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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO. 10 OF 2000

REPUBLIC PROSECUTOR

VERSUS

DANIEL MUTWII KANGETHE ACCUSED

Coram: J. W. Mwera J.
10 Mrs. Nzei Advocate for Accused
Orinda State Counsel for Republic
C.C. Muli

J U D G E M E N T

The accused herein was charged under S.203 as read with S.204 Penal Code in that on 19.9.99 at Ngei village Ndalani Machakos he murdered one Kasaya Muange

Kasaya was an old woman whose granddaughter, Nzaumi, the accused had 20 married. They lived in Kasaya's homestead. On the material day in the afternoon Beth Ndunda (P.W.1) went to do her hair in the nearby home of Syombua Musyoki at Ngei village. As the two ladies were so engaged they saw the accused armed with a panga running after his wife, Nzaumi towards Syombua's compound. Scared the two ladies with the children ran inside the house and locked themselves in. They heard loud screams from outside. They opened the door and ran to where the screaming was coming from. Villagers had gathered and P.W.1 saw Kasaya lying on the ground. P.W.1 did not see the accused but she learnt that Kasaya had been cut.

In cross-examination the court heard that P.W.1 knew the accused for about 3 years. She did not know what he used to do before the moved to live in the deceased's compound. That the couple had emerged running from Kasaya's compound. An illicit brew (changaa) is made and consumed in Ngei village. This 10 witness did not know where the accused chased Nzaumi to. But when she came out she saw Kasaya's body lying on her, P.W.1's mother-in-law's shamba.

The next witness was Mbithe Nzioka (P.W.2). She too heard the commotion created by the accused chasing his wife while armed with a panga. She saw it all from her compound. The accused would not catch up with Nzaumi. He came back very probably into Kasaya's compound. From there P.W.2 heard Kasaya asking the accused to explain why he had cut her. He answered that he would finish her off. P.W.2 ran to hide in her house; there was more screaming outside; she ran out to see then she noticed Kasaya lying on the ground in a white dress that she had been 20 wearing. P.W.2 was too fearful to go near. That all the time that P.W.2 came out she had seen the accused heading to Kasaya's compound still armed with a panga. P.W.2 kept to her compound. Later she heard that Kasaya had been killed.

In cross-examination P.W.2 said that she did not know that local brews were made and consumed in her locality. That when the accused walked back to Kasaya's compound, this witness did not know what he did to her.

Penina Syombua Musyoki (P.W.3) gave more or less the same testimony as P.W.1 and 2. She was seated with Mbethi Ndunda (P.W.1) when Nzaumi, the accused's wife ran past, followed by the accused who was holding a panga. The two women closed themselves in her house. When she came out she saw Kasaya lying down and people were screaming. As P.W.3 returned to her house, she met the 10 accused. He carried a bow and arrows and he torched Kasaya's house. He used the arrows to keep people away from getting to the burning hut. In cross-examination this witness said that when she saw the deceased's body lying on the ground, it was bleeding from a cut. She did not see the accused cutting, Kasaya though, but his behaviour that day was dangerous. P.W.3 did not know whether he was drunk or if he drunk as at all.

P.C. Bii (P.W.4) with other police officers from Yatta Police station heard of Kasaya's death. They visited the scene at Ngei village. They found the body of the 80 year old Kasaya lying near a homestead with a deep cut on the left side of her 20 head. Her left arm had also been severed at the elbow and the deceased lay face down in a pool of blood. They took statements from those around, drew a sketch map and took the body to the mortuary. That IP Kipsugut investigated the murder and he recovered the murder weapon from one Administration Police CPL Raphael Kimeu. The members of the public had arrested the accused and handed him to the Administration Police at Kisiiki Police Camp. On their way back P.W.4 with his mates found the accused had been taken to Yatta Police Station. P.W.4 had noticed one burnt house in Kasaya's compound. He did not know the accused's state of mind when he allegedly did all these but that a psychiatrist produced a report on him – that he was of sound mind. That P.W.4 had heard that the accused had taken some local brew but at the station he, P.W.4, did not notice any sign of that. That the accused and his wife alluded to the former having taken some local brew.

It was further heard from P.W.4 that as he helped IP Kipsugut investigate this case, he learnt that the accused sold his land and took the proceeds to live on with his 10 wife in the home of Kasaya who was childless. That on the material day when the accused returned home, they were involved in a quarrel with the deceased who was telling him to leave her home. According to P.W.4 all this may have contributed to what took place on 19.9.99. That at one point the accused had tried to take away his children with Nzaumi but the deceased refused with them.

Dr. Charles Kasuki (P.W.5) examined the body of Kasaya. It had a deep cut on the left temporal region of the head, some 17 cm. long, going through the skull bone to the brain. The left arm was also cut at the elbow and the deceased had bled much in the brain. Kasaya had also bled from the mouth and nose. P.W.5's opinion was that the immediate cause of death was cardio-pulmonary arrest secondary to severe brain damage. The probable weapon used was a sharp object. (Exh. P1A-B).

Ngonyi Makau (P.W.6) was on the material day informed by Nzaumi, the accused's wife, that the accused had chased her with a panga and Kasaya was dead. P.W.6 a local assistant chief accompanied Nzaumi through Kasaya's home with a view to report the matter at Ndalani. On the way, he met a group of people who informed him that the accused killed Kasaya and that he had been arrested by the members of the public and taken to the chief's camp. It was getting dark and P.W.6 used torchlight to observe the deceased body. It bore cuts on the head and left arm. One of her huts was burnt down. P.W.6 arranged for the dead body to be covered and people to guard it overnight. He telephoned police at Kithimani. On 24.9.99 they took his statement. In cross-examination, P.W.6 told the court that no particular person told him that the accused assaulted and killed Kasaya. He had not found the accused at the scene on 19.9.99 and P.W.6 did not see a panga or knife near the body 10 which bore cuts. That for about a year P.W.6 had noticed the accused living in Kasaya's home. He could not say if the accused had married Kasaya's daughter but they seemed to be living that way. At same point in the past P.W.6 had learnt that Kasaya had told the accused to take his wife and children and to go and live at his home. But then that seemed to have passed and life continued as in the past in Kasaya's home.

P.W.6 never met the accused drunk nor that he engaged in violent acts.

AP Cpl. Robert Kimeu (P.W.7) was once attached to the chief's camp at Mavoloni. He knew the accused who came from Kwota village, Ndalani.

On 19.6.99 at about 6 p.m. the accused was brought by members of the public while tied with ropes, to the chief's camp. The group told P.W.7 that the accused had killed an old woman in the village. They handed over a panga to P.W.7 who also took charge of the accused. He was placed under guard.

P.W.7 and another officer went to the scene of the murder. Villagers had gathered. The deceased lay on her right side. She had cuts on the head and left arm. She was still bleeding. A hut had been burnt down – the house where the accused used to live and P.W.7 learnt that the accused had done it.

Back to the chief's camp a motor vehicle came along and P.W.7 detailed some Administration Police to transmit the accused and the panga to Yatta Police Station. He produced the panga (Exh.P2). That on being handed over, the accused looked somehow drunk and he smelt beer. P.W.7 thought that he had taken a brew called "KARUBU" which was brewed in the accused's locality. He answered questions in a drunken way.

IP Job Magutu (P.W.8) then Officer In Charge Yatta Police Station on 27.9.99 took a charge and caution statement from the accused (Exh.P3). That in it the accused admitted cutting the deceased fatally because after he sold his land and spent the proceeds in that home, the deceased began to tell him to leave. That this angered the accused. That the accused had also told P.W.8 that he had been drunk. That closed the prosecution case.

Daniel Mutwii (D.W.1), the accused said that before this, he was a fisherman along Thika River. He had land which he sold for Sh. 75,000/=. By then he married Nzaumi, deceased's grand daughter. On doing so he demolished his huts and took his children from his deceased's first wife to go and live with the new wife in her grandmother's compound, on persuasion by the deceased. Initially they lived in harmony. When the money ran out the deceased began to order the accused to leave her homestead but he had nowhere to go. This was about 1987. Some of the money the accused had entrusted to Kasaya had been used to open a shop which his wife and grandmother operated. Life went on that way until 1999, when offence herein was committed.

That the accused went to fish. He returned, sold his catch and went to take local brew; he had a panga on his bicycle. That he did not know how he got home; he only found himself bound by members of the public claiming that he had killed Kasaya. That he drunk from 1 p.m. to 6 p.m. and he did not know how much he drunk. He was beaten, taken to Kisiiki chief's office and later to the police station. He did not know that he killed Kasaya.

Both sides finally submitted. The State urged the court to find the accused guilty on evidence tendered while the defence held a contrary view. Both learned counsel carefully went over the evidence laid out above.

After due summary to the assessors they each returned opinions of guilty as charged.

The court then rose to consider the evidence, the submissions, the assessors' opinions and the final decision.

It is not in doubt that Kasaya was cut on her head and arm on 19.9.99 and she died from the injuries. Evidence has it that in that day the accused chased about his wife, Nzaumi the grand daughter of the deceased and that both of them lived with the deceased. It can also be said that of the witnesses who were in the homes nearby: Ndunda (P.W.1), Mbithe Nzioka (P.W.2) and Penina Syombua (P.W.3) although they saw the accused chasing his wife while armed with a panga, sensing danger they had locked themselves in their houses fearful of the accused's violent act. They also heard screams outside and when they got out to see, Kasaya lay dead cut in the head and left arm. None of them saw the accused assaulting the deceased. But Mbithe (P.W.2) heard the deceased call out to the accused to go and explain why he had cut her. And Musyoki (P.W.3) saw the accused, armed with a bow and arrows, torching a hut in the deceased's compound. With all this and a dead woman to add, the accused 10 was arrested on the spot and handed to police with the murder weapon, the panga. When police recorded a statement from him, the accused admitted the killing. So it is on good and proper evidence that it is the accused who killed Kasaya. Then we have these two things: drinking local brew and being told to leave the deceased's homestead for good after spending there the proceeds of the sale of his only land.

For the last bit first, the accused said in the statement (Exh.P3) that he was annoyed or angry to be told to leave after seemingly being persuaded by the deceased to move into her compound with his wife, the deceased's grand child – and with all the money. That after the money was spent, the two women opened a shop with it, 20 the deceased in 1987 told the accused to go away. But from 1987 to 1999 is along time and that aspect of spent money and going away cannot be validly seen as the genesis of the fatal assault.

However coming to the drinking bit the accused told the court that on the material day he drunk his fish sale proceeds from 1 p.m. to about 6 p.m. That he went home and did not remember what he did until members of the public caught, tied and beat him up for killing Kasaya.

AP Cpl. Kimeu (P.W.7) was given the accused with his panga by members of the public. The accused looked drunk and spoke in that manner. He had drunk "karubu." IP Mugutu (P.W.8) took a statement from the accused in which he also spoke of having drunk.

When one puts up a defence of being intoxicated one has a duty to show that one was so drunk as not to know that what he was doing was wrong or that he was incapable of forming an intention to commit a crime. That defence is seen on a balance of probabilities but it is a defence indeed. What we have here is a claim by the accused to two witnesses of drinking and not knowing what he did until he was tied and beaten – allegedly for killing Kasaya.

After hearing all the foregoing, this court is of the view that the accused may have drunk. He caused the death of Kasaya. But it is not shown that he intended to kill her.

The assessors were of the opinion that the accused was guilty as charged. But this court is unable to find malice aforethought in this. Indeed chasing his wife with a panga is a criminal offence, even burning a house. But this court is of the view that although the accused killed Kasaya, he did not intend it. He is therefore found guilty of manslaughter C/S 202 as read with S.205 Penal Code i.e. causing the unlawful death of Kasaya and he is duly convicted.

Judgement accordingly.

Delivered on 26th November, 2001

J. W. MWERA

JUDGE



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