



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL CASE NO. 26 OF 2012.

REPUBLIC ::: PROSECUTOR.

VERSUS

CHRISANDOS WIYALA ::: ACCUSED.

J U D G M E N T.

1. On 10th October, 2012, the accused person, Chrisandos Wiyala, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. On 12th March, 2013, the Hon. Justice Dulu noted that a plea of not guilty was not entered when the plea was taken on 10th October, 2012. The charge was once again read to the accused person. The particulars were that on the night of 13th July, 2012 at Shivagala sub - location in Kakamega South District within coast province murdered Lucy Adhiambo. The accused person pleaded not guilty. A plea of not guilty was entered.
3. The hearing commenced on 21st May, 2014 and was heard by two different Judges before they were transferred . On 7th December, 2015, this Court informed the accused person of his rights under the provisions of section 200 (3) as read with 201 (2) of the Criminal Procedure Code. The accused person opted for the case to proceed from where it had reached.

The Prosecution's case

4. PW1, Anastazia Bukhala, testified that she was at home on 13th July, 2012 at 7.00 p.m. when she heard the accused person's wife screaming. She was PW1's step-mother. PW1 proceeded to the accused person's house and told him to leave the woman (sic).
5. In the morning (14th July, 2012), the accused person's wife (hereinafter referred to as the deceased) called PW1 and told her that the accused person had "**fatally injured**" (sic) her. The deceased showed PW1 a cut on her leg. PW1 told the deceased that she would report to the Chief, which she did at Murichi. The Chief did not visit the scene. At 2.00 p.m., the deceased was taken to hospital by her daughter, Mercy. PW1 also decided to follow the deceased and Mercy to hospital. On the way, she met Mercy who told her that the deceased had died. PW1 reported the death at Isulu Police Station where the deceased had made a report before her death. PW1 further stated that when she went to the accused person's house when she heard the screams, she found the accused person and the deceased alone.
6. On cross-examination, PW1 said she did not hear any quarrel between the accused person and the deceased. PW1 did not see any injuries on the accused person.

7. PW2, Benard Bunyasi, the deceased's brother was informed of her death on 14th July, 2012. The police at Isulu took him and another relative to the mortuary at Kakamega. PW2 saw a bad injury on the deceased's right leg. PW2 attended the post mortem of the deceased on 16th July, 2012 and identified the deceased's body to the doctor who conducted the postmortem.
8. PW3, Dr. Dickson Muchana a Pathologist at Kakamega County Referral Hospital conducted a post mortem on the deceased's body on 16th July, 2012. PW3 testified that he found defence injuries on the deceased's left elbow and left forearm. There was a linear bruise on the front of the left thigh with obvious swelling. There was evidence of medical intervention. He found that the left lung was fixed onto the left chest wall. The deceased had a narrow heart. 90% of her liver was deep yellow with small areas of normal colour. There was moderate swelling in the brain with yellowish fluid surrounding it. The left thigh had a big clot below the skin and PW3 formed an opinion that the cause of death was brain swelling following assault on a patient with compromised liver. PW3 produced the post mortem report as exhibit 1.
9. On cross-examination, PW3 stated that the brain swelling was caused by the injury on the body which was a secondary cause. The deceased had a lot of medical complications and the injuries could not have been the cause of death.
10. PW4, Corporal Samson Otieno Owino attached to Isulu patrol base received an assault report from the deceased on 14th July, 2012. She was accompanied by her daughter Maximila Asaya. The deceased, LucyAdhiambo, was crying in pain and could not alight from the motor cycle. She reported that she had been assaulted the previous night by the accused person, who was her husband. They booked the report. PW4 saw a deep cut on the deceased's left leg which was bleeding. Her right hand was injured. He advised them to rush the deceased to Shibuye hospital for treatment.
11. After about thirty (30) minutes, Maxmila returned to the police station and reported that the deceased had died at the hospital as she was undergoing treatment. PW4 booked the report and went to hospital and found the deceased on a stretcher. She was dead. PW4 informed the OCS Malaika police station and the DCIO Kakamega South who responded and went to the hospital. PW4 visited the scene of crime which was the bedroom and noted signs of struggle. He found no exhibit. The accused person was thereafter traced, arrested and charged. In the cause of his investigations he confirmed that the deceased was with the accused person in the house and Anastazia, PW1, testified on what happened.
12. On cross-examination, PW4 stated that they found blood stains at the scene. He did not confirm if the deceased was alcoholic and had any ailments.

The Defence case

13. The accused person was put on his defence in compliance with section 306 of the Criminal Procedure Code. He opted to give sworn evidence. He informed the court that the deceased was his wife of seven (7) years. They had no children. On 13th September, 2011, he left his home at 10.30 a.m. and took his wife to Eshibwe dispensary for she was unwell. He left her being attended by a Doctor and went back home to look for money to buy drugs. He then saw police officers at his home who arrested him on allegations of murder. Mercy, the deceased's daughter had informed the police about it.
14. The accused person denied having beaten the deceased and having killed her as she had not wronged him at all. He stated that the deceased had vomited at home and that is why he decided to take her to the hospital. He informed the court that PW1's home is near his house. He stated that on 13th September, 2011, he went to see her on his wife's health and his step mother, PW1, went to his home and confirmed that his wife was unwell. He denied having quarreled with the deceased at all. He had not even gone to her home for introduction. He denied having injured his

wife and denied the charges which he said were not true.

15. On cross-examination by Mr. Oroni, learned prosecuting counsel, the accused person said that he knows PW1, his step mother, and he was in court when she testified. He said that he did not cut the deceased at all since he married her. He said that PW1's evidence was false. He had not differed with the deceased. The deceased did not report any assault by him to the police on 14/7/2012. He stated that he knows Maximilla who is his daughter and that he is the one who called her to go to hospital to see her mother. He informed the court that the Doctor said that the deceased had ulcers.

16. After the close of the defence case, both the counsel for the defence and prosecution made oral submissions.

17. Ms. Andia, learned Counsel for the defence submitted that:-

- i. *The accused person was charged with the offence of murder. The burden of proof lies with the prosecution to prove its case beyond reasonable doubt. The prosecution should have adduced evidence to show that the accused person is the one who inflicted the injuries on the deceased. Malice aforethought must be established;*
- ii. *In this case, PW1 stated that she heard screams from the accused person's wife who is the deceased, she proceeded to the accused person's house where she saw the deceased who had a cut on the leg. PW1 testified that the deceased told her that the accused person had killed her. On cross-examination, PW1, the only eyewitness, said that she never got into the house of the deceased person but only saw her the following morning of 14th July, 2012 lying on a bed. PW1 did not see the accused person inflicting injuries on the deceased. The object that was alleged to have caused the injuries was not produced in court;*
- iii. *That the prosecution's evidence is purely circumstantial whose probative value must be assessed by the court. Ms Andia submitted so because the deceased was heard screaming while at the accused person's house. The accused person went into hiding after the incident. There was no proof of the fact that the accused person caused the death of the deceased;*
- iv. *PW3, Dr. Mchana testified that the cause of the deceased's death was brain swelling following assault on a victim with a compromised liver. The post-mortem report further indicates that the deceased was a person with compromised health and any form of injury would have led to her death. According to Ms Andia, there is no relation between the injury explained by PW1 and the Doctor's findings;*
- v. *In his defence, the accused person testified that he and the deceased were husband and wife, respectively, who lived happily. The accused knew that the deceased, his late wife, was an alcoholic and that on 13th July, 2012, the deceased was drunk. The accused could not tell if she fell while trying to find her way home.*

In concluding her submissions, Ms Andia said that there is no evidence linking the accused person to the offence before court. She urged the court to acquit the accused person.

18. Mr. Ng'etich learned Prosecuting Counsel submitted that:-

- i. *He relied on the evidence of PW3, the Doctor and PW4, Samson Otieno. As the defence had submitted, the Doctor made a finding that the deceased despite having failing health died as a result of brain swelling following an assault. Had it not been for the assault, she would not have died;and*
- ii. *Mr. Ng'etich also submitted that PW4 narrated how the deceased made a formal complaint at Isulu police post on 14th July, 2012 to the effect that the accused person had assaulted her on 13th July, 2012 at 7.00 p.m. This evidence is corroborated by that of PW1 who heard screams from the deceased and accused person's house. In the course of investigations, PW4 observed that there were signs of struggle in the deceased's house. The mere fact that the accused person went into hiding is evidence of a guilty mind. The prosecution has proved its case beyond reasonable doubt.*

Mr. Ng'etich prayed that the accused person be found guilty as charged.

Determination of the case

19. The issues for determination are:-

- i. *If the charge of murder facing the accused person has been proved beyond reasonable doubt;*
- ii. *If not, is the evidence on record sufficient to convict the accused person on the lesser charge of manslaughter?*
- iii. *Is there sufficient circumstantial evidence upon which this court can base a conviction?*
- iv. *Did the deceased's utterance that the accused person had "**fatally killed**" her amount to a dying declaration?*

20. It is trite law that for a conviction on a charge of murder to hold, the prosecution has to prove that there was malice aforethought as defined under section 206 of the Penal Code which provides that –

"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".***

21. The evidence in the instant case is circumstantial in nature. PW1 heard screams emanating from the accused person's house on the night of 13th July, 2012 and on proceeding there, she told the accused person to leave the woman (PW1's stepmother alone). The screaming stopped after PW1's intervention. PW1 did not witness the deceased being assaulted.

22. In the case of **Mwangi & Another vs. Republic [2004] 2 KLR 32** the Court of Appeal held as follows on circumstantial evidence:-

"In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge."

23. Still on circumstantial evidence, in the case of **Sawe vs. Republic [2003] KLR 364**, the Court of Appeal held *inter alia* –

1. ***In order to justify on circumstantial evidence, 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;***
2. ***Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of the circumstances relied on;***
3. ***The burden of proving acts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.***

24. Apart from circumstantial evidence, the case took a new twist on the morning of 14th July, 2012 when the deceased called PW1 and told her that the accused person had **“fatally injured”** (sic) her. The deceased passed away the same day. This court has to determine if the statement made by the deceased that the accused person had **“fatally injured”** (sic) her, amounted to a dying declaration.

25. Section 33 (a) of the Evidence Act, Cap 80 of the Laws of Kenya provides that:-

“Statements, written or oral, of admissible facts made by a person who is dead are themselves admissible in the following cases.

- a. *When the statement is made by a person as to the cause of his death or as to any circumstances of the transaction which resulted in his death, in cases, in which that person’s death comes into question and such statements are admissible whether the person who made them was or was not at the time when they were made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”*

26. In the case of **Pius Jasunga s/o Okumu vs. Republic (1954) 21 EACA 333**, the East Africa Court of Appeal stated:-

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage for the 7th Edition of Field on Evidence has repeatedly been cited with approval

It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration (R. V. Eligu S/O Odel & Another (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration.”

27. On the same issue of a dying declaration, the Court of Appeal in the Case of **Choge Vs. Republic [1985] KLR 1** stated thus:-

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need to be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

28. Looking at the circumstances surrounding the deceased’s death, I believe and I am convinced by the evidence adduced by the prosecution that the deceased was assaulted by the accused person on the night of 13th July, 2012 as a result of which she sustained a deep cut on her leg which led her to tell PW1 that she had been **“fatally injured”** by the accused person. It is my finding that the words uttered by the deceased amounted to a dying declaration and are admissible under the provisions of section 33 (a) of the Evidence Act. This is further compounded by the fact that the deceased died on the same day. I further find that the dying declaration was corroborated by the evidence of PW4 to the effect that before her death, the deceased went to Isulu Patrol base being accompanied by her daughter Maximila Asaya aboard a motor cycle. According to PW4, the

- deceased was crying in pain and could not even alight from the motor cycle. She told PW4 that she had been assaulted by her husband, the accused person, the previous night of 13th July, 2012 at 7.00 p.m. The report was booked and PW4 observed a deep cut on the deceased's left leg which was bleeding. Her right hand was also injured. He visited the accused person's house and observed that there were signs of struggle.
29. For the record, I would like to pinpoint that the person referred to as Mercy by PW1 is one and the same person as that referred to as Maximilla by PW4 and the accused person. This is established by the evidence on record.
 30. A close examination of the post mortem report produced by PW3 as exhibit 1 shows that the pathologist formed the opinion that the cause of death was cerebral oedema following assault in a patient with compromised liver. This was also the evidence that the Doctor gave in examination in chief. On cross-examination, the Doctor was of the view that the brain swelling was caused by the injury on the body which was a secondary cause. He further said on cross-examination that the deceased had a lot of medical complications and the injuries could not have been the cause of death.
 31. This court notes that what the Doctor said on cross examination on the deceased's cause of death was a departure from what he said in his examination in chief and what he recorded on the post-mortem report. I find it very strange indeed that a Doctor would utter words on cross examination that are at variance with what he recorded in the post mortem report and what he informed the court in examination in chief. I reconcile what the Doctor said on cross examination with the postmortem report which he produced in evidence. At the time the Doctor wrote the said report, the findings of the post mortem were fresh in his mind. The said Doctor is bound by the findings he made on 16th July, 2012 when he conducted the post mortem.
 32. It is my finding that the chain of circumstantial evidence in this case is so closely intertwined that it leaves no weak chain. The only hypothesis that can be drawn is that of guilt on the part of the accused person. He is the only person who had the opportunity to commit the offence as he was with the deceased on the night of the assault. The deceased died on the day after the assault and she was consistent that it is the accused person who had inflicted "**fatal injuries**" on her.
 33. In his defence, the accused person talks of having taken his wife to hospital on 13th September, 2011 when she was unwell and that he was arrested on allegations of murder when he went home to get money for buying drugs. He said that his wife had vomited and that is why he took her to hospital. The accused person denied beating his wife at all. He however admitted that his house is close to PW1's home and that on 13th September, 2011, he went to see her on his wife's health.
 34. On cross examination, he said that his wife (deceased) did not report any assault by him on 14th July, 2012.
 35. The accused person talked of events that happened on 13th September, 2011 which was long before the deceased sustained injuries at his hands. He talked of having been arrested in the year 2011. The incident of death happened in the year 2012. His defence statement was thus disjointed. Although the accused denied the offence, I find that his defence did not dislodge the evidence by the prosecution or cast any doubt on the same. The defence counsel submitted that the accused person in his defence stated that "*he and the deceased were husband and wife, respectively, who lived happily. The accused knew that the deceased, his late wife, was an alcoholic and on 13/7/2012, the deceased was drunk. The accused could not tell if she fell while trying to find her way home*". I have combed through the proceedings herein with a fine tooth comb and I have not found such a statement from the accused person.
 36. I have weighed the accused person's defence against PW1's, PW3's and PW4's evidence and I am satisfied that the prosecution has proved a case of manslaughter against the accused person

beyond reasonable doubt. I therefore substitute the charge of murder with one of manslaughter contrary to section 202 as read with 205 of the Penal Code. It has not been proved that the accused person had malice aforethought when he assaulted the deceased. I caution myself of the dangers of relying on the evidence of the deceased's dying declaration. As held earlier in this judgment, I find that the same was adequately corroborated by the circumstantial evidence on record. I therefore find the accused person herein guilty of the lesser charge of manslaughter contrary to section 202 as read with 205 of the Penal Code. I convict him accordingly.

DELIVERED, DATED and SIGNED at KAKAMEGA in open court on this .11TH day of FEBRUARY, 2016.

NJOKI MWANGI

JUDGE.

In the presence of:-

..... **for the accused.**

..... **for the Office of the DPP.**

..... **Court Assistant.**