



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL CASE NO 32 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**IKR.....ACCUSED**

**JUDGMENT**

The accused **IKR** was charged with the offence of **Murder** Contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on **24<sup>th</sup> December 2015** in **Trans Nzoia County**, the accused murdered **BKC** (deceased). When the accused was arraigned before this court he pleaded not guilty to the charge. The prosecution called a total of seven witnesses in its bid to establish its case against the accused.

After the close of the prosecution's case, the Accused was put on his defence. He gave unsworn evidence by which he denied committing the offence. He testified that he was a victim of mistaken identity.

After the close of both the Prosecution's and defence respective cases, learned Counsel filed written closing submissions. This court has considered the said submissions. Before giving its verdict, the court will set out the facts of the case as adduced by prosecution witnesses.

It should be noted that the entire prosecution's case was heard by H. K. Chemitei J before he ceased having jurisdiction upon his transfer from the station. This court took over the proceedings at the defence stage. The accused did not have any objection to the court continuing the proceedings from where it had reached.

According to PW3 JK, on 19<sup>th</sup> December 2015 at about 7.00. a.m. the accused visited him at his place of work. PW3 is the brother of the deceased. The accused told him that he was annoyed with the deceased because he found him having sex with his wife at his house. According to PW3, the accused told him that he was going to kill the deceased. PW3 advised the accused not to take such rush decision or take the law into his hands but instead refer the issue for resolution by the village elder and the area chief. PW3 called the chief through his mobile phone in the presence of the accused. The chief promised that he would resolve the issue. The two then parted ways.

It was apparent that the issue was not arbitrated upon as promised to the accused. On 24<sup>th</sup> December 2015 at about 7.00 a.m., the deceased was at his home having supper with his wife by the name N. PW5 CK, N's sister had paid a visit to her sister's home. She recalled that after they had eaten supper, she requested to leave to go her house. They deceased escorted her outside the house. While outside the house, she saw the accused. The accused rushed towards the deceased and beat him severally. When PW5 tried to intervene, she was hit on the face. She started bleeding. PW5 testified that the accused beat the deceased until he fell to the ground. It was then that the accused fled from the scene. Alarm was raised, the screams were heard by PW1 WSM and PW2 JC, the

deceased's other brother and also PW3. They rushed to the scene and found the deceased lying on the ground while unconscious. He was bleeding from injuries on his head. A motor cycle was procured which rushed the deceased to Ziwa hospital where first aid was administered before he was taken to Moi Teaching and Referral Hospital at Eldoret. He was pronounced dead on arrival. He was taken to the hospital's Mortuary.

Post mortem was performed on the body of the deceased by PW5 Dr. Alex Wanyonyi Barasa of Mt. Elgon Hospital. He observed lacerations with abrasions on the deceased's head. His skull has shattered. He arrived at the conclusion that the cause of death of the deceased was severe head injury due to blunt trauma. PW6 MKC, a nephew of the deceased identified the body of the deceased before post mortem was carried out.

The case was investigated by PW7 Corporal Aron Ombaso of Cherangany police station. He recalled that on 25<sup>th</sup> December 2015, he was on duty at the station when he was assigned the present case to investigate. By that time, the accused had been arrested by members of the public and was at the police station. PW7 interrogated all the witnesses and recorded their statements before reaching the conclusion that a case had been made for the accused to be charged with the offence of murder.

PW7 identified a wooden stick which was in pieces which he stated was the murder weapon. He also testified that when he arrested the accused he was wearing a blood stain jacket which he confiscated and submitted to the Government Chemist for analysis. Unfortunately by the time he adduced evidence in court, the jacket had not been returned to him by the Government Chemist. It was therefore not produced in evidence. The wooden stick, though identified in court, was never produced in evidence because the prosecution's case was closed before the officer who was possessed of the said exhibits testified.

When the accused was put on his defence, he denied committing the offence. He told the court that he was a victim of mistaken identity. He denied being at the scene when the deceased was assaulted. In particular he stated that he was about half a kilometre from the scene when he heard screams emanating from the deceased's home. When he went to investigate, he was confronted by a crowd and escorted to Cherangany police station allegedly for his own safety because he was the one suspected to have assaulted the deceased.

The accused however admitted that on 18<sup>th</sup> December 2015 at about 11.00 p.m. he found the deceased in his house with his wife. They quarreled. The issue was referred for resolution by the family members on 19<sup>th</sup> December 2015. It was later escalated to the Assistant chief but was not resolved by the time of the deceased's death. He stated that he was forced to admit that he had beaten the deceased because the police tortured him until he admitted to the act. He was emphatic that he had not committed the offence.

In all criminal cases, it is a duty of prosecution to establish its case against the accused to the required standard of proof beyond any reasonable doubt. The burden of establishing the charge is on the prosecution and never shifts to the accused. The accused is under no legal obligation to establish his innocence. Therefore the prosecution must establish each element constituting the charge to the required standard of proof.

In the present case, the accused was charged with **Murder** under **Section 203** of the **Penal Code**. There are three ingredients that the prosecution was required to establish to prove the charge: Proof of the fact and cause of death of the deceased; Proof that the deceased met his death due to unlawful act or omission on part of accused and proof that the said unlawful act or omission was committed with malice aforethought.

In the present case, the prosecution established to the required standard of proof that the deceased died as a result of the injuries he sustained from blunt force trauma to his head. The post mortem report produced by PW5 clearly established that the deceased's skull was fractured as a result of being hit with blunt force. The fact that the deceased died an unnatural death, was therefore established to the required standard of proof.

As to who caused the death of the deceased, PW4 CK testified that on the material evening at about 7.00 p.m., as she was leaving the deceased's home, and while the deceased was escorting her outside the house, she saw the accused rush towards the deceased and hit him severally until the deceased fell to the ground. When she tried to intervene, the accused hit her and injured her on the face. PW4 was positive that she had identified the accused because it was not yet dark. This eye witness account by PW4 was not shaken on cross-examination by the accused. PW 4 testified that the accused then ran away from the scene.

On re-evaluation of this evidence, it was clear to this court that the eye witness testimony of PW4 placed the accused at the scene of crime. There was no reason discernable from the entire evidence to persuade this court to disbelieve PW4's testimony. The accused was known to PW4 prior to the incident. No grudge existed between the two. PW4 had no other motive other than her need to tell the truth and to relate to court what transpired on that day. This court therefore holds that the prosecution established to the required standards of proof beyond any reasonable doubt that it was the accused that hit the deceased on his head with a blunt object that caused the deceased's skull to shatter thereby causing his death.

The issues that remains for determination is whether the accused committed the offence with malice aforethought. Malice aforethought is found under **Section 206** of the **Penal Code** and it includes where it is established that the accused intended to cause grievous harm to the deceased and as a result of which the deceased was killed. The issue for determination by the court is whether the facts put forward by the prosecution established to the required standard of proof that the accused had formed intention to kill the deceased when he assaulted him. It was clear from the evidence adduced that the accused developed a grudge with the deceased when he found him at the dead of the night with his wife in his house. This was approximately six days prior to the assault. The accused reported the incident to the deceased's brother. The brother PW3 testified that the accused was clearly obviously angry and disappointed with the deceased's conduct.

The accused told PW3 that he was going to kill the deceased to exact revenge. PW3 persuaded him not to take any precipitate action but instead referred the issue for resolution by the area chief. Unfortunately the issue was not addressed by the time the accused decided to take matters into his own hands six days later.

That the accused was provoked is without doubt. Indeed the accused was justified to get angry at the deceased's conduct. However, this court holds that the period of six days was sufficient for the accused to have toned or cooled down his anger and opt for a mode of resolution of the dispute proposed by the area chief. For the accused to have fatally assaulted the deceased six days after finding the deceased with his wife, was an act of revenge and not an act of a hot blooded cockled husband who found his wife in a sexual act with another man.

In the premises therefore, this court holds that the prosecution established to the required standard proof beyond any reasonable doubt that the accused killed the deceased with malice aforethought. The accused's defence did not challenge the thrust of the prosecution's case. The accused's alibi defence was displaced by the overall consistent, cogent, truthful and believable evidence of the prosecution witnesses.

This court therefore holds that the prosecution established to the required proof of any reasonable doubt the charge **of Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

It is so ordered.

**DATED AT SIGNED AND DELIVERED AT KITALE THIS 7<sup>TH</sup> DAY OF OCTOBER 2021.**

**L. KIMARU**

**JUDGE**



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