



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 61 of 2010

REPUBLIC **RESPONDNET**

VERSUS

A K **ACCUSED**

JUDGMENT

The accused **ANTEKWERI KEBO** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars for the charge were that:-

“On 8th day of June, 2010 at Maralal Town in Samburu Central District within the Rift Valley Province murdered A M L”

The accused entered a plea of ‘**Not Guilty**’ to the charge. His trial commenced before my learned senior brother **Hon. Justice Anyara Emukule** who heard all the prosecution witnesses and placed the accused onto his defence. Following the transfer of the trial Judge to the Mombasa High Court I did take over the case. After complying with Section 200(3) Criminal Procedure Code, I did record the accused’s defence.

Briefly the facts of the prosecution case were as follows. The accused and deceased were a couple. The accused had two wives, the deceased being the elder wife. The couple became estranged after the accused married his second wife. The deceased apparently filed a case in court seeking maintenance and was awarded a sum of Ksh 1,000/= per month to be paid by the accused. All the prosecution witnesses who knew the couple testify that payment of this maintenance was the cause of much strife in the family with deceased demanding to be paid her rights as granted by the courts and the accused often being unwilling and/or unable to make the payments as required.

PW1 E B was a 13 years old child of the couple. She told the court that on 8/6/2010 her mother (the deceased) went to the accuseds place of work to demand the maintenance money from him. **PW1** followed her mother and witnessed what happened. Accused told the deceased that he did not have the money to pay her. The two began to quarrel. Then **PW1** says the deceased held the accused by his coat demanding to be given her children’s rights (maintenance). The accused slapped her and she fell. The accused then handed the deceased Ksh 500/= saying that this was the last money she would receive from him. Accused then struck the deceased on the back of the head. **PW1** rushed to the aid of her mother she lifted deceased and helped her to stagger home. **PW1** then went to call her elder sister.

PW2 E E a 14 year old was also a child of the couple. She testifies that on the material day her younger sister E **PW1** called her and informed her that their father (accused) had beaten their mother. **PW2** rushed back home and found the deceased lying in the house with an injury to the back of her head. The deceased was unable to talk. She asked **PW2** to make her a cup of tea and to give her medicine (panadol) for the pain. **PW2** did as requested. Then they all slept. During the night the condition of the deceased deteriorated and she vomited and then died at 1.00am. The next morning the children went to call their uncle.

PW3 T L is a brother to the deceased. He told the court that his nieces called him to their home. He went and found the body of his sister (the deceased) lying dead. The children informed him that it was accused who had beaten their mother. The incident was reported to police who came and took the body of the deceased to the mortuary. An autopsy was later conducted to establish the cause of death. Upon conclusion of police investigations the accused was taken to court and charged with the offence of murder.

The accused elected to give an unsworn statement in his defence. He denied having hit and fatally injured the deceased. He claimed that the deceased fell and hit her head on some stones. At the close of the defence case this court must now analyse the evidence on record with a view to determining whether the prosecution have proved the charge of murder beyond reasonable doubt.

Section 203 of the Penal Code defines the offence of murder thus:-

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

From this definition arises the four (4) key ingredients of the offence of murder, all of which must be proved beyond reasonable doubt to prove the charge

1. ***Proof of the fact of death of the deceased***
2. ***Proof of cause of that death***
3. ***Proof that the death resulted from an unlawful act or omission on the part of the deceased (actus reus)***
4. ***Proof that said unlawful act or omission was committed with malice aforethought (mens rea)***

Regarding the fact and cause of death of the deceased there can be no controversy. **PW1** and **PW2** both testify that their mother died during the night in their house after having been beaten.

PW3 the brother to the deceased also confirms that he found the body of his sister lying dead inside her house. All three witnesses who knew the deceased very well identify her as '**A M L**'. **PW6 PC JARED WESANGO** also told the court that he went to the scene and found the body of the deceased lying dead on the ground. He drew a sketch map which he produced in court as an exhibit **P. Exh 1**. This court therefore harbours no doubt that the deceased was in fact dead.

Evidence regarding the cause of death was tendered by **PW7 DR. JOHN KURIA KAMAU** a doctor who was then attached to Maralal sub-county hospital. **PW7** told the court that he performed the autopsy on the body of the deceased. He observed an injury on the side of the head. **PW7** opined that the cause of death "**severe head injury with intra-cranial bleeding**". He filled and signed the post mortem report which was produced in court as an exhibit **P. Exh 2**. I therefore find that the deceased met her untimely death as the result of a blow to the head.

Having proved the fact as well as the cause of death of the deceased the prosecution is required to adduce evidence to prove that it was the accused who fatally assaulted the deceased. In this respect there is only one eyewitness being **PW1** the 13 year old child of the couple. **PW1** told the court that on the material day the deceased announced that she was going to collect her maintenance money from the accused. The deceased then left the home to the place where accused worked as a watchman. **PW1** followed her mother. She observed what transpired. **PW1** told the court that accused told

deceased that he had no money to give her. A quarrel erupted between them. The deceased held the accused's coat. **PW1** then states at Page 4

“my father stop..... to give my mother shs 500/=. He told her that this would be the last money you would get from me. He struck her at the back of the head. I struggled to raise her, she could hardly walk and she could not talk”

I am mindful of the fact that **PW1** is the only eyewitness. However I note that she did undergo a **‘voire dire’** examination in which the court established that she was an intelligent 13 year old child and capable of comprehending truth from lies. The incident occurred in broad daylight. Therefore visibility was good. The accused was the father of **PW1** and was very well known to her. There is no possibility of a mistaken identity. **PW1** gave her evidence in a clear and cogent manner – she remained unshaken under cross examination. At no time did **PW1** change her story. She gave the same narration of events to her sister **PW2** her uncle **PW3** and to the police. I am myself satisfied that **PW1** was telling the truth.

Mr. Mongeri Counsel for the accused submitted that since **PW1** was a child her evidence should be taken with caution. For the reasons stated before I found **PW1** to be an honest and reliable witness. Further her testimony is corroborated by the medical evidence which found the cause of death to be a blow to the head from a blunt force trauma.

In his defence the accused claims that the deceased herself fell and hit her head on some stones. The question/suggestion was never put to **PW1** under cross-examination nor was this suggestion put to the doctor. This is a mere afterthought by the accused. I am satisfied from the evidence on record that it was the accused who struck the deceased on the head inflicting upon her the fatal injury. The *actus reus* of the offence of murder has been sufficiently proved as against the accused.

Having proved the *actus reus* of the offence of murder the prosecution must also prove that the accused acted with malice aforethought – this is the *mens rea* for murder. It must be shown than in striking the deceased accused intended to either cause her death or that he intended to cause her grievous harm. All the family members have stated that there existed bad blood between the couple due to the accused's marriage to a second wife. The deceased moved to court and obtained orders of maintenance against her husband. This issue of maintenance was a further sore spot between the couple. **PW2** in her evidence stated at Page 7 line 5

“It was always a quarrel when my mother went for money. The court had ordered payment of 1,000/= but dad always paid half”.

Similarly **PW3** the brother of deceased stated at page 8 line 11

“I used to witness the struggle to get payment. The dispute was over payment.... they used to fight even before that quarrel. It was a dispute and insults between them”.

In this prevailing climate of bad blood the deceased went to demand the maintenance. Not surprisingly, a quarrel ensued between them which quickly degenerated into a physical altercation. **PW1** said she saw the deceased hold the accused by the coat. The accused retaliated by striking her on the head. It can be said that it was deceased who instigated the fight. The accused reacted to the provocation of being grabbed by the coat. He retaliated quickly in the heat of the moment and in so doing the accused fatally injured the deceased.

Section 208(1) of the Penal code defines **“provocation”** as an act or an insult which when done to another is likely to

“deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charge committed upon the person by whom the act or insult is done or offered”

This incident occurred in the course of the quarrel/fight. The accused did not set out or plan to kill his wife. He acted rashly by lashing out when she held his coat and insulted him I find that there was no premeditation on the part of the accused. The fact that there was no ill intention is proved by the actions of accused after the death of the deceased. He made no attempt to run away or abscond. Indeed after learning that deceased had died the accused went voluntarily to the police station and surrendered himself. These are not the actions of a man who wanted and/or planned to kill his wife. I find that in striking the deceased as he did the accused acted, in the heat of the moment due to provocation and before there was a chance for his temper to cool down. Section 207 of the Penal Code provides that:-

“where a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinunder defined, and before there is time for his passion to cool, is guilty of manslaughter only”

Based on the foregoing I find that malice aforethought has not been proved. I find that the charge of murder is therefore not proved. I acquit the accused of this charge of murder. The facts prove the offence of manslaughter therefore instead I substitute a conviction for the offence of manslaughter under section 207 of the Penal Code.

Dated in Nakuru this 11th day of March, 2016.

Mr. Ombati holding brief for Mr. Mongeri

Ms Nyakira for State

Maureen A. Odero

Judge

11/3/2016