceased person's house. She also did so and upon arrival at the deceased's persons home, she found Kenneth, the accused person herein quarrelling with the deceased. According to the accused person, the deceased was troubling him. At the time the deceased was crying and told Delvine that Kenneth had assaulted her. Delvine also stated that when she saw the deceased, she (deceased) was lying on her back, with her head almost touching the water in the trench. Before the deceased person's relatives arrived Kenneth and his wife dragged the deceased into her house and closed the door behind them. Delvine learnt some days later that the deceased had died.

7. Delvine confirmed that she did not have any grudge with the accused person. She also confirmed that the deceased had some kind of mental illness which made her to always quarrel people.

8. PW5, Katome Cherop Catherine, testified of how on 12.1.2019, she had passed by the deceased's house and found her unable to sit up because of pain in her back. Catherine made arrangements to take the deceased to hospital, but by the latter part of that week, the deceased had died. During cross examination, Catherine confirmed to the court that the deceased suffered from intermittent mental problems.

9. Stephen Pseret Sawil (Stephen) testified as PW6. On 12.1.2019, while at Endow Centre, he received information from Catherine that the deceased, who was lying sick at her house, needed help to go to the hospital. On arrival at the deceased's house, he found her lying on the floor of her house and when he interrogated her the deceased told him the accused person had assaulted her. Stephen made arrangements to take the deceased, first to the local health centre that same day later and to Moi Teaching and Referral Hospital on the following day. The deceased died a few days thereafter.

10. When Stephen was cross examined, he told the court that the deceased suffered from mental problems which made her say strange things at times. He also testified that the deceased spoke with her own mouth that the accused person herein had assaulted her on the neck using a jembe.

11. Number 73001 CPL Fredrick Muli testified as PW7. He investigated this case in which the accused person had surrendered himself to police. PW7 stated that during investigations, he had established that following a quarrel between the accused person and the deceased on the morning of 12.1.2019, the accused person had assaulted the deceased by hitting her with a jembe at the back of the neck. PW7 visited the scene at the deceased's home and also visited Moi Teaching and Referral Hospital where the deceased had been admitted in critical condition. He attended the postmortem examination which was conducted at the Moi Teaching and Referral Hospital on 25.1.2019 by Dr. Kibor Kibet, PW1.

12. According to the pathologist, the deceased was aged between 42 and 45 years. The body had turned blue due to extreme blood loss. The body had a sutured 6cm long incision on the right side of the neck. There was also another incision on the back.

13. Internally, the lungs were swollen with pulmonary oedema, while the right side of the chest had 200ml of fluid. The spine was fractured just under the incision at the level of C3 and C5. The fracture had been fixed by a metal plate. The spinal code was also fractured at the level of C3 and C5. In Dr. Kibet's opinion the cause of death of the deceased was pulmonary oedema due to cervical spine fracture and an injury to the cord due to blunt force trauma. Death certificate number 1206073 was produced in evidence as Pexhibit 1.

14. PW7 also testified that the accused person surrendered himself to the police. Before he charged the accused person, PW7 took him to Kapenguria County Referral Hospital for mental assessment. The mental assessment report produced by PW7 confirmed that the accused person was fit to stand trial.

15. In cross examination, PW7 stated that the accused person presented himself to the police for two reasons: one being that he was a suspected criminal and two for his own safety. PW7 conceded that no confession was offered by the accused person and further that there was no eye witness to the incident.

Defence Case

16. At the close of the prosecution case, the accused was found to have a case to answer. The accused person sought Court's leave to give his unsworn statement in Pokot. The other proceedings had taken place in Kiswahili, a language which the accused person had confirmed during the plea that he fully understood.

17. In his unsworn statement, the accused person stated that on 12.1.2019 at about 9.30am, he left home for the shamba. He was carrying a jembe on his shoulder. After throwing his jembe into the shamba, he went back home and found the deceased lying outside on the grass with her head facing the lower side. That when he asked why she was lying in that position, she rudely told him to go away. Thereafter he went about his usual chores, even as the lady continued shouting at him.

18. In the meantime, Haron and Delvine went to where the deceased was lying down. As the accused person prepared to go to the shamba he asked his wife to attend to the deceased, who was complaining of pain in the left hand and on the right leg. Assisted by his wife, the accused person took the deceased into the house. At around 12.00 the accused called the deceased's husband whom he referred to as my uncle, and informed him that the deceased appeared to be suffering a relapse of her condition. He also called Stephen who came and took the deceased to the hospital. He also went to the hospital. The accused followed the deceased's progress until she was taken to Moi Teaching and Referral Hospital and her subsequent death on Friday, 18.1.2019.

19. On that evening of 18.1.2019, Wilson advised him to run away from home for fear of an imminent attack upon him (the accused person) That is how, he ended up surrendering to the police at Kapenguria Police Station. On the following Monday, he was arraigned before court. He denied any involvement in the death of the deceased.

Submissions

20. Mr. Bororio, counsel for the accused person put in written submissions in which he contended that the circumstantial evidence availed by the prosecution could not sustain a conviction in this case. He urged the court to set the accused person free. M/S Kiptoo, prosecution counsel, did not file any submissions.

Issues, analysis and determination

21. The issues that are for determination in this matter are:-

- 1. The fact of the death of the deceased.**
- 2. The cause of that death.**
- 3. Proof that the accused person herein caused the death of the deceased.**
- 4. Proof that the accused person did so with malice aforethought**

a) Fact and cause of death

22. There is no doubt in this case that the deceased herein died, physically and medically. Wilson and his brother Stephen testified to that fact. Even the accused person confirmed that he learnt from his uncle Wilson, on 18.1.2019, that the deceased had died. Dr. Kibet confirmed that he carried out a postmortem examination on the body of the deceased on 25.1.2019 during which he confirmed that the deceased suffered blunt force trauma on the neck, spine and spinal cord. Thus, both the death and cause of death of the deceased were proved beyond reasonable doubt.

b) Whether it was accused person who killed the deceased

23. The defence has argued that since there was no eye witness, the available circumstantial evidence is too weak to link the accused person to the death of the deceased. Haron testified that on the morning in question, he went to the deceased's home and found her lying down on the grass with the accused person standing over her holding a stick. Haron cautioned the accused person not to beat the deceased and then went away to work on his shamba. Haron alleged that the accused person told him he had hit the deceased, though he could not say exactly where he had hit her.

24. On her part, Delvin stated that when she asked the deceased what the matter was, the deceased allegedly told her she had been assaulted by the accused person.

25. Both Wilson and Stephen testified that the accused person had been hired by Wilson to look after the deceased who had intermittent mental problems. Wilson also testified that because of her condition, the deceased was difficult to manage, and his decision to hire the accused person was to counter the deceased's intermittent ungovernable behaviour.

26. There is also evidence that the accused person was with the deceased on the morning in question. This confirms Haron's testimony that he found the accused person standing over the deceased as the deceased lay down on the grass in pain. My considered view of this matter is this:- that since the accused person had the responsibility to look after the deceased, and was seen with the deceased on the fateful morning, it is only the accused person who can say what happened to the deceased, whether the deceased fell down or whether she was hit with a blunt object or whether there was a sudden twist of the deceased's head and neck. Dr. Kibet ruled out the possibility of the injuries suffered by the deceased as having been caused by the surgery she underwent. The accused person did not controvert the evidence that he was the one who was looking after the deceased, and was with her on the fateful morning.

27. In light of the above, I am satisfied that it is the accused person who assaulted the deceased and caused the injuries which led to her death about a week later.

c) Did the accused person have malice aforethought

28. In other words, has the prosecution proved any of the following circumstances to warrant a finding that the accused person had the requisite malice aforethought:-

- 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 intention 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.**

29. From the surrounding circumstances, it does not appear to me that the prosecution proved malice aforethought. The available evidence

shows that the deceased was a difficult person whenever she suffered bouts of mental instability. She was also said to be very quarrelsome at such times. It is my considered view that the accused person assaulted her in order to temporarily immobilize her, though even in that state, she did not shut up.

Which way forward?

30. Having reached the conclusion that malice aforethought was not proved in this case, and yet it also having been proved beyond doubt that accused person assaulted the deceased, I can only fall back to the provisions of **section 179 of the Criminal Procedure Code** to make a finding that the state has proved the lesser cognate offence of manslaughter. In my humble view, the accused person could not have surrendered to the police if he knew he had done nothing wrong. Both Wilson and Stephen testified that they had no grudge with the accused person, and that is why Wilson was concerned with the accused person's safety. This fact rules out the possibility of fabrication of a case against the accused person. Haron, Delvin and Catherine also did not harbour any grudge with the accused person.

31. I accordingly find the accused person KENNETH RUTO CHOKER guilty of the offence of **manslaughter contrary to section 202 as read with section 205 of the Penal Code** and convict him accordingly **under 322(1) of the CPC**.

32. It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 5th day of November, 2019.

RUTH N. SITATI

JUDGE

In the presence of

M/S Kiptoo for state

Mr. Bororio for accused

Mr. W. Juma - Court Assistant