



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

HIGH COURT CRIMINAL (MURDER) CASE NO. 4 OF 2013

REPUBLIC .....PROSECUTOR

VERSUS

KEVIN SHAMAN ANDOLE.....ACCUSED

JUDGMENT

**Introduction**

1. The accused person herein KEVIN SHAMAN ANDOLE is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that KEVIN SHAMAN ANDOLE on the 12<sup>th</sup> day of January, 2013 at Muyala Village, Indangalasia Sub-Location in Kakamega Central District within Western Province unlawfully murdered ANNE ADHIAMBO NAMBALA

**The Prosecution Case**

2. The state called a total of eleven (11) witnesses. The prosecution case was partly heard by Justice Chitembwe before this court took over the matter from where he had left. From the evidence the deceased herein was married to one FREDRICK OMONDI OTITI (PW2). In his testimony PW2 a bread supplier told the court how his wife woke up early in the morning at about 5.00am on the 12.01.2013, prepared tea for him and then she left for work at "JAMES CAFÉ" in Kakamega town. He left for his work place at about 6.00am. At about 10.00am he received a call from a friend who told him that his wife had been killed and he should go and identify her body. He went to Muyalo area where he saw his wife's body lying on a mattress and identified it to the police. He explained that the scene of crime officer from Police took photographs of the deceased's body and he saw her clothes a white blouse and black skirt. They then took the body to the mortuary. He knew the homestead where the body of his wife was found. He also knew the accused who had already been arrested by the time he arrived at the scene.

3. On cross examination PW2 told the court that his home is about 300m away from the accused's home and one can hear screams from the accused's home. He stated that he did not hear any screams that morning but he maintains that he saw the deceased's body naked.

4. PW1 LABAN ANDUKA MBAYACHI testified that on that 12.01.2013 he heard screams at the road which is about seventy (70) meters from his home. He rushed to where the screams were coming from and found a lady who had been assaulted and was foaming from her mouth.

5. PW1 told the court that it was the accused who had assaulted the lady. He then followed the accused as he (accused) carried the lady to his (accused's) house. Since it was in the morning he went and reported

to the Assistant Chief who lived nearby. The Assistant Chief called the AP officers who went to the accused's house. He also went to the accused house where the deceased's body was removed at about 10.30 am on the same day.

6. On cross examination, PW1 explained that he leaves from his house at about 5.40am every morning. He further explained that the accused's house is about 100 metres from his. According to him the deceased was not drunk but he could not tell whether the accused was drunk at that time. He also did not know whether the accused was related to the deceased. He explained that he followed the accused from behind as the accused was carrying the deceased upto his own house. He also maintained that he saw the accused assaulting the deceased.

7. PW3 was Charles Nambala Akhunya the father to the deceased. He was informed of the death of the deceased by his wife on the 12.01.2013 which information was later confirmed by one Evelyne through the Assistant Chief. He went to the mortuary where he saw the body of the deceased which he observed was bleeding from the mouth and nose. One part of the head was swollen and the knees had injuries. He confirmed in his testimony that PW2 Fredrick Omondi was the one living with the deceased.

8. PW4 Sofia Bwibo Shikhulli told the court that as she was coming from an all-night prayer meeting on 11.1.2013 at about 5.20am, she saw someone standing in front of her who she identified as the accused. There was a lady lying on the ground foaming from the mouth. The accused then threatened her asking her why she was interested in the girl. She claimed that the accused told her that he would not attack her because he knew her. She further claimed that the accused told her that the girl was drunk. According to her testimony, the accused then dragged the lady to the fence and later carried her. She followed him from behind. The lady was unconscious. The accused then took the lady inside his house. A crowd gathered and she told them what she had seen. She also told the mother of the accused about the incident.

9. The mother of the accused told her not to inform the neighbour as her son would be killed but she told her that she had already informed them. PW1 informed her that he saw the accused assaulting the deceased. She identified the accused in court and said that she knew him.

10. On cross –examination, PW4 explained that she knew the deceased who had no relation with the accused. She further explained that the accused told her that the deceased was drunk. Pw4 further testified that she saw the accused with the deceased about 100metres to the accused's house. She added that PW1 followed her from behind and reached where she was. She claimed to have been the first person to see the deceased and the accused that morning and that PW1 came a little bit later.

11. According to PW4, the deceased had a biker and a black top. She explained that she told the crowd that the accused had taken the deceased into his house.

12. PW5 Dr. Dickson Mchana produced the post mortem report. He is the one who performed the post mortem examination on the deceased's body after it was identified to him by two witnesses namely Fabian and Fredrick

13. He explained that he conducted the post mortem within 24 hours of death. He observed that the deceased fingers were bluish which meant that she had difficulty in breathing before she died. He also observed that the deceased had bruises to the knees and lacerations on the left side of the scalp. Internally both lungs were solid but the air way had froth. There was also extensive blood clot under the scalp on the left side. The skull was not fractured. He formed the opinion that the cause of death was raised intracranial pressure in the skull secondary to blunt force trauma following assault. He produced the post mortem report as "PEX1."

14. On cross examination Dr. Mchana explained that he did not see features of sexual assault but deceased had had difficulty in breathing because of the blood clot on the head. The autopsy showed that she lived for some minutes after the injury before she died. He further explained that the bruises on the knees were not consistent with someone falling.

15. The arresting officer in this case was Senior Sgt AP Paul Nyangisa No. 87084580 who testified as PW6. He testified that on 12.01.2013 at about 10.00am he received a report from the Assistant Chief of Sichirai sub location, one Ernest Ongayo that there was someone who had locked himself in a house with a lady and it was suspected that the lady had died. They went to the scene where the accused refused to open the door. They threatened him (accused) and he agreed to open the door. He was naked when he opened the door and they arrested him

16. PW6 further testified that they saw someone on the bed covered partly with a blanket and at the top the body had a white T-shirt. He checked and saw the body was dead. The person arrested was Kevin Shaman Andole the accused. He identified the accused in the dock.

17. The area Assistant Chief of Sichirai Ernest Mayula Ongayo (PW7) told the court of the report he received from PW1. He made a report at the chief's camp and went to the house where the lady had allegedly been taken. They found the accused and the deceased naked in the house and the accused was arrested. He knew the accused who he identified in court. He also later interrogated PW1 about the incident.

18. PW8 APC Kipchirchir Tum Manase No. 234811 testified that he was one of the Police Officers who arrested the accused. They found him naked in the house together with the deceased's body. He saw the body which was foaming from the nose and mouth. They reported the matter to the CID Kakamega.

19. PW9 Beatrice Mutakale Nambala testified that she received information from one Pamela telling her that her daughter Anne had died at Mwiya. She informed her husband and again went to the mortuary where she saw the body of her daughter.

20. PW10 PC Alfred Kutol No.93595 from the scenes of crime CID headquarters Kakamega produced forensic photographs of the scene of the incident. He took the said photographs at Muyale Village Indangalasia Sub-Location within Kakamega County. He met the OCS Kakamega Police Station at the scene and there took the forensic photographs. All the photographs 1 – 29 were marked as PEX3 and his report as PEX2.

21. PW11 No.48936 PC Michael Kiprono investigated this case. He was instructed by DCIO after the accused had been arrested by AP Officers. He interviewed the AP officers who told him that the Assistant Chief of Shikangania Sub-Location had informed them that the accused had dragged a certain lady to his house at Emusala village. They went to the house of the accused where they arrested the accused and also found the body of the deceased lying on the accused's bed. When the matter was reported to them, officers of the scene of crime went to the scene and photographed the scene. Thereafter the deceased's body was taken for post mortem at Kakamega PGH mortuary. He recorded statements from the said officers and the public in general and thereafter preferred the charges against the accused person herein. The prosecution closed its case at this juncture.

### **Defence Case**

22. After carefully considering the evidence of the 11 prosecution witnesses the accused was found to have a case to answer and was put on his defence. He opted to give a sworn testimony and did not call any witnesses.

23. DW1 Kevin Shaman Andole testified that he worked at Metro Video as a cash officer and that he lived at Ebwambwa past Lurambi Sub-location. He explained that on the 12.01.2013 while at the video shop AP officers went and arrested him and told him that he had killed somebody which he denied. He was taken to Kakamega Police Station.

24. He claimed that he was not given the name of the deceased he is alleged to have killed. He also said he had no idea where the said person may have been killed. He was brought to court on 15.01.2013 and the charges read to him. He denied the charge. He maintained that he could not remember the name of the deceased. He also stated that he was never taken to the alleged scene of crime and if at all he was the

one who murdered the deceased at least the assistant chief or one of his family members could have testified.

25. On cross examination the accused maintained that he was at his place of work on the night of the alleged crime. He closed his case at this juncture.

### **Submissions and Determination**

26. This court has carefully considered the evidence adduced by the prosecution and the defence and the submissions by M/S Amasakha & Co. Advocates for the accused and Mr. Jamsumba learned prosecution counsel for the state. The accused faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Murder is defined under Section 203 as follows;-

“ 203 Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

27. The burden of proof in this case, as it is in all criminal cases, lies on the prosecution to prove that the accused person assaulted the deceased. The prosecution must not only prove that it is the accused who assaulted the deceased but must also adduce evidence that the accused at the time of assaulting the deceased had formed the intention to either cause death or grievous harm to the deceased.

28. The intention to cause death or grievous harm is malice aforethought and under Section 206 of the Penal Code the circumstances which constitute malice aforethought are set out as follows;

“ 206 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 death will probably cause the death of 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

(d) An intention by the act or omission to facilitate the flight or escape from custody or any person who was committed or attempted to commit a felony.”

29. The prosecution case is that the accused was seen assaulting the deceased by PW1 and PW4. Both these witnesses trailed the accused to his house where he (accused) locked the door after taking the deceased into the house. The deceased was found lying on the accused bed with her mouth foaming. By then, she had actually died. Among others who saw the deceased on the accused's bed are the police officers PW6, PW7 and PW8. The photographs produced in evidence show clearly that the deceased was found/seen on the accused's bed where the forensic photos were taken. PW5 who did the post mortem examination formed the opinion that the deceased died as a result of pressure in the skull secondary to blunt force trauma following assault.

30. The blunt force trauma was caused by the assault on the deceased which was directly witnessed by PW1 and PW4. The accused has not denied that he assaulted the deceased. He was seen carrying the deceased to his house which action raises questions as to what he intended to do to the deceased. He took the deceased to his house before the deceased died and they were both found in the house naked. He was alone in the house with the deceased and he did not explain what he was doing in the house with the deceased who was also naked. The incident herein happened in the morning of 12.01.2013.

31. I find that there is overwhelming evidence that the accused assaulted the deceased herein with an intention to commit a felony but was seen by PW1 and PW4 before he could do what he intended to do. He must have known that his actions could cause death or grievous harm to some person. The deceased raised alarm after she was attacked by the accused which attracted PW1 to the scene.

32. I do find that the prosecution has proved the ingredients of malice aforethought as defined under Section 206(b) and (c) of the Penal Code.

33. The evidence of PW1 and PW4 squarely places the accused person herein at the scene of crime which he has failed to rebut. Having been placed at the scene with the deceased, and having been the last person to be seen with the deceased the accused had a duty to give an explanation of how either the deceased died or exactly what happened that morning. The accused instead put an alibi in his defence that does not meet the statutory requirements of sections 111(1) and 119 of the Evidence Act. Therefore the rebuttable presumption created by these two Sections that having been the last person to be seen with the deceased before she died the accused knew how the deceased died and that it was in his interest to give an explanation.

34. From the evidence on record, all fingers point at the accused as having assaulted the deceased. He even took the deceased to his house and placed her on his bed where she was found naked and dead. The accused must have known that the injury inflicted on her was fatal.

35. I also find that the accused person's intentions were well calculated. He must have known the deceased's movement in the morning and that is why he way laid her as she went to work. He was a neighbour to the deceased and must have seen her at such an hour on that route on other days in the past.

36. Having come to that conclusion, I find that the prosecution has proved its case against the accused person beyond reasonable doubt. The accused is found guilty of the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code, and is accordingly convicted under Section 322 of the Criminal Procedure Code.

Orders accordingly

Judgment delivered read and signed in open court at Kakamega this 7<sup>th</sup> day of February 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

.....Miss Mukhwana (present).....for Accused

.....Mr. Jamsumba (present).....for State

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