REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 93 OF 2011

REPUBLIC……..……..PROSECUTOR

VERSUS

WYCLIFFE WAFULA NAMASWA……..……..……ACCUSED

JUDGMENT

Background

1. The accused herein, **WYCLIFFE WAFULA NAMASWA** was charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence are that on 22nd September 2011 at Enkoiko village within Oloimismis Location in Transmara District of Narok County in the Republic of Kenya murdered **DAMARIS KAYIEYO NAMASWA.**

2. On 18th October 2011, the accused pleaded not guilty to the offence before Sitati J. and a trial ensued before the same Judge who heard the testimonies of 4 prosecution witnesses. Following the transfer of Justice Sitati to another station, the case was on 4th November 2014 placed before Wakiaga J. for directions when it was agreed that the case proceeds from where it had reached.

3. On 12th July 2016, the matter was placed before me for further hearing when 3 prosecution witnesses testified after which the prosecution closed its case. It should therefore be noted that I only heard the testimonies of the 3 last prosecution witnesses namely; Dr. Misoi Samuel (PW5), Joyce Wairimu Joel (PW6), the Government Analyst and P.C. James Ngunjiri (PW7) the investigating officer. I did not therefore have the chance to hear the civilian eye witnesses testify as the 3 last witnesses were all formal witnesses who did not witness, first hand, the alleged crime of murder being committed.

4. Be that as it may, I have had the opportunity of perusing and analyzing the evidence tendered before my predecessor in the case with a view to writing this judgment.

Prosecution's case

PW1, **Mary Nemaoi Seitai** was the mother of the deceased herein, **Damaris Kayieyo Namaswa**. She testified that the accused was her son-in-law having been married to the deceased for about 2 years prior to her death and that on the material date, being 22nd September 2011 at about 3pm, she was at her home in the company of PW2, **Sepata Noolkepayang Seitai,** when the accused, who lived in her neighborhood, came to her home to enquire from her if she had seen the deceased. She informed the accused that she had not seen the deceased after which the accused became agitated and informed them that the deceased would never come back home again if he met her. The accused then left the home of PW1 in a hurry but PW1 and PW2 were alarmed by his utterances and decided to follow him to his home where they demanded to know where the deceased was after which the accused entered into his house from where he dragged the deceased out. According to PW1, the deceased appeared helpless and when PW1 asked her what had transpired, she informed her that the accused had hit her with a rungu. PW1 and PW2 raised an alarm and the accused then ran away. A group of people who had gathered in a nearby church responded to the alarm raised by PW1 and PW2 and quickly got a vehicle and assisted in taking the deceased to the hospital. Unfortunately, the deceased succumbed to her injuries at about 7pm on the same day. It was the testimony of PW1 that the marriage between the deceased and the accused was riddled with numerous disagreements.

5. On cross examination, PW1 stated that she did not witness the accused assault the deceased and that it is the deceased who informed her that the accused had beaten her with a rungu.

6. PW2 was **Sepata Noolkepayang Seitai**, the co-wife of PW1 and the step mother of the deceased. Her testimony was that she was on the material day with PW1 when the accused came to their home to ask them if they had seen the deceased. She added that the accused warned them that he would 'finish' the deceased that day after which he ran away, but that together with PW1, they followed the accused to his home and enquired about the deceased whereabouts. According to PW2, the accused then entered the house and dragged out the deceased who had been beaten and her mouth smeared with poison. The deceased informed them that the accused had kicked her and hit her with a rungu. They raised an alarm and people who had gathered at a nearby church came to the scene.

7. PW3 Julius Leshan Ole Mugie was a village elder and one of the people who had gathered at a church meeting when they heard screams from the accused's home which was about 50 meters away from the said church. He rushed to the scene where he found many people gathered after which they took the deceased to the hospital using a vehicle that they had secured from a well-wisher. He stated that while on the way to the hospital, the deceased informed them that the accused had hit her on the right kidney. He further testified that the deceased had a swollen stomach and that she died at about 8 pm the same day. He added that the deceased and the accused had frequent fights and disagreements but that he did not witness the accused assault the deceased.

8. PW4 Samuel Lepita Kitiapi learnt about the admission of the deceased to hospital and her subsequent death from an unnamed neighbor. He later accompanied elders to a place called Mirindat where they arrested the accused who had gone into hiding.

9. PW5, Dr. Misoi Samuel, performed the post mortem examination on the body of the deceased and established the cause of death to be internal hemorrhage secondary to raptured spleen. The doctor was of the opinion that raptured spleen could occur if the deceased was hit by a blunt object.

10. PW6 was Joyce Wairimu Joel a principal chemist at the Government Chemists. Her testimony was that an analysis of the specimens from the deceased's body did not establish that she had ingested any toxic substances.

11. PW7 P.C. James Ngunjiri received the report that the deceased had been assaulted by her husband but that shortly thereafter, he got another report to the effect that the deceased had died. He testified that the accused was on 23rd September 2011 brought to the station by the area chief and members of the public. On 24thSeptember 2011, he witnessed the post mortem examination on the deceased body and that since the accused had alleged that the deceased had taken poison, he took specimens from the deceased's body for analysis by the Government Chemists. He recorded statements from witnesses and charged the accused with the offence of murder.

12. When placed on his defence, the accused gave an unsworn statement in which he stated that he did not know why he had been charged in court. He explained that he had on 10th July, 2011 gone to his farm and that while at the farm, a mob came and started beating him for reasons he did not know after which he was arrested and charged in court. He further stated that his in-laws had earlier come to his home and taken away his wife, the deceased herein. He added that he did not know who killed his wife and only learnt of her death while at the police station. He further denied having had any disagreements with his wife.

Submissions

13. At the close of the defence case, Mr. Kaburi for the accused relied to on the written submissions filed on 19th September 2016 while Mr. Otieno for the state chose to rely on the evidence on record.

14. In the written submissions filed on 19th September, 2016, Mr. Kaburi submitted that the prosecution did not discharge its burden of proving, beyond reasonable doubt, that the accused had a hand in the death of the deceased. He urged the court to exercise caution in admitting the evidence of PW1 and PW2 because they were family members of the deceased and were therefore disturbed by her death.

15. The defence counsel further argued that the fact that the accused went to the home of PW1 to look for the deceased shows that he did not know her whereabouts and that it was possible that an assailant could have attacked the deceased while she was alone in the house. It was the accused's case that the evidence tendered in court does not place the accused at the scene of the crime. He urged the court to consider that there was no eye witness to the alleged murder and further that there was no proof that the accused was married to the deceased.

Analysis and determination

16. After considering the evidence presented by both the prosecution and the defence together with the submissions made by both the prosecution and the defence, this court needs to determine whether the prosecution succeeded in establishing, beyond reasonable doubt, that the accused murdered the deceased.

17. The offence of murder is defined under **Section 203 of the Penal Code** as follows:

> **"Any person who of malice aforethought causes death of another person by anunlawful act or omission is guilty of murder."**

18. Section 206 of the Penal Code defines malice aforethought in the following terms:-

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances.***
>
> ***(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 the death will probably cause the death 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 intent to commit a felony as an intention by an act or omission to facilitate the flight or escape for custody..."***

19. From the above provisions, it is clear that the following ingredients must be proved by the prosecution beyond reasonable doubt in order

to convict the accused of the charge of murder:-

(a) The fact of the death of the deceased.

(b) The cause of the said death and proof that it was as a result of unlawful act or omission on the part of the accused and that it was committed with malice aforethought.

20. On the fact of death, nearly all the witnesses testified that the deceased died as a result of the injuries that she sustained following the alleged assault by the accused. PW5 Dr. Misoi, who performed the post mortem examination on the body of the deceased, established the cause of death to be internal haemorrhage secondary to a raptured spleen. The doctor confirmed that injury from a blunt object could cause the spleen rapture. I am therefore satisfied that the fact of death and the cause thereof was proved to the required standards. The only question that still lingers and which this court needs to settle is if the accused is the one who, with malice aforethought, caused the deceased's fatal injuries.

21. Even though PW1 and PW2, who were the first people to arrive at the accused's home after he (accused) came to their home purportedly to look for the deceased, did not witness the actual assault of the deceased, there was ample evidence pointing to the accused as the perpetrator of the crime in question. According to PW1 and PW2, the accused warned them that the deceased would never come home again if he met her. In my humble view, the accused sounded a warning alarm to PW1 and PW2 and this is what prompted them to follow the accused to his home where, upon arrival, they demanded to know from the accused if the deceased was fine only for the accused to enter his house, and in the exact words of PW1 and PW2, **"he "pulled" the deceased out of the house."** Both PW1 and PW2 testified that the deceased was helpless and looked like she had been beaten when they saw her. The accused then ran away from the scene and on asking the deceased about what had transpired, she informed them that the accused had beaten her with a *rungu*. PW3 also testified that the deceased informed them that the accused had hit her with a *rungu* on the right kidney.

22. The key issue in this case is the dying declaration made by the deceased to **PW1, PW2 and PW3** who testified that the deceased mentioned the accused as the person who hit her with a rungu. I will therefore treat the statement by the deceased to the 3 witnesses as a dying declarations. It is a basic rule of admissibility of evidence that a dying declaration is an exception to the hearsay rule. I have looked at the statement made by the deceased to PW1, PW2 and PW3 and I find that it is a dying declaration within the meaning of **Section 33 (a)** of the **Evidence Act, Cap 80** of the **Laws of Kenya**. The relevant Section provides:

"Statements, written or oral, of admissible facts made by a person who is dead …… are themselves admissible in the following cases:

a) When the statement is made by a person as to the cause of his death, or as to any circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"

23. In the case of **Pius Jasunga s/o Akumu – v – R, (1954) 21 EACA 333**, the court stated:

"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval..... It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R-v-Eligu s/o Odel & Another, (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused..... But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration."

24. I have analyzed the evidence on record and taken caution before finding that the statement by the deceased to PW1, PW2 and PW3 amounted to a dying declaration. I am satisfied that there is no question of mistaken identity since the incident in question took place in broad daylight at about 3pm and the deceased, PW1, PW2 and PW3 all knew the accused very well as they were relatives and neighbors respectively. The statement of the deceased to PW1, PW2 and PW3 was consistent and was also corroborated by the medical evidence following the post mortem examination on the body of the deceased. The testimonies of PW1 and PW2 placed the accused at the scene of the crime and there was no evidence to show that they held any grudge against the accused so as to implicate him in the case considering that the accused was their relative having been married to their daughter and step daughter respectively. I find that the statement by the deceased is admissible under **Section 33 (a)** of the **Evidence Act** and I therefore admit is as evidence in this case.

25. I am therefore satisfied that the evidence tendered by the PW1, PW2 and PW3 met the threshold of the requirements for a dying declaration which was heard by more than two witnesses just barely a few hours before the deceased succumbed to her injuries.

26. The accused's claim and theory that the deceased had ingested poison as the possible cause of her death was ruled out by not only the results of the post mortem examination, but also by the evidence of PW6, the government chemist, who testified that no toxic substances were found in the specimens taken from the body of the deceased that had been taken to them for analysis.

27. My further finding is that the accused's testimony that he did not know the reasons for his arrest and subsequent arraignment in court amounted to a mere denial that did not dislodge the otherwise solid evidence tendered by the prosecution witnesses. My take is that even though no witness stated that they saw the accused assaulting the deceased, there was compelling circumstantial evidence pointing to the fact that it is the accused who caused the death of the deceased. In the case of **R Vs. Kipkering Arap Koskei & Another 16 EACA 135,** the Court held:

> ***"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."***

28. In order to test whether the circumstantial evidence adduced by the prosecution meets the legal threshold it must meet the principles set out in the case of **Abanga Alias Onyango V. Rep Cr. A No.32 Of 1990 (UR)** where the learned Judges of the Court of Appeal stated thus:

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."***

29. In the instant case, I find that besides the evidence of the deceased's dying declaration, there was corroborated and uncontroverted evidence from PW1 and PW2 who stated that the accused came to their home on a mission to find out about the deceased's whereabouts only to turn around and issue threats to the effect that he would 'finish' the deceased and true to his word, when PW1 and PW2 followed him to his home shortly thereafter, they found the deceased in a such critical state that they raised an alarm to call for help from neighbors and members of the public. To my mind therefore, the accused's conduct and the words that he uttered before PW1 and PW2 amounted to a veiled threat and was a clear indication that he had the intention (*mens rea*) to cause harm to the deceased which intention he actualized by clobbering her with a rungu thereby occasioning her the fatal injuries. In the case of **Daniel Muthee – v- R, CA No. 218 of 2005 (UR)**, where the Honourable Justices Bosire, O'Kubasu and Onyango Otieno JJ.A. while considering what constitutes malice aforethought observed as follows:

> ***"When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."***

30. I entirely adopt the statement by the learned Justices of Appeal made in the **Daniel Muthee** case (supra). When the accused clobbered the deceased on the stomach with a rungu, he must have known that his actions would cause death or grievous harm. I did not find evidence of any intervening or extraneous factors to break the chain of events that led to the death of the deceased. PW1, PW2 and PW3 testified that the deceased and the accused had a troubled marriage punctuated by frequent fights that saw the deceased returning to her parents on several occasions. I find that the totality of the circumstances of this case are that they unerringly point towards the guilt of the accused and no one else. I also find that the accused's argument, in his submissions at the hearing of the appeal, that there was no proof of the allegation that he was married to the deceased was an afterthought that was not consistent with his own testimony in court when he stated:

> **"Earlier, my in laws had come to my home to taken away my wife (deceased)…..My in laws took away my wife before coming to beat me in the shamba….I had never had any dispute with my wife before this date. "**

31. I find that the conduct of the accused and the words that he uttered immediately before the deceased was found in a critical condition in the house of the deceased irresistibly point to the guilt of the accused. I find that the circumstances of this case taken cumulatively forms a chain so complete that there is no escaping from the conclusion that within all human probability the offence was committed by the accused and no one else.

32. In conclusion I find that the prosecution proved its case against the accused beyond any reasonable doubt. I reject the accused defence and find that it amounted to a mere denial that did not dislodge the credible and corroborated evidence of the prosecution witnesses. I therefore find the accused guilty of murder contrary to section 203 of Penal Code and convict him accordingly.

Delivered, dated and signed in at Kisii on 7th day of March 2018.

W.A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State

- Mr. Sagwe for the Accused

- Omwoyo court clerk