



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. 40 OF 2011**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JOHN KHAMINYA AVUTAGA.....ACCUSED**

**J U D G M E N T**

**Introduction**

1. The accused herein John Ichamina Avutaga is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 7<sup>th</sup> day of March, 2011 at Kigamu sub-location in Sabatia District within Western Province he murdered Margaret Vugutsa Ichamina.

2. He pleaded not guilty to the said charge and the case has been ongoing. It is important to note that the case herein was partly heard by two other judges who have since been transferred. This court took over this case after complying with the provisions of Section 200 of the Criminal Procedure Code.

**Prosecution Case**

3. The prosecution called 7 witnesses and briefly the facts and the evidence of the case is as follows: The accused person and the deceased are man and wife, but their marriage had many unhappy moments and they were always quarrelling. PW1 Job Chanzu Kayugila testified of how on 07.03.2011, while in school at Vuyiya Primary School where the deceased was a teacher, he received a telephone call from one Nancy Phidelis informing him that the deceased had been injured and needed to be taken to hospital. PW1 (Job) made the necessary arrangements for the deceased to be taken to hospital by taxi. After the deceased left hospital, she and Job talked, during which time the deceased told Job that she would stay away from the matrimonial home because of some disagreement with her husband. Job stated that in times past, he had offered guidance and counselling advice to the couple but to no avail. Job did not accompany the deceased to hospital.

4. Alice Mbigura Kayugira, PW2 (Alice) testified that a fellow teacher by the name Nancy (not called as a witness) telephoned her on the morning of 07.03.2011 and informed her that the deceased was unwell and needed assistance to go to hospital. Alice rushed to deceased's house in the company of Beatrice Akoto, PW3 (Beatrice). The two took the deceased to hospital at Mbale and left her there. About three hours later both Alice and Beatrice learnt that the deceased had passed away. Alice testified further that throughout the journey to hospital, the deceased was groaning. Beatrice supported the testimony given by Alice.

5. Joel Chamwanda (Joel) who testified as PW4 stated that on 03.04.2011, the deceased went to his office and asked for a letter of transfer on the ground that her life was in danger, citing threats to her life by the accused person herein. Joel also testified that the deceased told him that the couple had domestic problems. After enquiries, Joel confirmed the veracity of what the deceased had told him and he accordingly wrote a recommendation for transfer. According to Joel, the deceased told him that the accused person used to beat her and to threaten her although during cross examination, Joel admitted that he had not mentioned the beatings and threats in his statement to the police.

6. PW5 was Simeo Mege Mugami who is a brother to the deceased. He received information's from his son, Billy Masiga on 07.03.2011 at about 7.00am to the effect that the deceased was unwell. He made arrangements for the deceased to be taken to hospital, but at 11.00am on the same day he received further information that deceased was in a bad state following assault by the accused. He was unable to reach the deceased on phone but when he eventually went to Mbale Hospital, he found the deceased in bad shape and had her transferred to Kakamega County General Hospital. After a few days of admission at the Kakamega County General Hospital, the deceased was discharged and went to the home of PW5(Simeo) and continued attending clinic for about three(3) months before she died. Simeo admitted that he did not witness the deceased being beaten by the accused.

7. Dr. Dixon Mchana Mwaludindi testified as PW6. He carried out the autopsy on the deceased's body on 06.06.2011 at the Kakamega Provincial General Hospital. Dr. Mchana testified that when he opened the deceased's body, he found the lungs fixed on the chest wall at the back and that this was abnormal, with white masses holding the right lung to the chest bone. The stomach was very red, which was indicative of ulcers. On the head, there was thickening of the skull bone above the ear, with an opening of the skull where there was thick tissue fibre. There were also healed fractures of the 3<sup>rd</sup> to 8<sup>th</sup> ribs on the right and the 3<sup>rd</sup> to 6<sup>th</sup> ribs on the left side. Dr. Mchana formed the opinion that the cause of the deceased's death was fluid within the lung due to heart failure with evidence of healing of the skeletal injuries namely the ribs and the skull. The post mortem report was produced as PExhibit 1. Dr. Mchana also explained that the fact of the lung being fixed to the back was a sign of trauma from previous injuries.

8. Number 232165 CID Keneth Otieno Ogutu investigated this case which was initially reported as an arson case but after the deceased died, he charged the accused person with murder. He testified that from the investigations, the accused assaulted the deceased on 03.03.2011. Though a P3 form was filled for the assault, the same was not produced in evidence. PW7 also testified that there was no eye witness to the assault and that by the time the deceased died she had been discharged from hospital.

### **Defence Case**

9. The accused did not call any witnesses but he gave sworn testimony. He confirmed that the deceased was his wife since 1984 and they had six children. He explained that their marriage was peaceful until 2009 when he lost his job. He testified that they had a quarrel on 07.03.2011 after which Nancy came to the home after receiving a call from his wife who told her that she needed to be taken to hospital. Other teachers also came including those who testified and they took her to Mbale District Hospital but the deceased wife did not return home. He was told that Simeo had taken her to his home and since 7.03.2011, the deceased never returned to the matrimonial home. It is only on 03.04.2011 that she went to take her belongings. He claimed that he did not do anything that would have caused the death of the deceased.

10. The accused was cross examined by Mr. Ngetich Prosecution counsel and he admitted that he and the deceased used to quarrel regularly but at no time did they ever fight. He added that his wife was never beaten by anyone else and that he was not aware of any threats on her life. He admitted that there was an altercation between him and the deceased on the 7.3.2011 but maintained that they did not fight. He closed his defence.

### **Submissions**

11. Mr. Kundu advocate for the accused, filed written submissions on behalf of the accused. He submitted that no direct or circumstantial evidence was availed in court to prove that the accused did anything which might have caused the death of the deceased. He also submitted that there was nothing on record to prove that the deceased was treated or admitted into any medical hospital as a result of having been assaulted. He submitted that the demise of the deceased was caused by factors not attributable to the accused. Counsel urged the court to acquit the accused of the charge of murder.

### **Analysis and determination**

12. The burden of proof in criminal case always lies on the prosecution. In the case of **Woolimington vs DPP [1935]AC** the House of Lords stated inter alia as follows;-

“That it is the duty of the prosecution to prove the prisoner’s guilt subject to the defence of insanity and other statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case against the prisoner....”

13. This proposition was applied in the case of **Sekitoliko – vs – Uganda (1967) EA 531** where the Court held that the prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is dependent upon the strength of the prosecution case and not the weakness of the defence case.

14. Having said the above, and after due consideration of the charge, evidence by the prosecution and accused’s defence and submissions by counsel, the prosecution is under a duty to prove the following;-

(i) That the deceased died

(ii) That she died as a result of an unlawful act (Actus Reus) or omission on the part of the accused persons;

(iii) That the said unlawful act /omission was actuated by malice aforethought (Mens rea)

15. On the first issue of death of the deceased, it is not in doubt the deceased died. According to the post mortem report (PEX1) produced by Dr. Mchana, the deceased’s body was brought to him on the 5.6.2011. It was identified by Simeo and Hellen Mugami. All the witnesses in their separate testimonies confirmed that indeed the deceased died. Even the accused person confirmed the fact of death of the deceased.

16. On the second issue the prosecution’s evidence is that the accused had a quarrel with the deceased on the 7.3.2011, a fact which is not denied by the accused. The quarrel was not witnessed by any of the prosecution witnesses but from the evidence there was a serious quarrel which led to the deceased calling her colleague Nancy to assist her go to Hospital. Nancy called other teachers who took the deceased to hospital that day. The accused who was present did not make a move nor did he offer to assist. It means the problem was serious to the extent that the accused was not willing to help. However, the prosecution did not produce any treatment notes from the hospital to show what the deceased was treated for on the day Nancy took her to Mbale Hospital. PW1 to PW5 only said that they went to the hospital and they took the deceased with them but they failed to show any treatment notes or any medical report for that matter. Even when Nancy and other teachers went to the deceased’s home none of them described the injuries they saw or the injuries the deceased told them she had suffered at the hands of the accused. Further, Simeo who took the deceased from Mbale hospital to Kakamega hospital did not produce any documents to show that indeed the deceased was admitted at both of these hospitals. He testified that after removing her from the Kakamega Hospital he chose to treat her with herbal medicine since he had no more money to cater for her hospitalization. The deceased thereafter recovered and was stable and it is then that she decided to go back to her home but this time she was going to pick up her belongings and also ask the area chief to give her a recommendation letter for a transfer because of the threats and the

mistreatment she received from her husband the accused. This was about one month or so from the date of the incident. Thereafter (deceased) went back to her brother's house. The deceased died three (3) months after the incident of the 07.03.2011. The post mortem produced by doctor Mchana showed that the cause of death was pulmonary oedema secondary to cardiac failure with evidence of healing skeletal injury. No evidence was adduced to confirm the age of the fractures on the ribs.

17. From the analysis herein above I find it difficult to point at the accused as the one who inflicted the fatal injuries on the deceased in this case although very likely he did so. There is no evidence direct or circumstantial that links him to the death of his wife. He was away from his wife for a period of three (3) months. There is no one who testified that the two were fighting as they argued. The only evidence is that the two had a habit of quarrelling, but as to whether they had fights is doubtful.

18. It is therefore my considered view that the prosecution has failed to prove that indeed it is the accused who by his unlawful acts caused the injuries on the deceased which led to her death.

19. Lastly the issue of mens rea or a guilty mind has also not been proved. None of the prosecution witnesses heard the arguments between the deceased and her husband the accused. At least if there was such evidence, this court could deduce that the two fought because of money and /or workers. The threats alleged to have been made to the deceased were not brought out by Joel and Simeo. It is evident that there was a case against the accused that was reported to the police according to PW7 the investigating officer. There was no action taken by him to investigate the same after it was reported, nor did PW7 produce the P3 form which he said had been filled in connection with the assault case against the accused person. In my considered view, PW7 took his assignment very lightly. He did not exercise due diligence to get information from other witnesses. I find that malice afore thought as defined under Section 206 of the Penal Code has not been proved to the required standard.

20. The upshot of the above is that the prosecution has failed to prove its case of murder against the accused person beyond reasonable doubt. There are glaring gaps in the prosecution case especially as regards the injuries suffered by the deceased and the absence of treatment notes of first instance and the doctor's findings. There is also the period of three (3) months that passed between the date of the quarrel and her death. It is not clear what the deceased went through during this period and the kind of traditional treatment she received.

21. I therefore find the accused not guilty of murder and I accordingly acquit him under Section 322(1) of the Criminal Procedure Code. He is therefore to be set at liberty forthwith unless he is being lawfully incarcerated.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 20<sup>th</sup> day of July, 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

.....Mr. Imbenzi for Kundu (present).....for Accused

.....Miss Tarus (present).....for State

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

....Miss Wambani holding brief W/b for victims family.....