



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 72 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

BKB.....ACCUSED

JUDGMENT

1. BKB (*the accused*) is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, (*Cap. 63, Laws of Kenya*).

2. The State alleged that on the night of 25th May 2008 in Molo District within the Rift Valley Province, murdered JCL.

3. The offence of murder is proved where the prosecution establishes by evidence that the accused with malice aforethought killed the deceased. Malice aforethought, the *mens rea* or “*guilty mind*” is established where any of the four ingredients set out in Section 206 of the Penal Code are established -

1. (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,*
- 2.
3. (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.*
- 4.
5. (c) *An intent to commit a felony.*
- 6.
7. (d) *..... (not in issue).*
- 8.

4. To establish the above ingredients, the State called eight witnesses, and at end of which, I put the accused to his defence. This was his defence in sworn evidence.

5. The accused did not State the time, but from his evidence it was evening. He had come home and found the deceased whom he admits was his wife, lying on a seat in the living room. Upon inquiry, the deceased informed him that she was feeling unwell, and that a little after his arrival, they heard gunfire. The deceased asked IK (PW2) to look outside and that PW2 did indeed look outside only to see houses on fire.

6. On learning that houses were on fire, the deceased informed the accused that she could not sleep in the

house because their home was on the boundary between the Kikuyu and Kalenjin Community occupied lands, and that the deceased told him that if he should leave (later) he should come with the children, and with that advice, she left.

7. According to the accused he and his two other children did not leave, but that early the next day, he heard someone knock on his door asking him to open the door. At the same time, the accused testified, that he heard a sound like a person cutting wood. He then heard his daughter scream, that her mother's body was in the maize plantation.

8. According to the deceased, it is a neighbour who found the body, and that he confirmed when he went to view, that it was the body of his wife, deceased. He thereafter himself made a report to the Police. The Officer on duty however informed him that officers had gone to Sosiot, the place where houses were being torched the previous day, but that they would come to Tegat Farm later. They came at about 9.30 a.m., and had the body removed to Elburgon District Hospital Mortuary.

9. Again according to the accused the Police did not find injuries on the deceased apart from a scar, following an operation for goitre in the year 2003, and that the deceased had never quite recovered from that operation and that she was under medication and used to take a particular drug which he said was only available at Tenwek Hospital. He also testified that the deceased was on drug called "*deprovera*" for family planning, and that is when she developed "*goitre*". He denied killing the deceased.

10. When cross-examined by Prosecution Counsel, the deceased though he had no evidence of clashes at the particular time, he insisted that there were clashes. He referred to OB 112 in which there was an entry that he telephoned an officer called Zachary and that his neighbours who lived near a camp of the Anti-Stock Theft Unit who reported the matter to the Police. Though he had their documents on treatment, he did not produce any in court.

11. When questioned about his second daughter, the accused stated that she was a grown up girl who had finished Standard VIII and used to sleep in a neighbour's house, and had never quarreled with her previously or on the 24th May 2008, and that his relationship with her was excellent.

12. In contrast to the Defendant's evidence denying the killing of his wife the deceased, PW1 testified that he heard screams, and followed the direction of the screams to the house of the accused – as his daughter was crying "*mama amekufa*" - *mother is dead*. PW1, along with neighbours, Bernard Langat and Weldon Korir found the deceased's body about 10-15 metres away from the accused's house and went to his house and took a blanket and covered the body. They found the body lying face down, and did not observe any injuries.

13. IK was PW2. He was aged 13 years when he testified. He was subjected to a *voire dire*, and found possessed of sufficient intelligence to testify. His statement was that his mother had slept outside their house on the day prior to her death, but that she had however returned in the morning of the day of her death. She, and not the daughter, had made the evening meal of that day. The accused came, found food ready, and after eating sent PW2 out to fetch a shovel for his father. He obliged. Thereafter the accused questioned his mother of where she had slept the previous night. The accused left after eating to a place unknown to the child, and then returned and sought keys for the store, and closed the store, and persisted in seeking to know where the deceased had slept the previous night, instead of sleeping in the house, and asked her to show him where she had slept.

14. Both the accused then went out, and returned and that the deceased placed the lamp on the table, and run out, and that his father followed her, and a little later he heard screams, and though he was at the window, he could not establish who was screaming! And that he (PW2) wanted to run out and inform neighbours that his father, the accused, wanted to beat his mother, at the time they had returned from the store, but that he did not and that he thereafter slept until morning.

15. It was the next morning when his sister came to make tea, that she found the body of the mother lying in the bush.

16. According to the boy, on 25.05.2008, she heard further screams coming from the shamba at about 9.00 p.m. The accused was outside, and that the accused stayed outside for a short time, and came back, and thereafter, there was no further noise, he beat him up and told “*me my mother had gone, and I would not go anywhere*”.

17. PW3, was Dr. Magaai Kigenyi. The accused had bruises on the right temporal area and right eye bleeding and that there were no other external injuries noted, but that the deceased had goitre grade III, there was no skull or intra-cranial haemotoma, but sub-scalpial bleeding on the left side.

18. The Doctor suspected the cause of death to be poisoning as there were no obvious external or internal injuries, and decided to take specimen for toxicology analysis – gastric contents, stomach wall and small intestine.

19. On cross-examination, PW3 testified that the bruises could not cause death, and there were no other serious injuries, and opined that the cause of death could be poisoning, as goitre caused by lack of “iodine”.

20. PW4 and PW5 identified the body of the deceased for purposes of the postmortem – related the doctor's evidence of injury with right eye.

21. PW6, the Government analyst found no evidence of any toxic substances in the specimen provided by PW3.

22. PW7, was the deceased and accused's daughter. She corroborated both PW1 and PW2 evidence and the evidence of the accused tallied with her evidence that she used to sleep at a neighbour's house where she used to study. She discovered her mother's body lying outside next to a pit latrine. She stated that her mother used to suffer from goitre, a disease PW3 the Doctor testified which affected more women than men.

23. The eighth witness (PW8) the investigation officer testified that when they went to the scene to collect the body of the deceased and to gather evidence concerning the cause of her death, he observed that the body had bruises on the forehead, and right eye and a swollen neck. He consequently interrogated a little boy called KB the son of the accused and the deceased who informed him that the accused and the deceased had quarrelled the night of 24.05.2008, and the deceased had then spent the night in the store and returned the next day on 25.05.2008 when the accused questioned her as to where she had slept, and that the accused left in the afternoon and returned in the evening and having had his meal, asked the same question and the deceased answered the same way that she had slept in the store, and that the accused then asked her to accompany him to the store. After listening to the boy PW8 formed the opinion that the accused killed the deceased. The question is, did he?

ANALYSIS OF EVIDENCE

24. According to the evidence of the accused, he came home on the material evening and found his wife sleeping on a couch in the living room and upon inquiry she informed him that she was unwell and that a little after his arrival they heard gunfire and they asked PW2 (*their son IK*) to look outside and that he saw houses on fire.

25. On learning that houses were on fire, the deceased told the accused that she could not sleep in the house and that she would go, and that if the accused also run away, he should come with the children. In the event the accused and the other children did not leave, slept in their house until the next day when he heard a sound like someone was cutting wood, and then heard his daughter, (PW7), scream.

26. Contrary to the evidence of the accused, that it was his daughter (PW7) who made the evening meal, that the deceased was unwell and was lying on a sofa the evidence of PW2, IK was that it is his mother who made the evening meal which the accused took, and after eating started questioning the deceased where she had slept the previous night. When the accused informed him that she had slept in the store, he

asked for the keys to the store, locked it up, and then persisted in asking the deceased where she had slept the previous night and asked her to go out and show him where she had slept the previous night. It was about 9.00 a.m. He heard screams from the shamba, and that the accused then came back to the house a short time later, and that there were no more screams. The accused beat him up and told him -

“Your mother had gone and you will not go anywhere”.

27. The evidence of PW2 was corroborated by the evidence of his sister PW7, who also corroborated the evidence of the father accused, that as a grown up girl, he shared quarters with a friend's family with whom she also used to study together. It was she, who upon returning to make tea for her siblings on the morning of 26.06.2008 who discovered her mother's body lying in a bush about 10-15 metres from their pit latrine.

28. PW3, the Doctor who testified found that the injuries suffered by the deceased were so superficial that they could not have led to the death of the deceased. The doctor's fears that the deceased could have died as a result of food poisoning were dispelled by the evidence of PW6, the Government Analyst who testified that there were no traces of toxicological substances in any one specimen submitted to them for analysis. The question therefore remains, who killed and how was the deceased killed?.

29. After listening to the evidence in particular of PW2 (*IK*) and PW7 (*JC*), there are many gaps left out, and leaves me like PW8, with a nagging feeling or suspicions that it is the accused who killed his wife and scared his children to dare to testify against him. He told his son PW2 after beating him up -

“your mother had gone and you would not go anywhere”.

30. It was not established in evidence in what language these words were uttered – that in many African native languages they may be attributed with two meanings either -

9. ***that your mother has physically ran away, and you her child are now left with me, you must toe my line, or***

10.

11. ***your mother is dead, and there is nothing you can do.***

12.

31. The question of who, and how your mother or father went away is never answered expressly. It is merely implied. It is in the hands of the speaker. To establish how he caused her to run away or her death is a question of evidence. In the absence of the “*how*”, it is difficult to pin the “*who*” upon the accused. It remains suspicion, and our own and received jurisprudence teaches that “*suspicion*” however strong is not sufficient enough basis for convicting an accused person.

32. That unfortunately is the fate of this case. The accused blamed the landscape and scarecrow of land clashes, and torching of houses of non-Kikuyu in the area as a cause of his wife's leaving the house on the night of 25.05.2008. None of the witnesses including his children, (PW2 and PW7) nor the Police (PW8), even remotely referred to torching of houses at that time. The accused therefore essentially lied to court on oath. The prosecution evidence however remains far below the threshold for a conviction for murder. Though there is a killing, that killing cannot be attributed to the malice aforethought of the accused. The cause of the bruises on the face and the neck, will remain a mystery which the deceased carried to her grave, and the accused will likewise do.

33. In this case however, I must make a return or finding of not guilty of the offence in terms of Section 203 as read with Section 204 of the Penal Code, and acquit the accused in accordance with Section 322(1) of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*) and unless otherwise lawfully held, I direct that the accused be released forthwith.

Dated, signed and delivered at Nakuru this 5th day of December, 2014

M. J. ANYARA EMUKULE

JUDGE