



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 32 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NICHOLUS MWAMBILI MBOGO.....ACCUSED**

**JUDGEMENT**

Nicholus Mwambili Mbogo, hereinafter “the accused” lived with Dorothy Wanza Hassan, hereinafter “the deceased” as man and wife. According to the deceased’s father, Mr. Hassan Matsila Chumo (PW4), the two were not officially married. They had two daughters. At the time of the incident causing the death of the deceased, the accused was living alone, his family having gone away to live with the deceased’s family. The accused told the court that his wife and children left him because of the interference by his father in law, PW4. Be that it may, the deceased went to the home of the accused in Motomoto Village Kwa Njenga in Imara Daima Nairobi on 12<sup>th</sup> April 2014. According to the accused, the deceased went to his home to pick their daughter who had gone to collect some clothes that the accused had bought for her.

At around 9.00pm, Rosalia Mwikali Nzangi, PW2, a neighbour to the accused person in house No. 015 heard a loud bang from the accused’s house. The bang was on the wall separating Rosalia’s house No. 015 with House No. 016 where the accused lived. According to PW2, the bang was unusual and she decided to call another neighbour and inform him. The neighbour she approached is Festus Mwanja, PW1. PW1 called Cosmus Mutua, PW3, who was the caretaker of the building. They went to the house of the accused. They could not gain entry because the house was locked from inside. They called the accused but they did not get an answer. Cosmas decided to forcefully open the door. Inside the house they found household items scattered in the sitting room. There was no one in the sitting room. They went to the bedroom. It was dark and using the flashlight from a mobile phone they were able to see the accused and the deceased lying on the ground near the door. The deceased was facing upwards. She was bleeding from the head. The accused was lying next to the deceased facing downwards. He was holding a bottle of pesticide in his hand. The deceased was dead but the accused was still alive. He was taken to Nairobi West Hospital for treatment.

Cosmas reported the matter at Villa Franka Police Post. Police took over the scene. Photographs of the scene were taken and the body taken to the Chiromo Mortuary. By the time the police arrived at the scene the accused had been taken to hospital.

After investigations were completed, the accused was charged with murder of Dorothy Wanza Hassan contrary to Section 203 as read with Section 204 of the Penal Code. The information shows that the offence occurred on 12<sup>th</sup> April 2014 at Mukuru Kwa Njenga Slums within Embakasi Division in Nairobi County.

In his defence given without taking the oath, the accused told the court that his relationship with the deceased started when they were still in school; that they later started living together and sired two daughters. He told the court that the deceased's father (PW4) did not approve of the relationship and he interfered with their relationship to an extent that they did not live in peace; that the father-in-law and his family followed the accused's family when they moved houses to Motomoto Village. He testified that the deceased went to live with her parents on the instigation of her father on the mistaken belief that she was going there to allow the accused and his family to initiate dowry negotiations. He testified that he was maintaining the children and that on 12<sup>th</sup> April 2014 he had bought his daughter some clothes which he had told the wife to go pick but the wife sent the daughter and another girl instead. He testified that the deceased's father claimed that the accused had abducted the child and insisted that the deceased goes to report the matter to the police and obtain an Occurrence Book number.

The accused testified further that the deceased reported the matter to the police after which she went to accused's house to pick their daughter; that when she noticed some ear-rings in the accused's house she became jealous and accused the accused of entertaining another woman. He told the court that the deceased attacked him first by slapping him and that a fight ensued between them with the deceased scattering household items by throwing them at the accused; that when the deceased's attack did not relent, he picked a chopping board and hit the deceased with it to stop her. He said that she hit her head against the wall when he evaded her attack. He further told the court that when he realized that the deceased was seriously injured and could not talk, he also decided to commit suicide and took the remaining pesticide.

In a murder trial the prosecution bears the onus of proving the case against the accused person. The standard of proof is beyond reasonable doubt. There are two main ingredients of murder that must be proved: the *actus reus* and the *mens rea*. *Actus reus* is a Latin word defined in the Black's Law Dictionary (9<sup>th</sup> Edition) to mean **“guilty act”**. **“It is the wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability.”**

*Mens rea* is defined by Black's Law Dictionary (9<sup>th</sup> Edition) to mean **“guilty mind”**. **“The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness.”**

Under **Section 203 of the Penal Code** murder is defined thus:

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

For the offence of murder to be complete therefore, there must be a person who, with malice aforethought (*mens rea*) causes the death of another person by an unlawful act (*actus reus*). These are the ingredients of murder that the prosecution must prove beyond reasonable doubt.

At the closure of defence case Mrs. Nyamongo for the accused submitted that there were no eye witnesses on what happened on that fateful evening; that the father of the deceased is the one who started the chain of events that led to the death of the deceased by interfering with the couple and that PW5 testified that he did not notice any visible injuries on the body of the deceased while PW4 said that he saw injuries. She further submitted that PW1 did not mention seeing the chopping board yet he was among the people who arrived at the scene; that the chopping board was not sent for analysis to confirm fingerprints and the source of the alleged blood stains on it and that the pathologist did not tender conclusive evidence as to the cause of death.

Counsel further submitted that crucial witnesses (the daughter and the other girl who had accompanied the daughter of the deceased) were left out by the prosecution; that the evidence shows that there was a fight between the accused and the deceased; that the accused had no motive to kill his wife nor did he have the intention to cause her death and that investigations were poorly conducted. Counsel urged the court to acquit the accused.

Ms Khaemba for the prosecution submitted that the prosecution has proved the case beyond reasonable doubt that the deceased died as a result of blunt force trauma; that the accused was positively identified as the person who caused fatal injuries on the deceased and that he had the intention to cause grievous harm to the deceased. Counsel urged the court to convict the accused for murder.

In determining this case I have analysed the evidence from the prosecution and that of the accused. I have noted that some facts are not disputed namely that the accused and the deceased lived as man and wife; that at the time of the incident giving rise to this case, the accused and deceased were estranged and that on 12<sup>th</sup> April 2014 the deceased went to the home of the accused. It is also not disputed that a fight ensued between the accused and deceased and that the accused hit the deceased with a chopping board. The accused has admitted hitting the deceased with a chopping board although he qualified this by stating that he hit her once. In my view whether the chopping board was taken for examination or not, whether it was produced by the officer who collected it or by another officer and whether PW1 did not see it at the scene or not, these facts are not in issue. This is because of the admission by the accused that he picked the chopping board and used it to hit the deceased.

Further on the contradictions between the evidence of PW4 and PW5 on the injuries on the body of the deceased, it is my view that PW5 was a witness who identified the body at the mortuary for post mortem examination and may not have observed the body well. There is no doubt in my mind that the injuries described by the pathologist existed.

The evidence by Dr. Dorothy Njeru, PW7, is that the deceased had the following injuries:

- (i) Deep (extending to the skull) laceration on the left temporal region measuring 4cm long
- (ii) Deep (extending to the skull) laceration on the left fronto-temporal region measuring 8cm long
- (iii) Lacerations on top of the left ear measuring 6cm long
- (iv) Lacerations on the left peri-orbital region measuring 7cm long
- (v) Abrasion on the anterior aspect of the neck –linear contusion on the frontal region
- (vi) Bilateral peri-orbital ecchymosis (darkening due to bleeding around both eyes)
- (vii) Contusion of the soft tissues on lateral aspect of the both upper limbs.
- (viii) Bruising of the soft tissues and muscles on the anterior aspect of the neck and these were deep extending to the muscles of the spinal code.
- (ix) Extensive subgaleal haematomata (global)- the skin covering the scalp on the entire head.
- (x) Subdural haemorrhage
- (xi) Subarachnoid haemorrhage
- (xii) Contusion of anterior aspect of spinal muscles

In the doctor's opinion, the deceased died as a result of head injury due to blunt force trauma with asphyxia due to suspected manual strangulation.

Keeping the ingredients of murder in mind, it is my view that there is no dispute that the deceased died. She was found dead when witnesses gained entry into the house. The injuries she had sustained are massive as testified by the doctor. There is no dispute that the deceased and the accused were the only people inside the house belonging to the accused at the time. There is no dispute that both the accused and the deceased were found lying on the ground near the door of the bedroom. The accused was alive but the

deceased was dead. The accused was found holding a bottle of pesticide in his hand. He claims to have taken it in order to die after realizing that the deceased was lying immobile and unable to talk. The evidence by the pathologist medically confirms death of the deceased.

Having considered evidence of both accused and the defence, I have no doubt in my mind that the deceased died and that the accused was the only person in that house with the deceased. The issue for determination is whether the accused inflicted the fatal injuries on the deceased and whether he had malice aforethought. In other words whether the twin-elements of guilty act and guilty mind exist.

The accused claims that he hit the deceased using the chopping board once. He claimed that the deceased was hit on the head by the wall after she aimed to attack him and after he evaded her attack. I find this evidence incredible. Does it mean then that the deceased inflicted these serious injuries on herself?

The injuries to the head were deep and extended to the skull. The injuries to the neck muscles extended almost to the spinal cord. The injuries to the head were extensive and covered almost the entire head. I highly doubt that these injuries were self-inflicted by the deceased or accidentally occurred. The doctor described the injuries as having been caused by a blunt trauma. To my understanding a blunt object was used to inflict those injuries. This court was shown a chopping board (Exhibit 2). It was broken into two pieces and PC Mithamo pointed to what he described as blood stains on the board. There is no evidence that this board was ever examined but given that the accused has admitted that he used it to hit the deceased, I have no doubt that it is the object used to inflict some of the injuries on the deceased. The deceased's head hitting the wall may have caused blunt trauma too. It is also probable that the deceased's head was banged on the wall by the deceased.

Rosalia told the court that she heard an abnormal bang on the wall separating her house with that of the accused and this prompted her to tell PW1. Although the accused claimed that the deceased hit the wall I doubt that she is the one who caused that abnormal bang on the wall unless she was travelling like a missile! Even if this were true, the question still lingers: who caused injuries on the global head of the deceased and her neck? It is not perceivable that the deceased caused massive injuries on her head and continued to strangle herself thereby causing massive injuries on her neck!

When I consider the evidence in total, I am persuaded that the injuries on the deceased that caused her death were caused by the accused person. I disbelieve him that he hit the deceased once as he claims. Whether the deceased is the one who slapped him first, the actions of the accused in attacking the deceased and inflicting on her these massive injuries is unjustified in my view.

I noted that the defence counsel did not cross-examine the doctor. Given that the accused's defence is that he was attacked by the deceased and hit with a rolling pin on his groin, and given the extensive injuries inflicted on the deceased and the accused's defence that he hit her with the chopping board only once, it was crucial for the defence to cross-examine the doctor. Secondly, the accused claimed he took pesticide, was bitten on his chest by the deceased and hit on his groin. Evidence shows that he was taken to hospital after neighbours realized he was still alive. To which hospital was he taken and why did he not adduce medical evidence of the injuries he had sustained? I am alive he has no duty to prove his innocence but this is crucial part of his evidence given that he was the only person with the deceased in their house on that fateful evening.

I am convinced beyond reasonable doubt that the injuries the deceased suffered were inflicted by the accused. It is not true in my opinion that he hit her with the chopping board only once. My considered view is that he did more than that. He must have hit the deceased against the wall or used the chopping board repeatedly on her head. There is also evidence of manual strangulation and as I have stated above it is incredible that the deceased strangled herself.

Did the accused, in assaulting the deceased, possess malice aforethought? In other words, did the prosecution prove *mens rea*? The prosecution has not established any motive on the part of the accused. It is not disputed that at the time of this incident, the deceased and the accused were not living together. However, the reason for their separation according to the accused is due to the interference by the father

of the deceased. I have no other evidence showing existence of reason for their separation other than what the accused has stated.

What happened inside the house of the accused is not clear since there is no independent evidence. However, given the description of the commotion in that house by PW2 it could be true that the accused and the deceased were fighting. This court does not have evidence, other than what accused told the court, to show who attacked the other first or whether the deceased hit and assaulted the accused at all. Further, I have no evidence to show that the accused had planned to kill the deceased or in the very least to assault her.

Having considered the evidence in totality including the defence it is my view that circumstantial evidence and the admission by the accused person point to the accused as the only person who assaulted the deceased causing her fatal injuries.

In *Rex V. Kipkering Arap Koske & Another (1949) XVI EACA 135*, the Court of Appeal for Eastern Africa held quoting from Wills on Circumstantial Evidence that:

***“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”***

The same Court expanded the principle in *Simoni Musoke V. R. [1958] EA 715*, which cited with approval the following passage from the Privy Council decision in *Teper V. R. [1952] AC 480* at P. 489,:

***“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.***

In my view the legal principles in the above authorities are satisfied in this case. However, in my considered view, I find that *mens rea* on the part of the accused has not been proved beyond reasonable doubt. I doubt he has planned to kill his “wife”. It seems due to their differences a heated argument ensued leading to a vicious fight that led to the fatal injuries on the deceased. It is my finding therefore that the accused caused the death of the deceased in circumstances that do not reveal he intended to kill her. The prosecution has failed to prove beyond reasonable doubt that the accused intended to kill his wife thereby failing to establish a guilty mind on the part of the accused. Consequently, I find the offence of murder has not been proved beyond reasonable doubt. I hereby acquit the accused of murder. I however find that the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code has been proved beyond reasonable doubt. I will and do hereby convict the accused for manslaughter. Orders shall issue accordingly.

**Dated, signed and delivered this 1<sup>st</sup> March 2017.**

**S. N. MUTUKU**

**JUDGE**