



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 33 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JAMES KIOKO MALUNGU.....ACCUSED

JUDGEMENT

1. The accused herein, **James Kioko Malungu**, is charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged that the accused, on the 21st day of September, 2012 at Kyaani Village, Kyaani Sublocation in Machakos District within Machakos County, murdered **Eunice Mbula Kioko**. The accused pleaded not guilty.

2. In support of its case the prosecution called 11 witnesses.

3. According to PW7, **Ngina Kioko**, on 21st September, 2012 at 6 pm in the evening her mother, the deceased arrived at home at 6 pm while her father, the accused arrived at 7 pm and they found her cooking food. After serving them, the parents went to sleep at around 8.00 am leaving her and her brother **Charles Wambua Kioko** (PW4) sitting in the house talking. They then heard noise from their father's room as if he was talking to the deceased though she was unable to hear what they were saying as the door was locked. PW4 then went to call PW3 leaving her in the house though PW7 did not know why he was going to call PW3 B. I do not know why he was going to call her. Upon going to her father's room, PW7 saw the accused hitting the deceased with his fists everywhere on her body. The accused also kicked her and ordered her out of the house and she did so.

4. When her parents came out, the accused was still assaulting the deceased. After a few hours, PW4 returned with PW3 and PW3's screams alerted many people who arrived including PW8 who asked the accused to stop beating the deceased. The accused and PW8 then entered the house leaving the deceased lying on the ground outside unable to talk. She was then taken by neighbours to hospital at around 11 pm in the night. According to PW7, though it was dark at the time, there was moonlight and they had a hurricane lamp in the sitting room.

5. The next day when PW7 woke up she found many people outside the house and was informed by her aunt that her mother had died. According to her, prior to that day her father and mother did not have any problem and they never used to fight.

6. It was her evidence that the deceased arrived alone and after eating the accused and the deceased went to their room using a torch. It was her evidence that when she went to their bedroom it was dark and she did not know if there was anyone else in their parent's bedroom. She then went out of the house to the road and when she came later to the house she found her mother lying on the floor. In her evidence, she did not see the accused throw any stones. She however saw PW1 who arrived at 10 pm but never saw PW5 at home that night. She stated that she knew his voice and would have recognised it and was not aware that PW5 was her mother's friend and if he was in her parent's bedroom. It was her testimony that she heard her parents start quarrelling 10 minutes after they

went to bedroom, I heard them start to quarrel after about 10 minutes.

7. PW4, the accused's son and the brother of PW7 however repudiated his statement to the police and was declared a hostile witness. According to him, he could not remember the events of 21st September, 2012 and though he was aware that her mother was dead he did not know how she died. He could not remember having gone to PW3's home and could not remember having recorded a statement. However, when shown his statement, he admitted that the statement bore his name but insisted that he could not recall if he recorded a statement or not and whether or not he went to the police station. He however, admitted that the handwriting was his.

8. On her part, PW3 testified that On the 21st September, 2012 at 8.30pm she was in her house when PW4 arrived and informed her that his father, the accused who was her brother in law, was calling her. According to the information she received from PW4, the accused was beating his mother. When she arrived at their home she found the accused and the deceased in the sitting room. The deceased was on the floor and the accused was assaulting her. She ran to the gate and screamed and people came but did not enter the compound. One of them was her son who arrived and using his cell phone she called her uncle PW8 and told him to call the police. Later PW8 arrived and separated the accused and the deceased and told PW3 to take away the deceased who was injured and could neither talk nor stand. With the assistance of another person they carried the deceased to the homestead, got a motor vehicle and escorted her to hospital- Machakos Level 5. Upon narrating to the doctor the history, they were told to take the deceased to Kenyatta National Hospital and an ambulance was brought which they boarded but by the time they reached Kenya Israel, the deceased died. As a result, they turned back to keep the body in the mortuary.

9. The following day she heard screaming saying the accused was going to her home and when she went out she saw the accused on the farm. The accused asked her what had happened after which he went to his house, removed a rope and locked himself inside the house. Upon opening the house, PW10 informed her that the accused had attempted to commit suicide after which the accused was taken to the hospital. According to her, previously, the accused and the deceased lived well.

10. It was her evidence that at 8.00 pm, she was called from her house some three (3) kilometres away from the home of the accused and since there was no home in between, she was their immediate neighbour. When she arrived, she found the deceased in the sitting room with the accused in the dark and though she did not have a torch, she was able to see them but she had to move closer in order to see well. She however later stated that she did not see what was happening and did not enter their bedroom but instead called her son who was passing by since there was no other person.

11. When the duo came from the house they went towards the farm and when PW3 returned from the gate, she did not get anyone. She denied that it was herself and her son who assaulted the deceased. The following day the accused went to her home seeking to know what had transpired when she took the deceased to the Hospital but she did not tell him only telling him that he knew what he had done. After that the accused went to commit suicide though she did not know who broke the news to him.

12. In the view of the witness, the accused was a peaceful person employed by Kenya Revenue Authority and she had never heard of him being troublesome.

13. PW8 testified that on 21st September, 2012 at around 9.00 pm he heard noise at the gate and when he proceeded there, he found a neighbour's child who requested him to go and assist the deceased who had been beaten by her husband and had been hurt and had been carried to his gate, about 300 meters from the accused's home. He however did not see the accused at the gate. Using his pick-up he took the deceased, who was not talking, but breathing with difficulty and bleeding from the nose and could not sit, to Machakos Level 5 Hospital where the doctors started attending to her and left her being taken for an x-ray and went home.

14. According to him, the accused was a neighbour and they used to live peacefully. He, however did not know what caused the death of the deceased.

15. PW1, a businessman, testified that on 21st September, 2012 at 8.30 pm he was at work when he got a telephone call from a nephew of the accused, who was his cousin's son, who informed him that the accused wanted to assault his wife. He rushed to the accused's house but did not find anyone. After a while he heard noise and proceeded to the farm where he found the accused beating up the deceased. Upon noticing his arrival, the accused, who according to him was drunk, took him aside and told him that his wife, the deceased, had wronged him as she had been given 50/- by somebody. Since it was dark, he could not see what the accused was using to hit the deceased. He stopped assaulting her and calmed down after PW1 told him that they would settle the

matter later. It was her evidence that when a lady came from the nearby bush screaming, the accused chased her before the deceased was taken to the Hospital while PW1 remained with the deceased before leaving him in his house having calmed down. Later he received the information that the deceased had passed away.

16. While the accused only informed him that the deceased had been given 50/= and that he was embarrassed, the accused did not inform him that he had found the deceased in Cactus with a lady. According to him, he heard a voice stating "he would finish her" and when he went up to the scene he was able to identify them because he heard their voices since it was dark. He however noticed that the deceased was unconscious and was not communicating.

17. According to PW1, the accused was a peaceful person but he could not tell if he was provoked by the act of the lady receiving money from other people but confirmed that he was drunk.

18. PW5, PW9 and PW10 testified that they were present when the accused was found attempting to commit suicide while PW2 did not witness the incident.

19. PW6, the pathologist undertook a post mortem examination on the body of the deceased on 27th September, 2016. Upon examination he found that there was facial oedema (swelling), multiple facial bruises on the chin (maxilla) measuring about 2 cm by 2 cm each, multiple indispersed subcutaneous contusion (bruises) and bilateral gluteus and thigh haematoma. There is a lot of signs of injuries on the thighs, gluteal region and back. He also found subcutaneous chest tissue contusion and bruises, multiple bilateral fractures, multiple haemorrhage on the surface of the heart caused by lack of oxygen. The head had multiple scalp contusions, haematoma and the brain had increased intracranial pressure. He concluded that the cause of death were multiple injuries to the head and chest cause by blunt force trauma and he exhibited his report.

20. On 22nd September, 2012 at about 8.00 a.m. PW10, the investigating officer, was in the office at Machakos police when the accused was brought by members of public with an AP officer **Christopher Maloo** with a report that the accused had attempted to commit suicide after assaulting his wife, the deceased. According to him, the accused was injured by the rope in the neck. He recorded their statements and took the accused to Machakos level 5 hospital for treatment and left him in the hands of other police officers. While the accused was undergoing treatment he received information that his wife, **Eunice Mbula Kioko**, whom he had assaulted passed away and the body was at Machakos Level 5 Mortuary. He proceeded to the mortuary, viewed the body talked to the doctor who showed him x-ray showing head injuries. He was then taken to the accused house by members of the public where he was shown the window that was broken in rescuing the accused. Upon entering the two bedroom and sitting room house, there was a cut rope on the roof in the sitting room. He was then taken to the farm where the deceased was rescued from the road which was 30 metres from the house within the homestead where he saw vomit and sign of struggle. There was a hurricane lamp but there was no blood. He returned to the Hospital where accused was being treated and since his condition was not bad they went with him to Machakos police station where he was placed in the cells and he started recording statements.

21. On 27th December, 2012 he joined the family members at the mortuary for post mortem examination where the doctor informed him the deceased died from head and chest injuries and he filled in post mortem report for the deceased.

22. Upon being placed on his defence, the accused, in his sworn testimony stated that on 21st September, 2012 he was from work and arrived home at 9.00pm. found the children eating and sat down. According to him, by the time he went to sleep with the deceased they had no problem. However, he heard some noise under the bed and since there was no light he inquired what it was. Failing to get the torch he got up and came face to face with a man whom he could not recognise due to the darkness. Both the man and the deceased pushed him onto the bed. When he came out, the two had disappeared and he heard his wife screaming in the farm. According to him, the deceased had fallen into a trench which was 10 metres deep in which were cut branches and stones. He then went down where the deceased was at it was there that PW1 found him asking the deceased how much money she was paid and she responded that she was paid Kshs 50/- When the neighbours arrived, they took the deceased away and left him there.

23. According to the accused he was providing for his family well and in his opinion the man must have entered their room earlier. That night he arrived home earlier than usual and it would seem that by the time the deceased was being taken away, she was already injured and he was told by PW1 to return to his house since he was annoyed by finding a man in his house. The next day he went to inquire from PW3 where they had taken the deceased but she did not respond. He then returned to his house and after that he was arrested and it was after his arrest that he learnt that the deceased had passed away. According to him the injuries that the deceased sustained were due to a fall since he had no disagreement with the deceased, his wife of 20 years with whom he had 4

children, before then.

24. It was his evidence that by the time they went to sleep, the 3 children who were present also went to sleep and none was left in the sitting room. According to him, when he saw the man he screamed and the children were awoken by his screams and called him asking what was happening. That night, it was his evidence that the house was not locked though they used to lock it. According to him, that night his pressure was high.

25. On behalf of the accused, it was submitted that the circumstances that led to other fight between the accused and the deceased are not clear since the prosecution did not adduce any evidence to show the circumstances leading to the fight, the motive and or the reason for the fight. The defence relied on Nzuki –vs- Republic (1993) eKLR 171 for the holding that the mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a crime of homicide into murder. Reliance was also placed on Joseph Kimani Njau –vs- Republic (2014) eKLR where the Court of Appeal in finding that *mens rea* had not been proved stated thus:

“The trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* have been proved to the required standard. In the instant case the trial court erred in failing to evaluate the evidence on record and to determine if the specific *mens rea* required for murder had been proved by the prosecution...In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear, the motive or reason for the fight remains uncertain; it is an error of law to invoke murder has not been proved. Failure to prove *mens rea* for murder means that the accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.”

26. It was submitted that in this instant case, the accused came home and had supper with his family and retired to his bed room with his wife and after a while commotion arose. It is clear that the accused did not come home with the intention to murder his wife but an altercation arose leading to the death of the deceased.

27. Based on the foregoing, it was submitted that the prosecution did not prove *mens rea* and the charge of murder is therefore not sustainable. In the defence view, the charge of murder should be substituted with that of manslaughter.

28. On the part of the prosecution it was submitted that there was no doubt that the death of the deceased was proved. As regards the issue of the cause of the death of the deceased, it was submitted that according to the evidence on record it is not in dispute that the death of the deceased was not by a natural calamity but by external force since according to **Dr Fredrick Okinyi (PW 6)**, the pathologist, the cause of death was due to multiple injuries on the head and chest caused by blunt force trauma.

29. As to whether the accused person committed the unlawful act which caused the death of the accused person and that the accused had malice afore thought, it was based on Section 203 of the *Penal Code* once the prosecution proves one or a combination of the circumstances mentioned therein, malice aforethought will be deemed to have been established; and in such situation there will be no escape route for the accused person.

30. Based on the evidence adduced, it was submitted that a critical evaluation of the evidence on record it places the accused person at the scene of crime. He was well known and recognized by PW1, PW3 and PW7. Pw2 knew him very well as his relative, PW3 was his sister in law, PW7 was his daughter therefore the issue of recognition is not in dispute. As to who caused the death of the deceased the eyewitness of PW1, PW3 and Pw7 confirm that it's the accused who assaulted the deceased.

31. On the second limb under this head is whether the accused person had malice aforethought when he committed the unlawful act that caused the death of the deceased, it was submitted that the accused assaulted the deceased and when he had been calmed down by PW1, he again followed the deceased attacked her while saying “I will finish you”. It was submitted that the injury on the body of the deceased were at the vital body part (chest and head) that it can only be deduced that the person who inflicted them (accused person) had intention of inflicting injuries or grievous harm on her which he did leading to her death.

32. In conclusion, it was submitted that the accused person was determined to assault the deceased and injure her. He set upon the deceased person who was his wife and overpowered her while saying I will finish you. Such action in the mind of the accused person was clearly to have an outcome of grievous harm or death of the victim. Indeed, this is what exactly happened. The deceased

was fatally wounded during the assault. The accused person had unlawful intention, acted on his intention with malice aforethought thus ingredient for murder has been proved beyond reasonable doubt.

33. It was submitted that the evidence adduced is sufficient to prove beyond reasonable doubt that the death of the deceased, which death was caused by unlawful act of brutal assault and these circumstances point irresistibly towards the accused person to the exclusion of any other persons to the person who caused her death. In light of the foregoing, it was submitted that the prosecution has discharged its burden of proving their case beyond reasonable doubt against the accused person. The prosecution prayed that this court finds the accused person guilty of the offence of murder and proceeds to sentence him accordingly.

Determination

34. I have considered the evidence on record. The prosecution's case in summary is that on 21st September, 2012, the accused went home after the deceased had already arrived and after taking supper, the accused and the deceased went to sleep leaving the children in the sitting room. Soon thereafter, screams were heard from the bedroom. What caused the disagreement is however unknown. However, when PW7 went into the bedroom, she found the accused assaulting the deceased. The accused ordered her to leave and she did so and went to the road. In the meantime, PW4 went to PW3's home some 3 kilometres away and relayed the information to her. PW3 left and when she arrived at the accused's house she found both the accused and the deceased in the sitting room. The deceased was on the floor and the accused was assaulting her. Using a cell phone belonging to her son, PW3 called her uncle PW1 and told him to call the police. Later PW1 separated the accused and the deceased and told PW3 to take away the deceased who was injured and could neither talk nor stand. With the assistance of another person they carried the deceased to the homestead, got a motor vehicle and escorted her to hospital- Machakos Level 5 but the deceased passed away before they got to the referral hospital.

35. According to PW1, he received a telephone call from on **Baadi Mutua** who told him that the accused was assaulting the deceased and when he went to the accused's house he did not find anyone but heard screams coming from the farm and upon his going there he found the accused beating the deceased claiming that the deceased had been given 50/- by someone. He proceeded to separate the two and the deceased was taken to the Hospital while he remained behind to calm the accused.

36. I have considered the evidence on record. Section 203 of the *Penal Code* under which the accused is charged provides that: -

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

37. Arising from the foregoing the ingredients of murder were explained in the case of **Roba Galma Wario vs. Republic [2015] eKLR** where the court held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

38. In **Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR** the elements of the offence of murder were listed by **M. Odero, J** as follows: -

- 1) **The fact of the death of the deceased.**
- 2) **The cause of such death.**
- 3) **Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly**
- 4) **Proof that said unlawful act or omission was committed with malice aforethought.**

39. In Mombasa High Court Case Number 42 of 2009 between **Republic vs. Daniel Musyoka Muasya, Paul Mutua Musya and Walter Otieno Ojwang** the court expressed itself as hereunder:

“The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder:

a) Proof of the fact as well as the cause of the death of the deceased persons.

b) Proof that the death of the deceased’s resulted from an unlawful act or omission on the part of the accused persons.

c) Proof that such unlawful act or omission was committed with malice aforethought.”

40. In this case, there was no doubt as to the fact of death of the deceased. This was proved by the witnesses and particularly the evidence of PW6 who conducted the post mortem examination on her body.

41. As regards the cause of death, according to PW6 who performed the post mortem examination formed the opinion that the cause of the deceased’s death were multiple injuries to the head and chest caused by blunt force trauma. It is clear that the death was not a natural one and that it arose from the fact that there was an external force that caused the same.

42. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person, the prosecution evidence as led by PW1, PW3 and PW7 was clear that the accused assaulted the deceased. Although the evidence of the accused was that the deceased sustained her injuries from a fall, all the three witnesses were clear in their evidence that they witnessed the accused assaulting the deceased. PW11 who visited the farm where the deceased, according to the accused, must have fallen, found that it was 30 metres from the house within the homestead. According to him, there was vomit and sign of struggle as there were footprints and the maize plants were disturbed. He also saw a hurricane lamp but there was no blood.

43. From the evidence on record, it is clear that the accused assaulted the deceased and the injuries which PW6 found on the body of the deceased were consistent with the evidence of assault. Accordingly based on the evidence on record, I find that the deceased met his death as a result of an unlawful act or omission on the part of the accused person.

44. It is however not enough to simply prove that the action of the accused caused the death of the deceased. In **Joseph Kimani Njau vs. Republic [2014] eKLR** the Court of Appeal stated that:-

“In all criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific *mens rea* required for murder had been proved by the prosecution...In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that *mens rea* for murder was not proved. Failure to prove *mens rea* for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.”

45. A charge of murder may therefore not be sustained unless the *mens rea* for murder is proved. The element of intention in committing the offence was examined in the English case of **Hyam v DPP [1974] 2 ALL ER 41** where Lord Diplock observed as follows:

“No distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequent, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act.”

46. As to whether malice aforethought has been established, Section 206 of the **Penal Code** sets out the circumstances which constitute malice aforethought as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) An intention to caused death or to do grievous harm to any person whether such 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 such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.

(c) An intention to commit a felony.

(d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.

47. In the case of Nzuki v. Republic [1973] KLR 171 the Court of appeal stated that in the commission of the offence of murder it must be committed with the following intentions: -

“(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those circumstances to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”

48. In Nzuki vs. Republic (1993) KLR 171, the Court in substituting Nzuki’s charge of murder with manslaughter observed:

“there was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”

49. In this case, it is clear that before the night in question, there was no problem between the deceased and the accused. What caused the disagreement that night remains unknown. However, from the evidence of PW1, the accused was drunk.

50. Having considered the evidence placed adduced in this case, I am unable to find that the death of the deceased was caused by malice aforethought on the part of the accused. Based on the holding in Nzuki vs. Republic (supra) I am unable to find that the ingredients of murder have been proved and I find the accused person not guilty of the offence of murder.

51. Section 179 of the *Criminal Procedure Code* provides that:

179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

52. For these reasons and on the principles set out herein above, I reduce the charge of murder to manslaughter. I accordingly acquit the accused of the charge of murder but convict him of the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*.

53. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 20th day of January, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Mulei for Mr Kamollo for the accused

Mr Ngetich for the State

CA Geoffrey



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