



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
HIGH COURT CRIMINAL CASE NO. 38 OF 2012
REPUBLIC.....PROSECUTOR
VERSUS
EVERLYNE ISALAMBO.....ACCUSED
J U D G M E N T

Introduction

1. The accused in this case is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on the 25th day of September, 2012 at around 13.00 hours at Otiende Estate, Township sub-location, Bukhungu Location in Kakamega Central District of Western Province she murdered GEOFFREY ODHIAMBO ODUOR. She pleaded not guilty to the charge and was released on bond pending trial.

2. Mr. Aburili together with Mr. Mukabwa were appointed to act for the accused and the hearing of the case commenced. It is important to note in the first instance that this matter was heard by several judges who were transferred before it was determined. This court took over the case at the defence stage.

The Prosecution Case

3. The prosecution called a total of six (6) witnesses to prove their case against the accused person. Their first witness was Dr. Dickson Mchana, PW1 a Government pathologist at Kakamega County Hospital who had practiced in Kakamega for nearly five (5) years. He conducted an autopsy on the body of the deceased herein, Geoffrey Odhiambo Oduor on the 26.09.2012 at the Kakamega General Hospital. The body was identified by Daniel Oduor and Daniel Otunga who confirmed that it was that of the deceased.

4. According to his testimony the body was that of an African male adult in mid 30's in good nutritional status, 5" 11" long. It had been properly preserved for more than 24 hours after death. Externally the finger tips (nails) were blue in colour. There was a single stab wound across the chest below the first rib to the right and the middle. There was evidence of medical intervention namely stitched stab wound amongst others. There were also healing injuries on the right palm, left armpit and the skull.

5. Internally there was massive bleeding into his right chest which collapsed the right lung. There was also injury to blood vessels below the first rib and the organs were very pale. PW1 concluded that the cause of death was internal bleeding secondary to penetrating chest injury following assault. He produced the post mortem report as PEXh 1.

6. On cross examination by Mr. Mukabwa, Dr. Mchana explained that he did not participate in the previous treatment of the deceased. He explained that the doctors when treating the deceased perforated the chest once to gain access into the inside but added that the said perforation could not contribute to the death though it would cause bleeding. He added on being re-examined by Mr. Oroni for the state that whenever one has bleeding in the chest the only prescribed procedure is to perforate the chest and remove the blood.

7. PW2 Danson Oluoch Owuor told the court that he called the deceased on the 25.09.2012 at around 1.30 PM and informed him that he was going to purchase a laptop charger since the one he had was no longer working. On his way to the shop the deceased who is his younger brother called him and told him that the accused person had come to pick their son, Jefferson Owuor.

8. The deceased was married to the accused person. PW2 told the deceased to handle the situation but the deceased insisted that he goes to his house at Otiende Estate in Kakamega Town. He then went to the deceased's house where he found the deceased who was in the sitting room. After a few minutes, the accused who was in the bedroom left the bedroom and entered the kitchen. The deceased then decided to check the bedroom and see what accused was doing. After a few minutes the accused went back to the bedroom.

PW2 did not see the accused carrying anything from the kitchen. Suddenly he heard some commotion in the bedroom and the deceased dashed out of the bedroom holding his chest. The deceased told PW2 to take him (Deceased) to hospital as the accused had stabbed him. PW2 saw that the deceased who was putting on a black stripped shirt (PExhibit 4) and a pale green trouser (PExhibit 3) was bleeding and holding the right side of his chest. He testified that the accused came out from the bedroom following the deceased who had a knife in her hand. On seeing this PW2 intervened and in the process the knife cut him on the left shoulder. He was able to struggle with the accused and eventually disarmed her. By this time the deceased had stepped out of the house and was on the ground asking for water. He testified further that his other brother Hesbon Ogeno who testified as PW3 who was within the compound organized for a vehicle which took them together with the deceased to Kakamega General Hospital. Since at that time doctors were on strike the deceased was attended to by nurses but unfortunately he succumbed to the injuries and died. He identified the knife the accused was carrying (PExhibit 2) and which was used to stab the deceased and which also cut him.

9. PW2 also testified that the deceased was also attended to by the nurses who stitched the wound. He reported the matter to the police and was issued with a P3 form. He told the court that the person who attacked was the accused. The witness identified the accused, he pointed her out as she sat at the dock.

10. He told the court that the accused was sober that day and that he had never seen her drunk. He was cross examined by Mr. Mukabwa for the accused. He explained that it was necessary for the deceased to call him to witness the giving of the child to the accused person. He also explained that the deceased and the accused had a history of quarreling and that accused used to assault the deceased which he himself had witnessed as he had lived with them for some time. He also told the court that if the deceased had attacked the accused in the bedroom the accused would have had the right to defend herself. But in this case the deceased ran out of the bedroom holding his chest.

11. Hesbon Otieno PW3, was in the farm of the deceased who was his elder brother digging on 25.09,2012 when he heard noises from the house. He rushed to the house where he found the deceased on the ground and bleeding from the chest. The deceased's hand was on his chest. PW3 did not remember which side of the chest was bleeding but he saw PW2 who was also bleeding on the shoulder. He told the court that in the house there was the house help Maureen and Jafferson the deceased's son. He testified that his brother went to get a taxi as he rushed to the neighbours to seek assistance. He managed to get the neighbours who assisted them in taking the deceased to hospital.

12. PW3 identified the knife PExhibit 2nd the clothes the deceased was wearing that day namely a blue stripped shirt PExhibit 4 and a trouser PExhibit 3. He testified that he knew the accused since 2008 and he explained that the marriage between the deceased and the accused was marred by quarrels. He also claimed that the accused was of hot temperament and would hit the deceased with a stool or a screw

driver.

13. PW3 also told the court that he did not witness the incident but the knife was at the culvert just outside the compound and it was recovered by his brother PW2.

14. Anthony Omondi, PW4, returned home where deceased used to live at about 2.00pm on the 25.09.2012. He had gone to assist a friend by the name Javan Adaka. At the gate of their home he saw his brother PW2 and the deceased. He saw deceased who had been stabbed. He did not enter the house because he was afraid. He saw PW2 leaving with the accused to the police station. He testified that he had known the accused since the year 2007. He added that the deceased and the accused had problems and they often quarreled. PW4 pointed at the accused who was seated in the dock.

15. PW5 Maureen Musipi Fwamba was working as a house help in the home of the accused and the deceased. She testified that on the 25.09.2012 she was at home when the deceased called the accused and asked her to go home and take the child to hospital as the child Jefferson Oduor 3 years old was unwell. The accused had gone to work in the morning but on being called by the deceased she returned at around 12.30pm for lunch. The accused passed through the sitting room and went straight to her bedroom. Her husband (deceased) later came at around 1.00pm followed by his brother Dan (PW2). PW2 asked his brother (deceased) to go inside the bedroom and talk to his wife (accused). She testified that the deceased had asked her to arrange all the child's clothes as well as hers as they were leaving for Ilero. The deceased went into the bedroom and they started quarrelling with the accused. PW5 said she could hear everything as she was in the bedroom next to where the deceased and the accused were.

16. According to PW5, PW2 at the time was in the sitting room eating oranges. A quarrel started between the deceased and the accused and the accused then ran out of the bedroom into the sitting room. PW5 stated that PW2 told the accused to leave the house because another wife was coming to replace her.

17. PW5 also stated that PW2 and the deceased then started beating the accused. She just watched while holding the child. She claimed that PW2 took a knife and wanted to stab the accused but the accused took cover behind the deceased and the knife stabbed the deceased instead. The deceased ran outside and fell down and called the accused to get him some water which she did. PW5 claims that PW2 was not injured at all. She further claimed that the deceased's younger brother PW3 also came into the house and even without asking what was happening started beating the accused who lost consciousness. The accused was by then pregnant. PW5 continued and testified that PW2 was not injured and he was the one who took the deceased to hospital where the deceased died.

18. PW5 also stated that during the time she worked at the accused house, there were regular fights between the husband and the wife and there was no peace in that house. She pointed at the accused who was in the dock. She told the court that the accused is the one who had employed her. She also claimed to have known PW2 for about four (4) months as he used to stay in the house with them and that he was very quarrelsome and used to pick up fights in the house too.

19. On cross examination PW5 stated that she did not see the knife PW2 used on that day. She reiterated her earlier testimony that she had been asked by the deceased to prepare and leave the house with the child and when the fight began she had finished packing all the clothes. She testified that they were relocating to Ilero. She explained that the accused and deceased started fighting in the bedroom and proceeded to the sitting room. She added that the knife was on the cupboard and that it was PW2 who had placed it there. She added that the police recovered that knife from the cupboard. She maintained that it was the accused who gave the deceased water when he asked her to do so.

20. This case was investigated by CIP Philemon Otieno No.233429 who was the DCIO at Kakamega then. Testifying as PW6, CIP Otieno stated that on the 25.9.2012 at about 1.30pm he received a call from one of his officers informing him that a person had been killed at Otiende Estate and the victim rushed to hospital. They rushed to Kakamega General Hospital and found the deceased in ward 6 who had a bandage but could not speak. A nurse told them that the deceased had been admitted having a deep wound in his chest and was waiting to be taken to theatre.

21. They also found the victim's brother (PW2) outside the ward. He too had blood stains on his left shoulder. He informed them that the victim had been stabbed by his wife the accused herein who also stabbed him on the left shoulder as he tried to intervene.

22. They then proceeded to the scene of crime where they found another relative of the victim (PW1). PW1 told them that there had been altercations in the house but by the time he got to the house the victim had already been stabbed, PW4 told them that he heard his brother say the deceased had been stabbed by his wife. PW3 told them that the knife was dropped and kept by the PW5. PW6 asked for the knife and it was handed to him. The knife had blood stains. He produced the knife which was marked as PExhibit 2. At the police station the brother to the deceased identified the accused to the police who arrested her later. Later, PW6 learnt that the deceased had passed away. After confirming the death, PW6 booked the accused for the offence of murder and recorded statement from witnesses. He produced the shirt PW2 was wearing that day which had blood stains and a tear on the left hand side PExhibit 4 and the deceased's trouser PExhibit 3

23. After a post mortem had been performed on the body of the deceased the accused was arraigned in court. The Exhibits produced by PW6 were as follows;-

- The knife PEx2
- Trouser(victims)PEX3
- Pw2's shirt PEX4

24. PW6 confirmed to the court accused was the person he had arrested. Mr. Mukabwa cross examined him and he explained that he cautioned the accused before preferring the charges of murder against her. He explained that he was an inspector of police and was qualified to record the accused's statement.

25. The prosecution closed its case. The court found that a prima facie case had been established against the accused and she was placed on her defence.

Defence Case

26. The accused opted to give a sworn statement but she did not call any witnesses. She testified thus. She is a nurse by profession and was working as such at Ileo Health Centre in Shinyalu but was later suspended pending the courts determination of this case. She told the court that she had cohabited with the deceased since 2008 and they were blessed with one (1) child. They lived in Otiende Estate in Kakamega House No. 245 and there were no problems until PW2 turned his brother against her. She claimed that she was segregated on tribal lines as the deceased was being pushed to send her home and marry a Luo woman since she is a Luhya. That is how problems began in her marriage in late May, 2012 when PW2 came from Mombasa and started living with them. At that time they had one child and she was expectant. She testified that on the 25.09.2012 her husband called her and requested her to come home as their son was very sick. She rushed home but on arrival at about 12noon she met her son who was playing and there was no sign that he was unwell. She found her husband the deceased sitting together with his brother (PW2). She also sat down after greeting the two.

27. Her husband then rose up and went to the bedroom. After a while her husband called her to the bedroom and she obliged. While in the bedroom her husband spoke to her in Kiswahili saying "Nimekwambia mara mingi utoke kwa nyumba yangu nioe bibi mwingine na hausikii?" translated in English." I have told you several times to leave the house so that I can marry another wife and you don't listen?"

28. Before she could respond, husband pounced on her and threw her on the floor and sat on her tummy as she was lying with her face up. She was by then 4 months pregnant. She stated that her husband then pulled a knife from the table in their bedroom. She got scared and thought that he wanted to kill her. She shouted for help but her shouts fell on deaf ears. She struggled with her husband and the knife dropped. The deceased was still sitting on her tummy. She picked the knife before the deceased could pick it and stabbed the deceased once on the right side of the chest so that he (deceased) could leave her alone.

29. Her husband got up opened the door and went out. PW2 then went to the bedroom and started beating her up but since she still had the knife in her hand, she used the same knife to stab him on the left shoulder and that is when she got a chance to step outside.

30. At the door she found her husband seated and crying for water which she gave him. She thought that he may have been hurt and she called for help and a neighbour who had a vehicle helped in taking the deceased to hospital but since there was a doctor's strike her husband did not get any assistance and he passed on. She was arrested by the police at about 5.00pm on the same day

31. On cross examination by Mr. Ng'etich she explained that her husband was taller than her and weighed about 75-80kgs. She did not know whether he was drunk that day. She confirmed that the knife in the bedroom was the same knife that was brought to court. She admitted that she stabbed the deceased on the right side of the chest. She stated that she intended to scare the deceased. She eventually delivered a baby girl on 27.02.2013.

32. She closed her case and Counsel Mr. Mukabwa filed written submissions on her behalf.

Issues for determination

33. It is trite law that he who alleges must prove. The burden of proving a criminal charge always lies on the prosecution. It does not shift to the defence even if one has been placed on her defence. This was clearly illustrated in the case cited by the defence counsel **Okethi Okale and others – vrs Republic [1965] EA 555.**

34. The law as to what amounts to murder is set out in section 203 of the Penal Code to the effect that. "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

35. To prove murder therefore the prosecutions has to prove that the deceased died, and that the deceased died as a result of an unlawful act or omission of the accused and that the accused had malice aforethought when he /she committed the offence.

36. The events of this case and the death of the deceased have been clearly brought out by the prosecution. From the evidence of the prosecution which is well corroborated the deceased was married to the accused. They had a child and accused was expecting another child. The deceased married he r in 2008. The deceased was Luo while the accused is Luhya from the accused's side of the story. This difference in ethnicity was the reason for the quarrels in their home because according to her testimony, the deceased was under pressure to send her away so he could marry a Luo woman.

37. From the evidence, the prosecution has proved that the deceased died. A post mortem report by PW1 has shown the cause of death as internal bleeding secondary to penetrating chest injury following assault. See PEX1. PW2 also identified the body of the deceased and confirmed that the deceased had died. This was also the testimony of the investigating officer who went to the hospital and confirmed the deceased had died.

38. The prosecution has also proved that it was the accused who unlawfully inflicted the injuries that led to the deceased's death. They have placed the accused squarely at the scene and also produced the murder weapon. PW2's evidence has been corroborated by the evidence of PW5 the house help though PW2 did not see the actual stabbing of the deceased. It is the accused who admitted during her own defence that she was the one who inflicted the injury on the chest of the deceased.

39. With proof of the unlawful act, the next issue the prosecution has to prove is whether the accused possessed malice aforethought at the time. I have considered the evidence of the prosecution witnesses and defence. A mental picture of the scene showed that there was tension in the house. The deceased had called PW2 to go to his house to witness the accused taking away her child and go away so that a new wife could come in. DW1 went to the house because her husband had called her to come home and pick

their child who was allegedly sick.

40. For whatever the reason he accused was in the house on the 25.9.2012 and a quarrel ensued between her and her husband in the bedroom. She was at that time pregnant and what ignited the quarrel as can be gleaned from the testimony of PW5 was the deceased's statement that "Nimekwambia mara mingi utoke kwa nyumba yangu nioe bibi mwingine na hausikii?" Translated in English " I have told you several times to leave the house so that I can marry another wife and you don't listen?" They were the two of them in the bedroom and so the accused was best placed to know what was happening there in the room.

41. According to the accused, the deceased threw her on the floor and sat on her tummy. PW5 who was also in the house did not testify to this fact but be that as it may the accused appears to have been scared and in a panic because her scream never attracted PW2 and PW3 or even PW5 who were all within reach. The accused claimed that her husband pulled the knife and threatened her with it and that they struggled and the knife fell. PW1 has said that he saw her entering the kitchen in a hurry and she went back to the bedroom and a few seconds thereafter, he saw deceased running claiming that he had been stabbed.

42. DW1 says that she was able to overpower the deceased and managed to grab the knife and in an effort to scare him off she stabbed him on the chest. PW2 after seeing the deceased come out of the bedroom injured tried to take away the knife from the accused but in the struggle he was injured on his shoulder. In their submissions the defence have pleaded self defence and provocation.

43. The term provocation is defined under Section 208(1) of the Penal Code in following terms;-

"208(1)the term provocation means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under the immediate care, or to whom he stands in a conjugal parental, filial or fraternal relation, or in the relation of master servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon by the person by whom the act or insult is done or offered."

44. The evidence by the defence has proved provocation. The accused person was held down by the deceased. She was pregnant at the time. Being told to leave her home by her husband to create room for another woman must have been a shocker. I am of the considered view that in such circumstances, the accused person was deprived of the power of self-control. Her screams for help were not responded to, and yet a knife was being held over her thus threatening her person. She struggled and overcame but her reaction led to the stabbing of the deceased. This is one of those human misfortunes that cannot be properly explained. It is a misfortune that emanates from the feelings of the heart that either threatened or denied I am satisfied that the defence has proved provocation. The law is clear that where there is evidence to prove provocation, then the court must reduce the offence of murder to manslaughter by dint of Section 207 of the Penal Code.

45. It is the finding of this court the accused did not intend to kill the deceased herein. I also find that the offence of murder contrary to Section 203 of the Penal Code has not been proved. The evidence adduced before the court points to a case of provocation and proves the offence of manslaughter beyond reasonable doubt. By dint of the provisions of Section 179 of the Criminal Procedure Code the accused person herein is found guilty of the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and she is convicted accordingly under Section 322 of the Criminal Procedure Code.

Orders accordingly

Judgment delivered dated and signed in open court at Kakamega this 7th day of February, 2017

RUTH N. SITATI

JUDGE

In the presence of :

.....Mr. Mukabwa (Present).....for Accused

.....Miss Ombega for Jamsumba (present).....for State

.....Mr. Ombuye holding brieffor victim family

.....Mr. Polycap.....Court Assistant