



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO 100 OF 2012

LESIT, J.

REPUBLICPROSECUTOR

VERSUS

GODFREY OCHIENG ODALO alias VICTOR.....ACCUSED

JUDGEMENT

1. The accused **GODFREY OCHIENG ODALO** alias **VICTOR** has been charged with the offence of **Murder** contrary to **section 203** as read with **204** of the **Penal Code**.

“The particulars of the offence are that on the 29th day of November, 2012 at Raila Decanting Site in Langata District within Nairobi County murdered Martha Awino.”

2. The prosecution called a total of twelve (12) witnesses. The brief facts of their case was that the accused and the deceased persons were living as husband and wife in Langata Decanting estate. On the night of 29th November, 2012 the accused and deceased had a quarrel and thereafter a fight ensued which ended with the accused person throwing the deceased over the balcony of their house.

3. PW1, a young girl aged 10 years when she testified was the daughter to the deceased and accused person. PW1 gave unsworn evidence after the court had conducted a voir dire and was satisfied the witness understood the duty to tell the truth. PW1 stated that on 29th November, 2012 at around 9.00 pm she arrived/returned home from buying cigarettes which her father the accused had sent her to buy and found her parents fighting. She said that when she returned to the house she saw her father strangle her mother. She then saw the accused tie a rope on her mother’s neck drag her to the bedroom where he closed the door behind them. Shortly later she said the accused dragged the deceased to their balcony and threw her downstairs. She saw the deceased lying on her stomach on the ground outside their home.

4. PW3 and PW4 were neighbors to the accused and deceased as well as the block representatives in the estate where they resided. PW3 alerted PW4 of noises that she had heard at door 22 and together they proceeded to the house where these noises were emanating from. This was the accused house. PW3 knocked and a young girl whom she knew as a daughter to the accused and deceased opened the door while crying.

5. PW3 and PW4 stated that the accused came to the door and chased them away instructing them to return to their respective houses. PW3 and PW4 later proceeded downstairs because they both heard

people making noises and upon getting downstairs, PW3 and PW4 saw the deceased lying on the ground. PW3 recognized the deceased as her neighbour who had been recently married to the accused.

6. PW9 was a neighbor who resided directly underneath the accused house. PW9 stated that on 29th November, 2012 while headed to her kitchen, she heard footsteps of someone running in the accused house. Soon thereafter, PW9 heard a child scream twice from the same house. PW9 moved to her balcony, shouted out in trying to enquire what the problem was but got no reply. PW9 was alerted by a neighbor from downstairs that a woman had fallen from upstairs and on getting to where this woman was, she found the deceased lying with her face downwards and recognized her as the accused wife.

7. PW9 proceeded upstairs to the accused house where she met the accused standing on the corridor saying **“mtu akitaka kukufa wacha akufe tu” “if somebody wants to die, let them just die.”** PW9 went and held the accused hand and enquired from him where his wife was but he did not answer. PW9 together with the accused proceeded downstairs upon which the accused touched the deceased and walked away.

8. PW5 was amongst the people who took the deceased to Kenyatta National Hospital in company of the accused and a driver who came with the accused. While at the hospital, PW5 stated that the accused stayed in the vehicle when they got to the hospital and that he appeared sad.

9. PW2 and PW6 were siblings to the deceased person. They stated that on 30th November 2012 after learning of the death of their sister from the accused, they reported the incident at Langata Police Station. PW6 stated that they tricked the accused in having him accompany them to the police station by lying to him that they were headed to the City Mortuary because they feared he would not cooperate if he knew they were heading to the police station.

10. PW11 DR. Njau Mungai stated that on 4th December, 2012 he conducted a postmortem on the body of one Martha Awuno. PW2 and PW6 identified the body to him. The pathologist's findings at post mortem were that the deceased had several injuries caused by violence or a fight. He noted those injuries as being bruises on the head, face, knees, loin, legs and pelvic area. The doctor stated that the injury on the pelvic area was very severe, had caused haemorrhage and that it was caused by trauma. His final conclusion was that the cause of death was haemorrhage as a result of trauma and pregnancy complications.

11. PW12 was the investigating officer in this case. He stated that on 30TH November, 2012, he interviewed PW2 and PW7 who had gone to the station to report about the mysterious death of their sister who had fallen off a balcony. PW12 stated that the accused was also amongst the group that had gone to the police station to report the incident and together with PW12 they proceeded to the alleged scene. PW12 later recorded statements from the witnesses and a statement under inquiry from the accused which he produced as P.Exhibit5.

12. The accused opted to give sworn statement in his defence. The accused stated that on the said night of 29th November 2012, around 9.00 pm he had arrived from work when he enquired from his wife the deceased herein, whether they were not having supper since she had not served him food and the eldest child had indicated to him they had not had supper either. The accused stated that the deceased started shouting and abused him severally. The accused requested the deceased to go to the bedroom so as to try and cool down. The accused left the deceased in the bedroom and proceeded to the sitting room. While at the sitting room, the accused stated that he was informed by his neighbour one Mama Pamela, PW9, that his wife had fallen downstairs from the balcony. The accused denied throwing the deceased off the balcony and indicated that the deceased might have thrown herself from the balcony because of the disagreements they had had.

13. The learned prosecution counsel, Ms. Wafula in her final submissions urged the court to find that the prosecution had proved its case as against the accused person beyond any reasonable doubt. Counsel urged that since the accused and deceased were living in that house with their minor children, it left the

accused as the only person who threw the deceased from the balcony. Counsel urged that PW1 evidence who was a minor was corroborated by the neighbors to the effect that she was in the house when the violence was being meted out against the deceased by the accused.

14. Counsel urged that forensic evidence was not an exact science where conclusive evidence was possible and that explained why the pathologist came up with two possible causes of death. Learned counsel further urged that the accused person subsequent conduct proved a guilty mind since he did not report the incident of death to the nearest police station.

15. Mr. Madialo learned counsel for the accused in his submissions urged the court to find that the prosecution had failed to prove their case as against the accused. Counsel urged that the prosecution was relying on the unsworn evidence of PW1 who was a minor and as such it required corroboration. Counsel further urged that PW11 the Pathologist who conducted the post mortem had come up with two possible causes of death hence was inconclusive and as such there were serious complications which needed to be investigated so as to eliminate all doubt.

16. Counsel urged that what the court needed to determine was whether the prosecution had proved motive, whether the prosecution had established malice aforethought against the accused, whether the circumstantial evidence adduced by the prosecution meets the legal threshold required to infer guilt, whether the defence by the accused is reasonable and plausible and what value should the court give to the inconclusive evidence of an expert witness

17. I have carefully considered the evidence adduced by the prosecution and the defence, the learned counsels' submissions and their authorities.

18. The accused person faces a charge of murder contrary to **section 203** of the **Penal Code**. This section creates the offence of murder and provides as follows:

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

19. Malice aforethought is an essential ingredient in the offence of murder. The circumstances that constitute malice aforethought are set out under **section 206** of the **Penal Code** as follows:

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 of any person who has committed or attempted to commit a felony.

20. The onus and evidential burden lies with the prosecution to prove its case against the accused person beyond any reasonable doubt. The prosecution must prove that it was the accused who caused the death of the deceased by inflicting serious injury on the deceased when he threw her over the balcony of their house. The prosecution must also equally prove that at the time the accused threw the deceased over the balcony to their house, he had formed an intention to either cause death or grievous harm to the deceased.

21. Having considered the entire evidence adduced by both sides, I find the following issues not in dispute.

a. It is not disputed that the accused and deceased were husband and wife who lived together in their house with their two children aged 8 years and 1 year.

b. It is not disputed that PW1 was a child to the accused and deceased and was in the house on the day of the incident.

c. It is not disputed that the accused was at the scene of the incident when the incident occurred.

d. It is equally not in dispute that the deceased fell off the balcony of her house which she lived together with the accused.

22. From the totality of the evidence, I find these as the issues for determination:

I. Whether the evidence of PW1 who was a minor met the legal requirement of being corroborated by other independent evidence?

II. Whether the prosecution established it was the accused who caused the death of the deceased by an unlawful act?

III. Whether the prosecution established the cause of death of the deceased?

IV. Whether the evidence of the pathologist was inconclusive and if so, what was the probative value of the same?

V. Whether the malice aforethought was established?

VI. Whether the prosecution proved motive?

VII. Whether the defence by the accused was plausible and reasonable?

23. Regarding whether the evidence of PW1 who was a minor met the legal requirement of being corroborated other independent evidence. Regarding the evidence of children, **section 124** of the **Evidence Act** provides as follows:

“S.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.”

24. The process of determining whether the child witness should testify at all and secondly whether it will be a sworn or unsworn statement was explained in the celebrated case of **JOHNSON MUIRURI VS REPUBLIC [1983] KLR 445, Madan, Porter JJ & Chesoni Ag. JA** held:

(1) “Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

(2) It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

(3) When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

(4) A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

(5) The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

25. According to the **Children Act 2001** a "child" means any '*human being under the age of eighteen years*'. A **child of tender years** is defined under the same Act as '*a child below 10 years*'.

26. PW1 was 8 years old at the time of this incident, and 10 years when she testified in court. She gave an unsworn testimony after the court ruled that she did not understand the meaning of an oath, but was possessed of sufficient knowledge to testify and understood the duty to tell the truth. Given these definitions PW1 was a child of tender years both at the time she witnessed the incident, and also at the time she testified in court. It is therefore important that the evidence of PW1 should receive corroboration from independent evidence.

27. The importance of corroboration of the evidence of a child is explained further in the Court of Appeal case of **ONSERIO v. REP. [1985] KLR 618**, where it was held:

"An accused can only be convicted on the evidence of a child of tender years if corroborated by other material evidence in support thereof implicating him as set out in section 124 of the Evidence Act."

28. The evidence of PW1 was that the accused started beating her mother on the evening in question and that she and her mother the deceased screamed for help. Those cries were heard by PW3 and 4 who were Block Reps and who lived one and two levels respectively above the accused house. The two went together to accused's house. PW9 whose house was immediately below the house of the accused also heard the screams and went out to her balcony to investigate what the problem is.

29. From what transpired when PW3 and 4 went to knock at accused house confirmed the testimony of PW1. The two witnesses both stated that the moment PW1 opened the door for them the accused went menacingly towards the two of them, hurled insults at them, chased them out of his house and told them to mind their own businesses.

30. I am satisfied that the evidence of PW1 received independent, ample and cogent corroboration from the evidence of PW3, 4 and 9. Their evidence confirms that the accused attacked the deceased that day, was aggressive and violent towards her causing a commotion which attracted the neighbours.

31. The other issue was whether the prosecution established that it was the accused that caused the death of the deceased by an unlawful act. I will consider that issue together with the issue whether the prosecution established the cause of death of the deceased and whether the evidence of the pathologist was inconclusive and if so, what was the probative value of the same.

32. PW1 said that when she returned to the house from the shops where the accused had sent her, she saw her father strangle her mother. She then saw the accused tie a rope around her mother's neck and drag her to the bedroom where he closed the door behind them. While at the sitting room, PW1 stated that she saw the accused hold the deceased by her legs and throw her through the balcony of their house. PW1 then

proceeded to the balcony from where she could see the deceased on the ground downstairs lying on her stomach.

33. The evidence of PW3, 4 and 9 shows clearly that there was a short lapse of time between the time they heard cries and screams in the accused house and the time the deceased was found lying on the ground downstairs. The deceased was lying directly below the balcony of their home. That was the same balcony that PW1 stated she saw the accused throw down the deceased from.

34. The evidence of PW3 and 4 is proof that no sooner had the accused chased them aggressively from his house, shortly later they heard screams outside the block. The screams were by persons who saw the deceased lying on the ground below her balcony.

35. On the other hand PW9 was disturbed by movements and screams in accused house. She said that when she eventually went to her balcony to ask what the matter was. Her neighbour Mama Keli informed her that a person had fallen down from upstairs. Eventually PW9 went upstairs to the accused house where she met the accused standing on the corridor saying **“mtu akitaka kukufa wacha akufe tu” “if somebody wants to die, let them just die.”**

36. I find that the evidence of the prosecution shows that the accused was home with his wife and two kids, including PW1. Apart from the deceased, the accused was the only other adult in that house. The prosecution has established that there was fighting going on in accused’s house. PW1’s evidence that the accused was beating her mother received corroboration from PW3 and 4 who were chased away by the accused when they went to answer the deceased and PW1’s cries for help.

37. PW9 also corroborated that evidence having testified that she heard commotion and cries in accused house just before the incident. The accused response to PW9 when she asked him where his wife was shows a person who was not interested in his wife’s welfare. PW9 testified that the accused response was **“mtu akitaka kukufa wacha akufe tu” “if somebody wants to die, let them just die.”**

38. The evidence of PW1 that the deceased was beaten up that night received critical corroboration from the post mortem findings on the deceased body. PW11 the pathologist stated that externally he noticed some bruised abrasions on the left orbital area and lateral right elbow, abrasions on linear right anterior forearm, congested conjunctiva, labial scar/hypo pigmented rash and bruises on both knees and right lower leg.

39. PW11 further stated that externally there were no deformities noted or any definite defense injuries. PW11 further stated that internally the main findings were in the abdominal cavity where there was a lot of blood in the peritoneum cavity, a foetus of about 5 months in the uterus, blood within the gestational sac which was open. On the head areas PW11 main findings were clotted blood associated with injuries to tissues in the eyes and on the right and back of the head.

40. PW11 further explained that the reason he had listed pregnancy complications as a possible cause of death was due to the blood he had noticed in the abdomen, uterus and the stained sanitary pad which meant there was over bleeding which was unusual in the 5th month gestation period. He classified the bleeding as acute which meant the loss of blood was fast and that it was the acute rate of loss of blood which he said was fatal.

41. On the possibility of blunt trauma being the cause of death, PW11 stated that the bruises on the abdomen, knees, pelvic areas, face and back of head led him to make that conclusion that the blunt trauma could also have been the cause of death. The doctor testified that the injury on the pelvic area was severe and caused acute loss of blood. PW11 stated that if someone was involved in violence or a fight, it was possible for one to have the kind of injuries the deceased had. He however stated that the injury on the pelvis was not caused by a fall but by trauma through assault. PW11 stated that the injuries he saw on the deceased were caused by a fracas, not a fall or accident except the bruises on the knees which could have been as a result of a fall on a rough ground.

42. The doctor stated that the cause of death was both haemorrhage as a result of blunt trauma and pregnancy complications. The question is whether the prosecution established the cause of death of the deceased and whether the evidence of the pathologist was inconclusive and if so, what was its probative value.

43. I will quote from a text, Sarkar's Law on Evidence 15th Edition Vol. 1, the opening remarks under the title "*Medical opinion and its value*" thus:

"The opinion of physicians and surgeons may be admitted to show the physical condition of a person, the nature of a disease, whether temporary or permanent the effect of the disease or of physical injuries upon the mind or body as well as in what manner or by what kind of instruments they were made, or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death."

44. In same text, SARKAR ON LAW OF EVIDENCE (Supra) a case is quoted, TANVIBEN PAKAJIKUMAR DIVETIA Vs. STATE OF GUJARATA 1995 SC 2196; 1997 Criminal Law Journal 2535, 2551 where it was suggested:

"The doctor who had held the postmortem examination had occasion to see the injuries of the deceased quite closely and in absence of any convincing evidence that he had deliberately given a wrong report his evidence is not liable to be discarded."

45. I will quote a persuasive case REPUBLIC Vs. LANFEAR 1968 1 ALL ER 683 where DIPLOCK, L. J. gives the correct English position in regard to doctors evidence thus:

'... Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent expert evidence with the sole desire of assisting the court.'

46. In Kenya the position is quite clear and established, in DHALAY vs. REPUBLIC {1997} KLR 514 the Court of Appeal held:

"It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so."

47. The acid test set out in this case is that an expert's opinion can only be rejected if there is proper and cogent basis for rejecting it. The principle was fortified in an earlier case NDOLO vs. NDOLO {1995} KLR 390. The Court of Appeal held;

"The evidence of PW1 and the report of MUNGA were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held, the evidence of experts must be considered along with all other available evidence and it is the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision... of course where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected."

48. The law is clear that the evidence of experts must be considered along other evidence, and while it should be respected especially where the expert is qualified in the field, and has given an opinion and the reasons upon which it is based that opinion should be accepted. The only rider is where there is evidence in conflict with such opinion.

49. I have set out the pathologist's evidence at length. From this evidence the pathologists makes it clear that he formed the opinion that the cause of death was both haemorrhage as a result of blunt trauma, and pregnancy complications. He gave his reasons for his opinion at great length.

50. I have considered the pathologist's evidence and opinion alongside the rest of the evidence. I find that the evidence that before the deceased died she had been violently assaulted by the accused and then thrown off a balcony was all in tandem with the injuries PW11 found on her body.

51. The cause of the bleeding, and which the doctor said was acute and caused death was trauma caused by an assault on the deceased. The pregnancy complications he noted were bleeding evidenced by presence of a used bloody pad, and the open sac and a liter of blood in the uterus, all which were unusual in pregnancy of the age deceased had. The deceased was five months pregnant at the time but, the foetus was intact and *in situ*, meaning there was no abortion of the baby.

52. I find that the evidence and findings of the pathologist, PW11 was conclusive, clear, straightforward and in consonance with the prosecution case. I accept the findings. I find that they clearly show that as the witnesses testified, the deceased was assaulted physically by the accused before she was thrown out through the balcony where she landed two floors down. The injuries on the eyes, head, face, legs and in the pelvic areas were all caused by fracas, while the injuries on the knees were as a result of the fall.

53. The fall was also caused by the accused. The action by the accused against the deceased both by violence, blunt trauma and fracas, and by throwing her down from a height were the substantive cause of the deceased death. I therefore find that PW11's evidence was conclusive and established the cause of the death of the deceased was both pregnancy complications and blunt trauma.

54. As to whether the motive was established. None of the neighbours or relatives of the deceased who testified in this case were able to tell the motive for the attack. However motive need not be proved. This is evident under **section 9(3)** of the **Penal Code** which stipulates thus:

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

55. That provision was the subject of interpretation in the case of **Choge Vs Republic (1985) KLR1**, where the Court of Appeal held as follows:-

"Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not."

56. As to whether the prosecution proved malice aforethought. In the case of **Nzuki V Rep 1993 KLR 171** the learned judges of Appeal set out the principles of determining whether intention to commit murder is proved as follows:

"1. Malice aforethought is a term of art and is either an express intention to kill or implied where by a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as the result.

2. Before an act can be murder, it must be aimed at someone and must be an act committed with one of the following intentions

(a) To cause death;

(b) Cause grievous bodily harm; and

(c) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from his acts, and commits these acts deliberately.

3. Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder.

4. ...

57. In this case the evidence adduced by the prosecution establishes without a doubt that the accused took it upon himself to assault his wife on the material day. He did not entertain any outside interventions. His actions attracted many people who were his neighbours. Those who were bold enough to confront him were met with wrath leading them to run out of his house in fear.

58. The attitude of the accused to his neighbours shows the intention of the accused. His intention was to cause harm to the deceased. By assaulting her and then throwing her downstairs from the second floor of the flats where they lived, several feet below, is proof that the accused had formed the intention to either cause grievous harm or death to the deceased.

59. The remarks accused made to PW9 when she asked him where his wife was is proof of accused indifference whether his action would cause grievous harm or death to the deceased. He told PW9 that if someone wanted to die, let them die. To PW3 and 4 he told them to get out of his house and to go mind the business of their own homes. These remarks are not those of a victim of aggression as the accused stated in defence. They were the words of a man who had formed an intention to cause harm to another irrespective of the circumstances. When one considers that the deceased was five months pregnant, and in her state to be thrown down mercilessly, it becomes clear that the accused had ulterior and sinister motives against the welfare of the deceased.

60. As to whether the defence by the accused was plausible and reasonable. The accused in defence denied the offence. He stated on oath that it was his wife who was aggressive, had failed to cook food that day, and when he sought to know why, she attacked him. The accused said that PW1 was his wife's child out of wedlock. He explained that the wife had just returned home from her rural home where she had gone to get documents for enrolling her daughter PW1 in a school in Nairobi. The accused also said that the deceased had an issue with her brother, PW6 over his disabled child that he wanted the deceased to care for against her will.

61. On the material day the accused stated that the deceased was rude to him leading him to slap her then drive her to their bedroom to cool off. He said that when he slapped her she abused him and shouted causing PW3 and 4 to go to their house whom he chased away. The accused stated that as he sat in the sitting room thinking, PW9 knocked on his door and told him that the deceased had fallen downstairs. The accused said he did not know why the deceased committed suicide but that he suspected problems at her home.

62. Mr. Madialo for the accused urged the court to consider accused statement under inquiry taken by PW15, the investigating officer in this case and produced unopposed as P. Exhibit 5.

63. I have considered the statement under inquiry P. Exht. 5. That statement is similar to accused statement in defence. In it he said he found a distraught wife at 9 p.m. when he returned from work. He said that they quarreled when he demanded to know why the children had not eaten. He said that the deceased called him stupid and that he slapped her and took her to the bedroom and told her to calm down. Soon thereafter PW3 and 4 came whom he chased away. He said that soon thereafter he was told by PW9 that the deceased had fallen down from the balcony.

64. I considered the accused defence against the rest of the evidence. I find it is clear from PW1 and the

neighbours, PW3, 4 and 9 that there was a serious fight in accused house and among those crying and screaming for help was PW1 besides the deceased. Further these witnesses said that the accused was aggressive, violent and rude. That is not the picture he created of himself, of a calm, temperate and controlled person in his defence. I find that the accused defence that he was calm and that it was the deceased who was aggressive that day is not correct. I find it was indeed the accused who was aggressive. He attacked his wife and eventually threw her down from the balcony causing her serious injuries out of which she died.

65. Regarding alleged disagreement between the deceased and PW6, it was noteworthy that that issue was not raised by the defence when cross examining PW6. The allegation of a grudge between PW6, the deceased and other family members was an afterthought and I find it was therefore untrue.

66. Having considered the entire evidence adduced by the prosecution and defence in this case, I find that the prosecution has proved the charge of murder contrary to **section 203** of the **Penal Code** against the accused person beyond any reasonable doubt. I find the accused guilty of murder as charged and accordingly convict him under **section 322** of the **Criminal Procedure Code**.

DATED AT NAIROBI THIS 2nd DAY OF MARCH, 2017.

LESIT, J.

JUDGE