



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 19 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

CHARO KENGA SHIKARI.....ACCUSED

JUDGMENT

CHARO KENGA SHIKARI hereinafter referred to as the Accused is charged with the offence of murder contrary to section 204 of the Penal Code.

The particulars being that:-

“On the 2nd day of June, 2011 at Okole Village Changoni Location, Kwale County he murdered Haluwa Shikari”.

This matter was partly heard by Lady Justice Nzioka. After compliance with section 200 of the Criminal Procedure Code the defence opted to have the matter proceed from where it had reached. Four Witnesses were heard by Justice Nzioka and I heard the rest of the case.

The prosecution called a total of five (5) Witnesses in support of their case. The defence called the Accused to buttress their case.

Corporal Ita Wandui Letula (PW 1) and PC Andrew Kiplimo (PW 2) were at their police station Taru when one Juma Kenga a brother of the Accused went there early in the morning of 2nd June, 2011 reported that the Accused had murdered his wife. They proceeded to the scene and found her lying dead with cut wounds on the neck. At the scene near the body they recovered a blood stained panga which was the murder weapon. They did not find the Accused as he had allegedly gone into hiding. On 4th June, 2011 Juma Kenga the Accused brother went and reported to them that the Accused was back in his house. They went and arrested him and caused him to be charged with this offence.

When Juma Kenga (PW 3) was called to testify he admitted that the Accused was his brother and that in the month of June, 2011 at 5:00 pm he heard screams from his brothers house, from a person who was saying that ***“I am being killed”, “I am being killed”***. He proceeded there and saw a lady emerge running. He saw that it was the deceased, she fell down. He saw a man emerge carrying a panga. He told the Court that he did not identify the man. It was at this stage that the prosecution sought to have him treated as a hostile Witness and he was cross-examined and admitted recording a statement and stating that it was his brother (Accused) who had emerged from his house armed with a blood stained panga.

Dr. Wahome (PW 4) performed the post mortem Examination of the Deceased and formed the opinion that the cause of death was haemorrhage due to severed blood vessels and asphyxia due to severed trachea. The investigating officer (PW 5) testified to the effect that there was a misunderstanding between the Accused and his wife on account of unfaithfulness on her part.

He also testified that PW 3 who had retracted his evidence was later charged in the lower court and was Sentenced to six (6) months imprisonment.

In his defence, the Accused told the Court that on 2nd June, 2011 he was not at the scene of the murder but was away at Kulalu forest where he had camped for purposes of burning charcoal which is some distance from his homestead. He denied having had marital problems with his wife and having murdered her.

Section 203 of the Penal Code provides;

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

Malice aforethought is defined under section 206 of the Penal Code thus,

“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 by a wish that it may not be caused;

(c) An intention 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”.

In the present case the issues for determination are whether there was

1. Malice aforethought.
2. Motive
3. Identification
4. Corroboration

Malice aforethought.

A perusal of the post mortem report prepared by Dr. Wahome and her evidence in chief places the age of the Deceased at nineteen (19) years. Upon examination she formed the opinion that the cause of death was haemorrhage due to severed blood vessels and asphyxia due to severed trachea. In simpler terms the Deceased throat was slit.

A person intentionally slitting the throat of another one must be deemed to have had the intention to cause grievous harm or to kill.

PW 3 had testified to have heard shouts to the effect that, ***“ I am being killed”, “I am being killed “.***

These screams were emanating from his brothers house (Accused). He went to check and saw a lady running away. He identified her as the Deceased. She fell down outside the house. He observed a man emerge from the same house while armed with a panga but he did not identify him. The Witness was declared a hostile one and during cross-examination he admitted that it was his brother (the Accused) who emerged carrying a panga which was blood stained.

Motive

The investigating officer did testify to the effect that the Deceased was the wife of the Accused. That it was alleged that she was pregnant with someone else child. Further that the Deceased had another child borne out of wedlock.

Identification

The incident took place at around 5:30 pm. This was in broad daylight. The Accused is the brother of PW 3. They were staying in the same homestead. He was close by when he saw the Deceased emerge being followed by the Accused who was carrying a blood stained panga.

Corroboration

The Accused was the husband of the Deceased. PW 3 first heard her shouting that she was being killed. He went to check and saw her emerge from her house and fall outside owing to injuries inflicted on her. The Accused came out of the house while armed with a blood stained panga. The Doctor who performed post mortem examination formed the opinion that death was as a result of asphyxia due to severed trachea (slit throat).

This incident happened on the 2nd day of June, 2011.

The Accused was arraigned in Court on 8th June, 2011.

According to the evidence of PW 1, Juma Kenga PW 3 had made the murder report on 2nd June, 2011. They went to the scene and did not find the Accused. PW 3 later went to the police station on 4th June, 2011 and reported that his brother had returned. Police went and arrested him.

In his defence the Accused maintains that on the 2nd day of June, 2011 he was burning charcoal at Kulalu forest a distance of more than 12 hours traveling by riding a bicycle.

His own brother testified that the Accused escaped only to return on the 4th June, when he went and reported to police and he was arrested.

I am satisfied that the Accused after committing the dastardly act went into hiding and was arrested after he resurfaced.

The prosecution has proved this case beyond reasonable doubt. The Accused is found guilty on the charge of murder contrary to section 203 of the Penal Code and is Convicted accordingly under Section 322 of the Criminal Procedure Code.

Judgment delivered in open Court this **2nd** day of **November, 2015**.

.....

M. MUYA

JUDGE

2ND NOVEMBER, 2015

In the presence of:-

Learned Counsel for the prosecution Miss Ogweno

Learned Counsel for the defence Miss Oyeir holding brief Waithera

Court Assistant Musundi

M. MUYA – JUDGE

2/11/2015

Miss

I dont have instructions on mitigation.

Oyier:

Court:

Mitigation, probation officers report on *13th November, 2015.*

.....

M. MUYA

JUDGE

2ND NOVEMBER, 2015