



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

H.C. CRIMINAL CASE NO. 6 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

S A M.....ACCUSED

JUDGMENT

1. R E O (The Deceased) and S A M (The Accused) were Husband and Wife. The Deceased died on 7th February 2014 from an injury to his Carotid Artery and it is the Prosecution theory that his wife was responsible for the injury. The Accused faces a charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code (Chapter 63 Laws of Kenya).
2. The only eye witness account to the incident that led to the death of the Deceased was provided by his son E O (PW1). He was aged 9 years old at the time he testified on 30th June 2014. His evidence was received as an unsworn statement after the court conducted a voir dire examination on him.
3. On the evening of 7th February 2014, PW1 was at home. This was at about 8.00p.m. The Deceased and the Accused Person were also at home. At one point the Deceased went to the kitchen where the Accused Person was. She took a piece of sugar cane and hit the Deceased on his leg. In retaliation the Deceased slapped the Accused Person. A struggle ensued and continued to the outside of the House. The witness saw the Deceased strangle the Accused Person. After sometime the Deceased shut the Accused Person outside the house.
4. Shortly, the Deceased opened the door and let the Accused person in. She then tried to remove his underpants. Presumably, to save them from embarrassment, the Deceased asked the children to go into their room. But after a short while PW1 left his bedroom to see what was happening. It was then that he found that the Accused Person had killed the Deceased. And although he never saw his mother (the Accused) stab the Deceased, it was his evidence that he found the Accused Person by the side of the Deceased. There was also a knife on his side. It was also the evidence of the witness that the Accused Person had picked the knife from the kitchen.
5. Badi Omar (PW3) was on 7th February 2014 at about 8.00p.m. on his way from the Mosque when he heard a woman screaming and yelling. In re-examination he clarified that he heard her say

“nimeua, nimeua”

this is Kiswahili for

“I have killed, I have killed”

He responded and went to the house of the Deceased. On the outside, the Deceased was lying on the ground stark naked. With him was his wife (the Accused) who was holding him by the hands.

She asked for help. She telephoned and called for a motor cycle which they used to take the Deceased to Hospital. The Accused supported her husband on the motor cycle.

6. The Deceased succumbed to his injuries and a postmortem was conducted on his body by Doctor Haron Ombongi (PW2). The body was identified to be that of the Deceased by F E O (PW4) and G O (PW5). The former is the father of the Deceased while the latter is his brother. A significant finding of the Doctor was that there was blood in the left pulmonary field and the left lung had collapsed. The Doctor formed the opinion that the cause of death was Hemorrhage (severe blood loss) due to injury to the Carotid Artery.
7. At the close of the hearing of the Prosecution case, being satisfied that a prima facie case had been made against her, the Court invited the Accused Person to make her Defence under the Provisions of Section 306 of the Criminal Procedure Code. She chose to give an unsworn statement.
8. It was the evidence of the Accused Person that on 7th February 2014 at about 6.00p.m. the Deceased returned home from work and left some money with her. It was to buy food. The Deceased then left and returned home at 8.00p.m. This time he was drunk. He picked a quarrel with his wife. It turned violent and he assaulted the Accused Person, strangled her and threw her outside the house. Because their children began to scream, the Deceased locked them in the bedroom. There was calm for about 20 minutes and assuming all was now well, the Accused Person returned into the house.
9. On her entry, she found the Deceased in the sitting room armed with a knife. He tried to stab her and she resisted. The Accused Person tried to disarm the Deceased. In the course of the struggle, the knife pierced the Deceased. The Accused Person asserted that it was accidental. On noticing that her husband was injured, the Accused Person called for transport and took the Deceased to hospital only for him to succumb to the injuries.
10. The only Prosecution witness who gave implicating evidence against the Accused Person is PW1. PW1 is a minor and was 9 years at the time he testified. The material aspect of his evidence is that on the fateful evening his parents (Deceased and the Accused Person) fought twice. He seemed to have witnessed the first fight. In that fight the aggressor was the Accused Person. This was his description of that fight,

“My mother took sugar cane and hit my father on his leg. My father slapped her. They pushed and struggled to the outside of the house, they exited through the kitchen door”

11. In respect to the second fight, the witness and the other children had been asked to go into the bedroom and they obliged. The witness stated,

“We left my father and mother in the sitting room. I do not know what happened when we were in the bedroom.”

From this evidence PW1 did not see the second fight. He added;

“after a short time in the bedroom I came out because I wanted to see what they were doing. I found that my mother had killed my father. She killed him with a knife.”

Clearly, the witness emerged from the bedroom and got to the scene when the fight was over.

12. The evidence of the Accused Person as to how the fight occurred agreed with the version of PW1 in some aspects but differed in others. There was evidence by both that on that evening the Deceased was drunk. There was evidence that the fight was on two instances. PW1 was able to see the first but was unable to see the second episode as he was in the bedroom.
13. There was disagreement as to who was the aggressor in the first fight. PW1 says that the Accused Person threw the first blow by hitting the Deceased with a piece of sugarcane while the Accused Person asserted that it was the Deceased who attacked and strangled her.
14. Then there is what turns out to be a critical aspect of this case. The knife. This is what caused the fatal wound. Who had the knife and how did it end up injuring the Deceased? On this aspect

PW1 told court in cross examination,

“I never saw Mum stab my father. Mum had the knife, she took it from the kitchen”

He had earlier testified,

“ I never saw Mum kill Dad. I found her by his side. The knife was also on the side”

(my emphasis)

It is not therefore clear whether, at the time he left the bedroom the witness saw the Accused Person with the knife. What is clear is that he found the Accused Person by the side of the Deceased and the Deceased had a stab wound.

- 15.The evidence by PW1 that the Accused Person took the knife from the kitchen is without difficulty. This is because there was no distinct evidence that PW1 saw her take the knife from the kitchen. The witness only saw the first fight. In this fight no knife was involved and, certainly, PW1 did not mention that any of the fighters possessed a knife. The question to be posed is how then did PW1 see the Accused Person take the knife from the kitchen when in fact he was in the bedroom?
- 16.To this question, no answer was offered by the Prosecution evidence. It is for this reason that the Court will give some benefit to the version of the Accused Person who told court that it was the Deceased Person who was armed with the knife. She attempted to disarm him. There was a struggle and in the process the Deceased was accidentally injured. This injury, unfortunately, turned fatal. The only person who could have controverted this version is the Deceased himself. But the Dead tell no tales!
- 17.From the totality of the evidence I find that on that sad night of 7th February 2014 there was a fight between the Deceased and the Accused Person. Who provoked the fight is unclear. The fight was in two phases. PW1 witnessed the first but not the second. In the second fight, the Deceased sustained a fatal injury. The injury according to the Postmortem Report was to the Carotid Artery. The only evidence as to how this injury occurred was given by the Accused Person in her unsworn statement. She said it was accidental and happened as she struggled to disarm the Deceased. The Medical evidence does not disprove that theory. There is no evidence that there was more than one stab. Although a murderer can feign sorrow over the death of his/her victim, the behavior of the Accused person after the incident makes her side of the story believable. Immediately on discovering what had happened, she called for transport to take the Deceased to Hospital. Their neighbour PW3 saw the effort that the Accused Person made to rush her husband to Hospital. When transport arrived, the Accused Person rode on the motor cycle with the Deceased and supported him as they made their way to hospital. All this turned out to be futile as the Deceased was to succumb to the injury.
- 18.In my assessment, the Prosecution has not proved the important element of mens rea. For this reason I find the Accused Person guilty of the lesser offence of Manslaughter. Accordingly, this Court convicts S A M for the offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

F. TUIYOTT

JUDGE

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF JULY 2015

IN THE PRESENCE OF:

OILE.....COURT CLERK

OKUTA.....FOR ACCUSED

OBIRI.....FOR STATE