



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL (MURDER) CASE NO. 27 OF 2016

REPUBLICPROSECUTOR

VERSUS

J O M.....ACCUSED

JUDGMENT

1. **J O M**, the accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

On 25th September, 2016 at Karanyanga village, Ang'ongasub-location, South West Seme location in Seme District within Kisumu County murdered E A O

2. The prosecution summoned a total of 7 (seven) witnesses in support of its case while the defence called accused only.

Prosecution Case

3. **PW 1 S E A**, a son of the accused and the deceased stated he heard their parents quarrelling on the morning of 24.9.16 with the accused threatening to kill their mother. He stated that he left home for school at about at 7.50 am and when he returned home in the evening received information from his brother Chris and sister Ruth that their mother had been taken to hospital after she was seriously beaten and injured by their father as a result of which she died on 25.9.16. **PW 2 V O O** a son of the accused and the deceased stated that on the morning of 24.9.16, he heard his father asking their mother to accompany him to hospital. That he later found their mother who was bleeding from the mouth and had a swollen forehead lying outside the kitchen. He stated that accused said their mother had taken poison and he took her to hospital where she died on 25.9.16. **PW 3 Morris Ochieng Abade**, a motor cycle rider stated that he took the deceased to hospital on 24.9.16 after accused told him that she had taken poison. **PW 4 R A O**, a daughter of accused and deceased aged 14 years stated that on the morning of 24.9.16, his father called him to their bedroom to collect money for Saturday tuition. She recalled that as she was leaving, her mother attempted to follow her and accused hit her on the head with a rungu causing her to fall down from where accused continued to hit her. She stated that she left home for school at about at 7.50 am and when he returned home in the evening received information from his brother Chris that their mother had been taken to hospital after she was seriously beaten and injured by their father and she later died on 25.9.16. **PW 5 Caleb Odundo Oyende**, assistant chief Ang'onga sub location stated that he accompanied police to accused's home on the date of his arrest on 25.9.16. **PW 7 PC Joseph Emuron**, the Investigating Officer stated that he visited the scene of the murder on 25.9.16 and arrested accused. He stated he recorded witness statements and on 30.9.16 witnessed the autopsy on the body of the deceased after which he received a report which showed that the following injuries:-

- i. Generalized contusions/ abrasions on the face, both upper limbs, shoulders, posterior trunk and both legs
- ii. Bilateral black eye
- iii. Frothy exudate in bronchial tree
- iv. Mild subepicardial petechial
- v. Stomach contained liquid contents laced with powdered chemical with fetid odour
- vi. Mild stenosis of the liver
- vii. Punctuate petechial of kidneys
- viii. Extensive subcutaneous scalp hematoma especially on left side

- ix. Left hemorrhage with mild cerebral edema
- x. External extensive subcutaneous muscular hematoma

The report PEXH. 1 shows that deceased died of extensive soft tissue injuries and chemical poisoning with evidence of external blunt force assault.

The Defence Case

4. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put him on her Defence. In his sworn defence, accused denied the offence. He stated on 23.9.16 at about 11.00 pm, his wife went out to answer a call of nature and when she did return, he went out to look for her and he found her engaging in an intimate with a man he did not know. That he took his wife to the house and told her that he would report the matter to her parents. He further told court that on the morning of 24.9.16, he was telling his wife that they would go to her parents' home when their daughter PW2 went into their bedroom to collect money for tuition and he escorted her into the sitting room. He said he returned to the bedroom to find his wife drinking a tick pesticide, Triatix, and that when he snatched it from her, she fell on a generator and injured her head. He said he informed his children PW1, PW2 and PW4 that their mother had taken poison. He stated that he took his wife to hospital where she died on 25.9.16. In cross-examination by Ms. Barasa for the state, accused confirmed that his wife was bleeding from the mouth and had injuries on the head, forehead, hands and legs among other injuries.

ANALYSIS AND FINDINGS

5. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari Vs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

- (a) the death of the deceased occurred;***
- (b) that the accused committed the unlawful act which caused the death of the deceased; and***
- (c) that the accused had malice aforethought.***

(a) The death of the deceased

6. The death of the deceased has been proved by the postmortem form **PEXH. 1** produced by PW7 which confirms that deceased had extensive injuries on her body and had died of extensive soft tissue injuries and chemical poisoning with evidence of external blunt force assault.

(b) Proof that accused committed the unlawful act which caused the death of the deceased

7. PW1 told court that accused used to beat the deceased regularly and that he heard them quarreling on the morning on 24.9.16. PW2 also confirmed that accused regularly used to beat the deceased. PW4 stated that he saw accused strike the deceased with a rungu on the head and continued to assault her all over the body when she fell down.

8. I have considered the evidence by PW4 that deceased was clobbered with a rungu by the accused and accused's defence that deceased fell on a generator *vis a vis* the injuries on deceased's body. The injuries on the body are incompatible with a single fall on a generator or on any other object. On the contrary, the injuries are consistent with repetitive clobbering of the deceased with a rungu as explained by PW4. The doctor found evidence of chemical poisoning in the deceased's body. Accused told court that the deceased took the poison. The deduction by the doctor is that deceased died of both extensive soft tissue injuries and chemical poisoning with evidence of external blunt force assault. The evidence of chemical poisoning does not in my considered view exonerate accused from culpability considering the overwhelming evidence adduced by PW4 that accused was the one that assaulted the deceased and inflicted her with extensive soft tissue injuries.

9. From the foregoing; I find that the Prosecution has proved beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which constitutes the '*actus reus*' of the offence. Accused's defence that deceased on a generator is for the foregoing reasons rejected.

(c) Proof that deceased had malice afterthought

10. The court must determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code. The ingredients of murder were explained in the case of **ROBA GALMA WARIO VS REPUBLIC [2015] eKLR** where the court held that;

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

11. Malice aforethought was defined in the following cases;

- (a) NZUKI VS REPUBLIC [1993] KLR 171*** where the Court of Appeal held that before an act can be murder, it must be aimed at

someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- *Intention to cause death*

- *Intention to cause grievous bodily harm*

- *Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.*

(b) In the case of *DANIEL MUTHEE VS REPUBLIC CRIMINAL APPEAL NO. 218 OF 2005 (UR)* cited in the case of *REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR*, Bosire, O'kubasu and Onyango Otieno JJA., 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 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.”

12. Upon a careful evaluation of the evidence, the court finds that the prosecution evidence was overwhelming and effectively dislodged the defence offered by the accused. I am satisfied that accused inflicted considerable injuries that led to the death of the deceased. From the severity of the attack, I find that it was the intention of the accused to cause the deceased grievous harm if not death. I am therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

Disposition

13. Consequently, I have come to the conclusion that the state has proven its case beyond reasonable doubt. Accused is found **GUILTY** of the offence of murder and he is accordingly convicted.

DATED AND SIGNED IN KISUMU THIS 11TH DAY OF OCTOBER 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Accused - Present

For Accused - Ms.Ayieta/Mr Adiso

For the State - Ms Barasa