



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL (MURDER) NO. 4 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPHAT ONGUBO RATEMO.....ACCUSED

JUDGMENT

[1] The accused, **Josephat Ongubo Ratemo**, faces a charge of murder, contrary to S.203 as read with S.204 of the penal code, in that on the 13th November 2014 at Masongo Village Kisii Central District within Kisii County, murdered Rebecca Kerubo Mochere.

[2] It was the prosecution case that the deceased was a girlfriend to the accused and on the material date at about 7.30 p.m she was at her home in the company of her mother **Elizabeth Mochere (PW 1)**, and her brother, **Dennis Mochere (PW 3)**. While the mother was in another area of the house, the brother and herself (deceased) were in the kitchen where she was cooking. Suddenly, a person appeared at the kitchen window from the outside and splashed a liquid chemical substance on her body from the upper region.

[3] The intruder took off from the scene after inflicting severe bodily burns upon the deceased who wailed in agony and attracted her mother into the kitchen. The mother removed both the deceased and her brother from the kitchen and took them outside the house where she poured some water on them while raising alarm and attracting scores of villagers into the scene.

[4] The deceased suffered serious injuries but was able to tell her mother what had happened to her in the kitchen. She was taken to Kisii Referral Hospital from where she was transferred to Moi Teaching and Referral Hospital in Eldoret due to the nature of her injuries. Her brother was also taken to hospital but he recovered and was discharged.

[5] An elder brother of the deceased, **Marcelino Mamboleo Mochere (PW 2)**, who lived elsewhere was contacted by their mother at about 8.15 p.m and informed on what had befallen the deceased. He rushed to the scene where he found some villagers pouring cold water on the injured deceased and her brother Dennis (PW 3). He (PW 2) noted that the two victims had burns on their bodies and gave instructions that they be covered with blankets. He thereafter arranged a vehicle to take them to Kisii Referral hospital where Dennis was treated and discharged.

[6] However, the deceased was referred to Moi Teaching and Referral hospital as she had suffered serious burns on her body but that notwithstanding, she spoke in a strained voice and told her elder brother (PW 2) that prior to the incident a person called "Daddy" or Josephat called her on phone and she informed him that she was in the outside kitchen of their houses and minutes thereafter, a person appeared at the kitchen window from outside and poured an acid like substance on her.

[7] "Daddy" whose real name was Josephat was known to the deceased's elder brother (PW 2) as a former boyfriend of the deceased but their relationship had broken down due to the two being relatives. He (Daddy) was actually the accused herein and did show up at the Kisii Referral Hospital after the deceased and her younger brother were rushed there.

[8] The deceased had earlier confided to her elder brother (PW 2) that the accused had threatened her after their breakup and was angered by the breakup since he had spent so much on her. He (accused) was thus suspected of having caused serious burn injuries to the deceased which led to her death.

He was therefore arrested and charged with the present offence when it was disclosed by the deceased's younger brother (PW3) that he was heard calling out the deceased just prior to the incident.

[9] The autopsy of the deceased was carried out by **DR. Macharia Benson (PW 5)**, a pathologist at the Moi Teaching and Referral Hospital in Eldoret who thereafter compiled a report (P. Ex 6) indicating that the cause of death was pneumonia in a patient with more than 60% body burns. He testified that the pneumonia was a complication of the burns sustained by the deceased and these were concentrated on the face, trunk, upper and lower limbs.

[10] The Government Analyst, **James Michael Welimo (PW 6)**, indicated that his analysis of a sample of the suspect liquid chemical revealed that it was actually sulphuric which could easily be obtained from a shop or a vehicle's battery. He stated that the substance is highly corrosive strong mineral acid which could cause burns if in contact with the human body.

[11] After a formal report to the police, **PC Alfred Nasio (PW 4)** investigated the incident and in the process proceeded to the hospital where he found the deceased with very severe burn injuries. He also proceeded to the scene of the incident and collected therefrom a jerrycan and jug containing the suspect chemical substance. He forwarded the items to the Government Analyst for necessary analysis.

[12] An opportunity arose for PC Nasio (PW 4) to visit the deceased at the Moi Teaching and Referral where he found her to be in a better condition to speak. He then recorded her statement (P.Ex 2) in which she confirmed having a relationship with the accused but which was disapproved by their parents due to the fact that they were relatives. It was those circumstances which led to the accused threatening her and later coming to her home where he poured the chemical substance on her.

[13] It was after that statement that the accused was initially charged with causing grievous harm to the deceased. Unfortunately, the deceased succumbed to her injuries and this resulted in the accused being charged with the present offence.

[14] In his defence, the accused denied the charge and raised an alibi by stating that on the material date he was at his father's shop at Minyinkwa Market from 6.30 a.m upto 8.30 p.m. He was not alone but in the company of his cousin, Bernard Machuka (DW 2) and at about 8.00 p.m he received a phone call from a sister of the deceased called Veronica and informed that something had happened to the deceased and that she was taken to hospital.

[15] Pursuant to that information, the accused summoned a motor cycle taxi operator (Boda-Boda) called Richard Mogaka (DW 3) and instructed him to come and collect him from the shop. He was then collected from the shop by Mogaka and dropped at the hospital where the deceased's elder brother (PW 2) instructed the security guards not to allow him in but this was overruled by another of the deceased's sisters.

[16] The accused stated that he spoke to the deceased although she was in bad condition. She told him that she did not know the person who poured acid on her. He stayed at the hospital at Kisii upto midnight when the deceased was transferred to Eldoret. He contended that the deceased was his girlfriend but that he had never been to her home which was about a kilometre from his. He indicated that he was not previously known to the deceased's younger brother (PW 3) and that he was suspected merely because the deceased's elder brother (PW 2) did not approve his relationship with the deceased.

[17] The accused's nephew, **Bernard Machuka (DW 2)** said that he was with the accused in their shop on the material date from 6.30 a.m to 8.30 p.m when the accused was called and informed on phone that his girlfriend had been rushed to hospital. He (accused) called a "boda-boda" rider who took him away.

Bernard, indicated that he could not tell what happened to the deceased and although the accused was alleged to have murdered her he was with him in his (accused's) shop on the material date.

[18] The "boda-boda" rider indicated that he was called by the accused on the material date at about 8.30 p.m or some minutes to 9.00p.m. He thereafter proceeded to a road near the accused's shop. It was then that the accused boarded the motor cycle ("boda-boda") and asked to be taken to Kisii Level Six Hospital where his girlfriend had been taken after being burnt.

After dropping the accused at the hospital, the "boda-boda" operator left him there.

[19] All the foregoing evidential facts give rise to the main issue for determination i.e whether the deceased was murdered and if so, whether the accused was the person responsible for the offence.

Under S.203 of the penal code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

[20] It is not disputed that the death of the deceased by the unlawful act of an individual. It was that individual who triggered the circumstances leading to the deceased's death. This was confirmed by medical evidence through the production of the post mortem report (P.Ex 6) by DR. Macharia (PW 5). He confirmed that the deceased suffered over 60% first and second degrees burns which resulted in a complication in the form of pneumonia on both lungs. This was what actually caused her death.

[21] It was also undisputed that the burns suffered by the deceased were caused by sulphuric acid as confirmed by the Government Analyst (PW 6) after examining a liquid chemical substance recovered at the scene of the offence by the investigating officer (PW 4). The acid was deliberately and/or intentionally splashed or poured on the deceased through a kitchen window by a person who suddenly appeared at the window on the outside under the cover of darkness. This fact was confirmed by the deceased's younger brother (PW 3) who was with her in the kitchen at the material time. The fact was also confirmed by the deceased through her statement (P.Ex 2) recorded by the investigating officer (PW 4) while she was in hospital at Eldoret and was at the time capable of speaking.

[22] The Analyst (PW 6) indicated in his report (P.Ex 7) that sulphuric acid is highly corrosive strong mineral acid which could cause burns if in contact with humans.

Indeed, sulphuric acid came into contact with the body of the deceased through the action of an individual bent at causing her grievous bodily harm but which resulted in causing her death instead.

The action by the individual was undoubtedly a criminal act in which the deceased fell victim.

[23] In his quest to grievously harm the deceased the culprit clearly displayed an intention to cause her death.

Under S. 206 of the Penal Code, malice aforethought is deemed to be established by evidence proving an intention to cause the death of or to do grievous harm to any person. The circumstances in this case as revealed in evidence demonstrate beyond reasonable doubt that the deceased was murdered most likely than not by a person known to her.

[24] The big and crucial question is whether the accused was responsible for the murder. His defence was a denial on the basis that he was not at the scene of the offence when it occurred as he was in his shop from about 8.30 a.m to 8.30 p.m. His uncle (DW 2) confirmed as much. The boda-boda operator (DW 3) could only confirm that he picked him up between 8.30 p.m and 9.00 p.m near his shop and dropped him at the hospital in Kisii.

[25] The alibi defence was however discredited by the deceased's younger brother (PW 3) who knew the accused and was able to recognize his voice as he talked to the deceased on phone just prior to the incident. He (PW 3) heard the accused saying that he was coming to their home.

Apart from the recognition of the accused by the deceased's younger brother, there was additional evidence of identity. From the deceased herself in the statement she recorded with the police prior to her death.

[26] In the statement the deceased did place the accused at the scene of the offence on the material date and time. She also provided insight as to the apparent motive behind the accused's criminal action against her and this was the fact that the accused was angered by the breakup of their relationship after it was pointed out to them that they are relatives.

There was no denial from the accused that they enjoyed an intimate relationship and that indeed the deceased was his girlfriend.

[27] The deceased's elder brother (PW 2) disclosed in evidence that his family was against the relationship between the accused and the deceased because they were related to one another. It was apparently for this reason that the relationship could not continue much to the chagrin of the accused who according to the deceased went as far as threatening her with harm.

It seems that the threat was actualized by the burning of the deceased with sulphuric acid.

[28] A failed love relationship between the accused and the deceased was undoubtedly the motive behind the murder of the deceased by inflicting grievous burn injuries on her body.

The allegation by the accused that he was implicated for the offence merely because the family of the deceased did not approve his relationship with the deceased did not appear truthful given the circumstances leading to her death. His alibi was also not credible as he was placed at the scene by the deceased's younger brother as well as the deceased. If anything, the alibi was more or less an afterthought.

[29] Basically, the prosecution evidence has credibly shown that the accused was not implicated without good cause and that he was actually the person who splashed or poured the acid on the deceased in order to disfigure her. The action however proved fatal as the deceased suffered great pain and ultimately lost the fight to stay alive.

The relationship between the accused and the deceased appeared to have been doomed from the very beginning. It ended up becoming a fatal attraction and thus, place criminal responsibility upon the accused for the murder of the deceased.

[30] The fact that the accused visited the deceased in hospital immediately after she was admitted there did not destroy his said criminal responsibility nor did it portray him as an innocent person. At times, even murderers attend the funeral of their victims to confirm that the victim is indeed dead and buried.

All in all, the case for the prosecution has been proved beyond reasonable doubt against the accused. He is therefore found guilty as charged and is accordingly convicted.

Delivered and signed this 15th day of May 2018

in the presence of

State Counsel – Mr. Otieno and

Mr. Okenye holding brief for Mr. Ogari for accused

J.R. KARANJAH

JUDGE

State Counsel: Accused may be treated as a first offender.

J.R. Karanjah, J

Mr. Okenye: May I be given another day for mitigation.

J.R. Karanjah, J

Court: Matter adjourned to 16/5/18 for mitigation and further orders. Accused Remanded in Custody.

J.R. Karanjah, J

15/5/18

16/5/2018

Before J.R Karanjah – Judge

CC Njoroge

Otineo for the State

M/s Ndugukira holding brief for Mr. Ogari for accused

J.R. Karanjah, J

Court: Matter coming up for mitigation and further orders.

J.R. Karanjah, J

Mitigation by M/s Ndugukira:

Accused has a one month old child. He is the only child of his sick father. He prays for a non-custodial sentence. His father suffers from cancer. He is twenty two years old.

J.R. Karanjah, J

16/5/18

COURT: Accused is a first offender, mitigation noted. Circumstances of the offence must be treated with the seriousness deserved and that is why it carries with it a death sentence.

However, since the accused is a young man and the offence was actually an “offence of passion” he may be spared the death sentence and shall instead serve an imprisonment term of fifteen (15) years.

J.R. Karanjah, J

16/5/18