



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MURDER NO. 28 OF 2006

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES TUJU MESO.....ACCUSED

J U D G M E N T

1). The accused person herein was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

The particulars of the charge were that on the night of 20th August 2000 at Kagilo sub location in Siaya District within Nyanza Province murdered Rispa Anyango.

2). To establish their case the prosecution called 5 witnesses. The 5th witness however the doctor was called pursuant to the ruling of this court on 13-5-2013 pursuant to the provisions of section 150 of the Criminal Procedure Code and Article 159 of the Constitution.

3). Briefly, **PW1 David Odhiambo Akumu**, told the court that he was escorting the deceased at around 7 p.m on that material day towards Wagai Trading Centre. They met the accused who was armed with a knife, panga, rungu and a sword. He proceeded to attack him which forced him to run away leaving behind the deceased who was his wife. He then assaulted the deceased. The following day he learned that the deceased had died.

4). **PW2 Susan Apondi Wager**, told the court that on the material night at around 9 p.m the accused arrived while beating his wife using a hoe handle. When she inquired the accused told her that she had stolen his clothes.

5). **PW3, Shadrack Otieno Magambo**, the brother to the deceased got a report from his sister Betty Awuor that her sister had passed away. They went to the home and found the accused sitting outside. He told them that the deceased had consumed poisonous alcohol. On being asked about the injuries he said that he had found her sleeping with some people. They then took the deceased body to Yala Police Station.

6). **PW4 PC Francis Muthuku**, explained that one Shadrack Otieno reported about the incident. They went to the scene and found the deceased body which on observation showed injuries on the head, neck and left leg. They took the body to Siaya mortuary and commenced their investigations. He said that PW1 was a brother in law to the deceased.

7). PW5 as stated by the court was called by the court to produce the postmortem report. Although he was not the maker, the doctor who performed the same opined that the cause of death was severe haemorrhage secondary to rupture of the spleen.

8). The accused gave unsworn evidence. He said that he had found the deceased having sex with PW1 where he picked a stick and hit PW1 on the back. They fled away and when he arrived home he found the deceased. Later that night the wife complained of a stomach ache and pain on her leg. Later she asked for some water. She died after about one hour. He then reported at Wagai police station. He generally denied the offence.

Determination

9). The evidence on record by PW1 and PW2 points out to the fact that it was the accused person who assaulted the deceased. Although the weapon used by accused seemed to vary between the witnesses there is no doubt that on the fatal evening the accused assaulted the deceased. The accused in his unsworn evidence corroborates the fact that he assaulted PW1 an issue which PW1 confirms.

10). It appears therefore that after PW1 taking off the accused continued with his assault upon the deceased which was confirmed by PW2. It is therefore not true that the accused did not assault the deceased.

11). Did the accused find the accused making love with PW1? From the evidence of PW1 which was not denied by the accused the deceased was PW1's sister in law. Again the accused did not establish where they were if indeed he found them in the act. PW1 told the court that the incident took place in a residential area where people passed by.

12). During cross examination PW2 told the court that the accused hit the deceased on the back using a stick. In the premises I do find that the accused assaulted the deceased using crude weapons and that the issue of the love making between PW1 and the deceased was simply the accused creation.

13). The next argument raised by the defence counsel Mr. Odeny was the cause of death. According to the defence it was excess consumption of alcohol that caused the spleen to rupture. However from his evidence on cross examination PW5 Dr. Collins Oginga Oliech said:

“Haemorrhage is bleeding. A spleen can rupture by blunt trauma on the abdomen. Excessive consumption of alcohol cannot cause rupture”.

14). From the foregoing quotation I do not think that the rupture of the spleen was caused by excessive consumption of alcohol.

15). The defence in its submission argued that the constitutional rights of the accused person were infringed when the court ordered that PW5, the doctor ought to produce the postmortem report. On the contrary it would have been great injustice both to the prosecution as well as the defence if the matter would have proceeded in the absence of the postmortem report. Moreover the court found that it was sheer reluctance by the prosecution to call the maker of the postmortem report and that in any event both parties had the benefit of cross examining the doctor. I do not respectfully find the constitutional rights of the accused was infringed.

16). Consequently, I do from the above analysis of the evidence conclude that the prosecution has established its case beyond reasonable doubt. I find that there was malice aforethought on the part of the accused person. He armed himself with the full intention of assaulting the deceased. The issue of love triangle he advanced in his defence holds no water. He admitted assaulting PW1 but fell short of telling the court where was the deceased at the time.

17). Further he was found at home by PW3. He changed the story from allegation of the deceased having consumed poisonous alcohol to finding her sleeping around with some people.

18). The upshot is that the prosecution have established *mens rea* as well as malice aforethought, the key ingredient in such a case. The accused is consequently found guilty.

Dated, signed and delivered at Kisumu this 12th day of March, 2015.

H.K. CHEMITEI

JUDGE