



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 20 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

YASIN HAMISI BAWALU.....ACCUSED

JUDGEMENT

1. The accused herein Yasin Hamisi Bawalu stands 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 15th November, 2013 at Mbalambala location in Bura Tana District within Tana River County murdered Kamila Isnino Mamata.

2. He has denied the charge. In support of their case, the prosecution called seven witnesses.

3. Pw1 was Gobu Mamata, a technician or mason from Madogo trading centre. It was his evidence that on 15th October, 2013, his sister in law came with two children that is Issack and Kamila Mamata. Kamila Mamata was bleeding from the mouth and nose. Kamila informed him that her husband assaulted her in a night fight and though she screamed, neighbours did not help as the fight was in the farm. She noticed an injury or swelling on the front part of the head. They slept and the next day, reported the matter to Madogo police station and a P3 form issued for Garissa General Hospital. At the hospital they were told to take the injured person for x-ray and the doctor prescribed drugs for Kamila and asked them to bring her after 7 days. The doctor also completed the P3 form which he returned to the police.

4. Though they administered the drugs, Kamila did not improve and they took her again to hospital and the doctor said she should be taken to Kenyatta National Hospital but the cost of transport by the ambulance was Kshs.25,000/=. As they looked for the money, Kamila died after 2 days. Before she died however, she said that she was hit with a stick by her husband Yasin Hamisi. He was shown photographs and he pointed the part of the head where the deceased was hit. He identified the accused in court as his in-law.

5. In cross examination, he stated that he did not know whether the deceased and the accused lived with somebody else. He said the two had 3 children who were young. He was told by the deceased that the nearest neighbour to their house was an Assistant Chief by the name Jomo Abaghana. He stated that he made a statement to the police and that he mentioned the use of a stick though the police did not record that down. He stated that after injury, the deceased stayed for a month before moving away to her parent's home and that she initially attended traditional treatment. He said that he only relied on the deceased in identifying the person who injured her. He said the deceased and accused lived in a village called Dirisa in Mbalambala. He denied being informed that the deceased had mental problems.

6. In re-examination, he said that the deceased told him that she was assaulted by her husband. He confirmed that he came from Madogo location where Madogo police station was situated.

7. PW2 was Haron Molu Sapalu from Mbalabala. He was an elder and on a certain day, a young woman called Kamila who was his niece went to him and he took her to Madogo. He had been informed by an old man by the name Gobu on the phone that his niece had a swelling on the forehead. When he talked to her, she said she had been beaten by her husband with a stick. He asked her what caused the conflict and she said that she suspected that he was having an affair and the accused thus assaulted her.

8. On another date he could not remember, the deceased started bleeding from the nose and mouth and they took her to the hospital and the doctor referred her to Kenyatta hospital. As they were looking for money for the ambulance the deceased died. He attended the postmortem examination and took the body for burial. He identified the body in photographs.

9. In cross examination, he stated that the deceased had a swelling on the forehead. He maintained that he asked for the reasons leading to the injuries even if the police statement does not reflect so.

10. In re-examination he stated that he made a statement to Madogo police station which was recorded by the police. He maintained that the deceased gave her side of what had happened.
11. Pw3 was Jomo Bagana Abadiba from Mbalambala. He was an assistant chief of Pamba location of 10 years' service. He knew Isnino Mamata the deceased as a resident of his area. He also knew Yasin Bawalu a resident of his area. The two were wife and husband.
12. On 4th August, 2013, while at Dirisa village he received information from an old man by the name Tumbo Dabaso that Yasin assaulted and injured his wife. He advised the reportee who was a village headman that the injured person be taken to hospital for treatment. He also saw the injured woman with a swollen face. He summoned both the injured woman and her husband and when they came the woman said she had been hit on head with a head-butt by the accused person. The injured woman complained that the accused who was her husband came home late every night and she suspected he had other women outside. When he asked the accused about the incident, he said he had taken his wife to hospital and he was not prepared to take her to hospital again. He then left. This was said in the presence of mother of Kamila the injured woman and her brother and therefore he advised them to make a report to the police and take Kamila to hospital.
13. It was his evidence that initially after treatment, Kamila improved but she later deteriorated again and the doctor referred her to Kenyatta Hospital but she died before being taken to Kenyatta hospital. He stated that he saw her swollen forehead and was aware that the accused was the one who caused the injury.
14. In cross examination, he said he knew both the deceased and accused from childhood. He said the parents of the deceased did not report to him any complaint before she died. He said also that Tumbo Dabaso the village elder was now deceased. He maintained that the deceased explained to him how she was injured by the husband in the presence of the husband. He said that after the initial report he visited the couple's homestead and then called them to the office with the parents. According to Isnino the deceased had informed him that she had received prior treatment.
15. In re-examination, he denied smearing the accused who is his cousin.
16. Pw4 was Gabe Madina Isnino from Loka in Mbalabala, the father of the deceased with 8 children, the deceased being 2nd born. He was aware that accused Yasin was husband of the deceased. According to him on 25th September, 2013 his daughter was very sick and he suffered high blood pressure after receiving the telephone call. He however proceeded to see his daughter and found that she had a swollen head. Prior to that, he had seen her with a swollen head and when he asked her in front of the accused, the accused became very angry and started chasing and abusing them. According to him his daughter the deceased stated that if she died, then the death was caused by the accused. Though he asked the accused politely to explain and take the deceased to hospital, he refused. In the morning because the daughter was getting worse and, though they again told the accused to take her to hospital, he refused and told him to take both her daughter and the children away and even chased Issack with a stick. Neighbours then separated them and the chief advised him to take the daughter to hospital and they then took her for traditional treatment, and after sometime took her to Garissa where she was operated on the head which was by then paralyzed, and then died.
17. Though he asked Yasin to apologize, he never apologized but chased them away. He identified the accused in court.
18. In cross examination, he stated that of his children, he had 5 girls all married. He denied hating the accused.
19. Pw5 was Issack Mamata a brother of the deceased. He said the accused was his brother in law. He lived with his mother when neighbours informed them that the accused had injured the deceased. This, they were told by the assistant chief Jomo through the phone.
20. They proceeded and brought their sister home. Though they met the accused at his house he told them to take their sister and children away. The accused was in fighting mood at that time and the chief was not present. He was aware that Tumbo was a village elder and an uncle.
21. According to him, his sister told him that her husband assaulted her at 2.00am because she was jealous of him. When he was asked, the accused said that he had already taken the deceased for treatment and the relatives should also take her away for further treatment. They then took her for traditional treatment but she did not improve and later they took her to Garissa Hospital where they were referred to Kenyatta hospital and she died while they were preparing for the journey to Nairobi. He said the sister died at home and Yasin the accused never bothered to come. He was not aware if postmortem was done but they took the body for burial. He identified the accused in the dock.
22. In cross examination, he said he was 20 years at the time of tendering evidence but was much younger when the incident occurred. According to him, the deceased could have been 28 or 30 years old. He did not know if there were problems between his sister and the accused.
23. Pw6 was Dr. Ernest Amos Siwo, a General Surgeon at Garissa County Hospital from 2011 who qualified at China University.
24. He tendered evidence on a postmortem report filled by Dr. Okello who worked with him in 2012 to 2014. He could recognize his handwriting and signature. Dr. Okello was doing Masters in Surgery in Nairobi and was sitting an exam. He read the contents of the postmortem report. The post mortem was on Isnino conducted on 16th November, 2013 at 4pm Garissa Provincial Hospital. Deceased, a slender woman of poor nutrition with a swelling on the front of the forehead. Internal examination was not conducted. Cause of death was cardiorespiratory arrest due to head injury. The doctor recommended opening of the body, and the report was signed on 18th November, 2013. He produced it as an exhibit.
25. In cross examination, he stated that the swelling caused death because it would likely cause a clot. He said however, that there was no internal examination of the body and that even though the doctor recommended open postmortem, this was not done. From the report there

was no record of refusal of opening of the body by relatives. He said however, if facilities was not available to open the scull, then such would not be done at Garissa Hospital.

26. In re-examination he maintained that the deceased was assaulted and there was clinical history to that effect. Cause of death was recorded. He stated that at that time they did not have equipment for open post mortem at Garissa.

27. Pw7 was Police Constable Victor Mandegwa from Madogo police station. It was his evidence that in October, 2013 a report was made by Kamila Mamata with her brother and an uncle called Gobu, that she had been assaulted by her husband Yasin. She said the husband had butted her and banged her head against the wall and she suffered injuries. She complained of headaches and said that she was locked in the house for several days by the husband. She was swollen in forehead. The report was recorded on OB and a P3 form was issued, which she took and returned. The results were that she suffered grievous harm, as recorded in statements from witnesses and a letter then was addressed to Mbalambala police station for the arrest of the accused. The story was that after injury, she suffered in silence until her mother rescued her and took her to hospital but she later died. He produced the statement of the deceased, Kamila as an exhibit. He said the arrest was done by Mbalambala police station. He identified the arrested person in court.

28. In cross examination, he stated that he was the investigating officer but did not see the clinical notes. He maintained that the deceased said that she was assaulted at night in their matrimonial home. He said the deceased's statement was recorded about 3 weeks before death.

29. In re-examination, he said he did not expect clinical notes in the P3 form as that was not the practice.

30. In his defence the accused gave unsworn statement in Kiswahili and said he was a mason at Pamba sub-location, Mbalambala location.

31. On 16th November, 2013 as he was travelling to Garissa from Mbalambala police met him on the road and said they were looking for him and told him to board a motor cycle. When he boarded they took him to the gate of Mbalambala police station, told him to alight and hand cuffed him. He was put in the cells and when the OCs came, he asked if he knew why he had been arrested. The OCS then told him that he was alleged to have killed his wife.

32. By that time, what he knew was that his wife had been taken by her mother in good health condition. When he asked him where the wife had died, the OSC said she died at Madogo in an uncle's house. He said he was saddened as his wife had left him with children. He was then moved to Garissa and charged in court.

33. This is a murder case. The prosecution was required to prove beyond any reasonable doubt all the four ingredients of the offence. The accused did not have a burden to prove his innocence. He could only raise some doubts in the prosecution case. See **Leonard Aniseth vs Republic [1963] EA 206**.

34. The four elements of the offence of murder which the prosecution was required to prove beyond reasonable doubt was firstly whether the deceased died. Secondly, whether the death was unlawful. Thirdly, whether the death of the deceased was caused by the accused person. Lastly, if the death was caused by the accused person, the prosecution was required to prove whether it was caused with malice aforethought.

35. Did the deceased die? The evidence of prosecution witnesses was that Kamila Isnino Mamata was brought from Mbalambala to Madogo with an injury on the head which was visible. She complained of severe headache. She was taken to Garissa General Hospital by her uncle. She was treated and discharged and given drugs to use at home. Her condition deteriorated and she started bleeding from the nose. She was taken back to Garissa General Hospital and was referred to Kenyatta National Hospital for specialized treatment. As the family tried to look for Kshs.25,000/= to pay for an ambulance to take her to Kenyatta National Hospital she died. Postmortem examination was done at Garissa Provincial General Hospital and cause of death was established.

36. In my view, the prosecution proved beyond any reasonable doubt that the deceased died of severe injury to the head.

37. Was the death unlawful? The evidence on record does not indicate any lawful reason why the deceased sustained the injuries from which she died. In my view, the prosecution proved beyond any reasonable doubt that the death of the deceased was unlawful or was caused by unlawful means.

38. Did the accused cause the death of the deceased? The accused was the husband of the deceased with whom they had children. The prosecution evidence was that the two disagreed over alleged unfaithfulness of the accused and that the accused hit the deceased on the wall of the house and also head-butted her causing her the injury and swelling. She remained at home but was later rescued by the mother. She was subsequently taken to Garissa for treatment after attempts were made to use traditional medicine.

39. In his defence the accused stated that he handed over the deceased to the mother in good health condition and was surprised on arrest to be told that she had died. In my view, the prosecution established beyond any reasonable doubt that the injuries of the deceased were caused by the accused in a domestic fight. The defence of the accused was merely an attempt to divert attention as in my view the mother could not have taken the deceased to hospital or for treatment if she was handed to her in good health.

40. Was the death of the deceased caused with malice aforethought? Malice aforethought is defined under section 206 of the Penal Code. In brief, it is an intention to cause death or do grievous bodily harm. Everybody is presumed to intend the natural consequences of his acts. The deceased was seriously injured on the head. The prosecution evidence is also that the accused refused to take her for medical attention. If this incident was not because of a domestic misunderstanding and fight, I would have found that the death of the deceased person was caused with malice aforethought. However in view of the surrounding circumstances of a fight over jealousy, I find that the prosecution did not prove that the death of the deceased was caused with malice aforethought. Though the death was unlawful, there was no malice aforethought and the offence committed was thus not murder but manslaughter contrary to section 202 of the Penal Code.

41. Consequently, and for the above reasons, I find that the prosecution did not prove the offence of murder contrary to section 203 as read with section 204 of the Penal Code. I however find that the prosecution proved the lesser offence of manslaughter contrary to section 202 of the Penal Code and I convict the accused for manslaughter accordingly.

Dated and delivered at Garissa this 11th December, 2018.

.....

George Dulu

JUDGE