



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 18 OF 2010

REPUBLIC

VERSUS

DMM

JUDGMENT

This judgment is delivered in rather unfamiliar and unprecedented circumstances. The entire world has been hit by a respiratory disease known as COVID-19 or corona virus. It is viral in nature spreading mainly through human contact although, lately, it has been suggested that it could be airborne as well. So far, it has no known cure but its spread can be contained if human contact or interactions can be restricted. Measures have been taken the world over towards this end in what is now popularly referred to as 'social distancing'. It is for this reason that this judgment is delivered via skype communication or video conferencing.

Sometimes in April 2009, the accused's wife, JNO disappeared from their home and was never seen alive again; it was not until her skeletons were found in a pit latrine in the same home that it was discovered that she had died. The relationship between the accused and the deceased had been confrontational and at times, physical; generally speaking, their marriage was anything but stable. Against this background, the accused was suspected to have murdered the deceased and so on 5 July 2010, he was arraigned on a charge of murder contrary to section 203 as read with section 204 of the Penal Code, cap. The particulars were that at an unknown time within the month of April 2009 at Ihwa village in Tetu within Nyeri District of Central Province, jointly with others not before court, the accused murdered JNO.

The accused pleaded not guilty to the charge.

In a bid to prove its case against the accused, the state called twelve witnesses; of these witnesses was the accused's daughter LW who, though a minor aged 14, gave sworn testimony once the court satisfied itself that she understood the solemnity of an oath and the importance of telling the truth.

She testified that sometimes in July 2009, she was awakened from sleep by a commotion of a fight between the deceased and the accused. The accused had asked the deceased not to enter the house where accused was at the material time but in defiance the deceased entered the house. He forcefully attempted to remove the deceased from the house but she held tightly on the bed. In an angry reaction, the accused picked an iron bar and hit the deceased on the head with it. The deceased fell down, apparently unconscious. He carried her outside the house. It was her evidence that, somehow, the deceased woke up and left with the accused's mother who had been at the scene all along and had even tried to separate the two.

The deceased is alleged to have come back later but she found when gate had been closed. The accused and his daughter retired to bed, not knowing where deceased had gone to. It was her father who prepared breakfast for her the following day before she left for school.

She also testified that the deceased was her step-mother and that her own mother worked in Nairobi. The accused had two houses; one for the deceased and the other for her co-wife. The fight took place at the deceased's co-wife's house; she had been there earlier that evening to prepare food for her co-wife's children but this was before the accused had come back from work.

She came back at 10 PM when she learnt that the accused had returned home. L testified further that the quarrel between the deceased and the accused started outside the house when the deceased insisted that she wanted to spend the night with him in her co-wife's house. The accused's mother (PW9) was attracted to the house because of the commotion. It was L's evidence that she managed to separate them and took the deceased to her house.

The accused's son AKM (PW2) also witnessed the scuffle between his father and step-mother. Like his sister, he was awakened by the fight between them. He saw his father hit the deceased even as his grandmother attempted to restrain him. The accused and his mother subdued the deceased and escorted her to her house which, according to his testimony, was about 100 metres from her co-wife's house. But that was not all; he also heard noise at the deceased's house after the deceased had been escorted there. Maina then proceeded to sleep in his grandmother's house. His grandmother came in 30 minutes later. In the morning he found the deceased's house locked with a padlock. He

did not see the deceased again.

TWK (PW3) testified that she was the accused's sister-in-law and like the accused's children she heard a commotion in the accused's house at about 11 PM; she realised that the accused was assaulting the deceased as the latter cried for help. She heard the accused and his mother close the deceased's house. She noticed, on the following morning, that it had been locked with a padlock yet she did not hear the deceased leave that house. It was her evidence that the deceased's house was about 50 metres from hers. She never saw the deceased again but she recalled that the deceased and the accused fought regularly.

The accused's brother PKM (PW4) testified that the accused had three wives; of these wives, the deceased was the second. The deceased initially lived with the accused's mother; he later built a house for her. He said that the accused and the deceased always fought. Three months after the deceased disappeared, the accused destroyed her house.

The deceased's uncle RM (PW5) testified that the accused married the deceased in Ongata Rongai in Kajiado county and that after the birth of their child, they moved to Nyeri. The deceased would communicate with her aunt but this communication stopped in April 2009 when the deceased's family could not contact her.

They managed to trace the accused's home on 27 December 2009. On that day, M, J, the deceased's mother and two other relatives, MK and P travelled to the accused's home. They found the accused and his two parents. When they enquired about the whereabouts of the deceased, they were told that the deceased had gone to work in Limuru. The accused told them that he couldn't inform them of their daughter's departure earlier because he had no phone. They agreed that the disappearance of the deceased be broadcast in the media. They then left for Limuru but asked the accused and his family to alert them should he come across any information on the whereabouts of the deceased.

In April 2010 M together with the deceased's uncle L, the deceased's mother and one Martha came back to the accused's home. They found his father who told them that the accused had a temporary job in Nyeri town. When they asked for his contact, he told them that he could not remember it. It is then they decided to report the matter to the police; they took the accused's father with him. They managed to get to the accused with the assistance of the area chief. The accused told them that he was in Nyeri and that is where he was arrested. The deceased's relatives left and were told by the police that they would be informed of any new developments. Later, they were called and told that the deceased's body had been found in a pit latrine.

The accused's father, EM (PW6) testified that on some unspecified date he found the deceased's child crying outside his house at about 5 PM. He was crying because her mother had left him alone. He asked his wife to give him food. When he sought to know from the accused where the deceased was, the accused told him that she had gone to Nairobi where she had secured a job. Later, the deceased's family came to his home to look for her. He told them that the deceased had gone to Nairobi to look for a job. He went with the deceased's relatives to the police station the second time they visited his home. He was eventually arrested together with his son. He was, however, released after fourteen days in custody.

JNO (PW7), the deceased's mother, testified that on 27 December 2009, she went to visit her daughter at Kinunga in Nyeri. She was accompanied by P, R and Martha. They found the accused and his father. The accused told her that the deceased had gone to Nyeri where she was working. That she had been there for one year and eight months. She asked the accused to make the announcement of the disappearance of the deceased in the media but he never did. She took the initiative and caused the announcement to be made in the Kisii language.

She came back to the accused's home in March, 2010 but did not find the accused. Neither could he be contacted on phone. They proceeded to the chief's camp at Kinungi where they made the report of the disappearance of the deceased.

The witness recalled that she last saw her daughter in May, 2009 when she came to visit her in Kisii where she lives; by then she had been married to the deceased for five years and had been blessed with one child. She added that she identified the deceased's body in the mortuary. The deceased's uncle SOM (PW8) also testified that he was at the mortuary on 16 June 2010 to identify the body of his niece. According to him, all that was left was his niece's skeleton and that he only identified it as the deceased's because of a gap on either side of her teeth. He testified that he was a brother to the deceased's father who was also deceased.

LM (PW11) testified that he lived with the deceased till she got married to the accused; she was his sister-in-law's daughter. He met the accused in Rongai but later he moved to Nyeri with the deceased. He and his family communicated with the deceased for some time and at times she could visit them in Nairobi. Later, they lost contact and did not hear from the deceased for almost a year. It is then that they decided to come to Nyeri where she lived. The accused's father told them that the deceased was working in a tea plantation, in Limuru. They reported the matter to the police and the accused's parents were arrested. The accused was later arrested in Nyeri.

The accused's mother, HWM (PW9) testified that in April 2009 at about 8 PM she heard some commotion from the accused's house. As she approached the house, she heard the deceased's voice. She was demanding money from the accused. She persuaded the deceased to go back to her house while the accused remained in his first wife's house. She never saw the deceased again. It was her evidence that she wasn't surprised that the deceased had disappeared because it was usual for her to disappear and come back again. She admitted that sometimes in 2009 the deceased's family visited looking for the deceased because she had not communicated with them for a long time. It was her evidence that the deceased left because she had found a job at Nairobi.

The government analyst Elizabeth Waithira Oyiengo (PW10) testified that she received the deceased's body tissue and a sample of her mother's blood to determine if there was any genetic relationship; however, a DNA profile could not be generated from the body tissue.

Dr Dindi Kithi (PW12) conducted the postmortem on the deceased's body; the postmortem was conducted on 16 June 2010. It was her evidence the body was of a female African; it had decomposed and only bones were left though there was some tissue around the thigh region. There were multiple fractures on the skull. The ribs were also fractured. The head was fractured on the left side and the temporal region; there was also a fracture on the right and parietal region. There was abnormality noted on the spinal region. The doctor opined that the cause of death was severe head injury secondary to trauma. She certified the deceased's death and produced the certificate to that effect.

Moses Kimani (PW13) a government chemist produced a report to the effect that a police officer, corporal Samuel Nyamasi, had presented to the government laboratory a bottle for chemical analysis of its contents. According to the report, the bottle was empty but there were traces of poison in it. To be specific, the bottle had traces of diazonal which is toxic phosphorous pesticide capable of causing harm if ingested.

Dr Moses Mwenda (PW14) testified that the accused was examined and found fit to stand trial; he produced a psychiatrist report to that effect.

Dr Naomi Sitati (PW15) testified that the accused was admitted at Nyeri provincial General Hospital on 10 June 2010 after having ingested a pesticide. It was alleged that he took the pesticide after he killed his wife. He was subjected to intravenous fluids and had his stomach emptied. He was discharged on 14 June 2010.

The investigation officer in the case against the accused was inspector Rose Thungu (PW16). On 5 April 2010, she was tasked to investigate a report of a missing person. The relatives of the missing person had made vain attempts to contact her since July 2009. On 6 October 2010 she visited the accused's home. On arrival the officer and her colleague, corporal Nyamasi found the accused and members of his family. Upon interrogation, the accused told them that the deceased disappeared early in 2010. They established that prior to her death, the deceased and the accused had been in constant fights. They conducted a search at the accused's home; in the course of that search, they demolished a pit latrine. As they searched the pit, the accused entered his house and took poison. The officers rushed him to a nearby hospital but were referred to Nyeri Provincial General Hospital where he was admitted. They then went back to the pit latrine where they retrieved the remains of a human being. They took the remains to the Nyeri Provincial General Hospital mortuary. They also recovered the bottle from which the accused had taken the poison. This bottle was forwarded to the government chemist for analysis. Also taken for analysis were the deceased's body tissue and her mother's blood sample.

The accused opted to give unsworn evidence when he was put on his defence. He stated that he once worked in Nairobi but he later moved to Nyeri. He married the deceased in 2002 while he was working in Nairobi. The deceased was his second wife and together they got a child in 2003. In 2006 he got a job at Kangemi in Nyeri. He commuted from his home to his place of work. Sometimes in 2006 the deceased had expressed a desire to work. The accused got her a job at Ihururu in Nyeri but she left the job after a month. The accused got her another job but she rejected it. In 2007 she approached the accused and asked for money. The accused told her that he did not have the money but he would give it to her as soon as he was paid. He was in his first wife's house at the material time. The deceased left back to her house and he did not see her again until a year later, in 2008. She could not tell where she was all this while. She left the same day and the accused never saw her again. He again called the deceased's mother to find out whether the deceased had gone back to her home. Later the mother and other relatives of the deceased visited the accused's home. They left but after six months, they came back with a policeman who arrested him. He admitted that he entered his house and took poison but it was because the police were beating him. He also admitted having been admitted in hospital and discharged later.

The entire evidence has to be evaluated in the context of section 203 of the **Penal Code** which defines the offence of murder. This section reads as follows:

203. Murder

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

There is no doubt that the skeleton found in a pit latrine at the accused's home was that of a human being; according to Dr Dindi Kithi (PW12) who conducted the post-mortem, the skeleton was that of an African female of 'fair physique'. The pathologist further observed that the deceased had sustained fractures on the skull to which she succumbed; in her own words, the cause of death was severe head injury secondary to trauma. She certified the death of a person and tabled her report accordingly. This evidence was neither disputed nor controverted and therefore the twin facts of death, and of a person, which are vital components in the offence of murder were proved to the required standard.

Equally important to establish is whether the skeleton was that of JOO. There is sufficient evidence that it was; the deceased's mother (PW7) and her uncle (PW8) positively identified the skeleton to be that of the deceased; her uncle was specific that there was a gap on either side of the deceased's teeth and with this special feature, they were able to positively identify the skeleton as that of their daughter. This evidence was corroborated by the evidence that the deceased had disappeared without trace for more than a year. Again, no evidence was led to the contrary that the remains were that of the deceased. I am therefore satisfied that it was proved beyond doubt that the skeleton recovered from the pit was that of the deceased.

The nature of injuries to which the deceased succumbed would suggest that the death was caused by an unlawful act of another person. According to Dr Kithi, the deceased's skull was fractured multiple times; there fractures on its left side; the temporal region and on the right parietal region. Apart from the skull, some ribs were also fractured. These injuries were certainly not self-inflicted, they were caused by another person. No reason was ever suggested to justify the injuries and therefore it is reasonable to conclude that the injuries were as a result of unlawful act by another person.

The question is whether these injuries were inflicted by the accused. The accused's children's account of what transpired on the night that the deceased disappeared is crucial in this regard. According to LW (PW1) she saw her father strike the deceased with an iron bar on the head as a result of which the deceased fell down. He then carried her outside the house when apparently, she was unconscious. AM (PW2), on the other hand, corroborated his sister's testimony that he saw the accused hit the deceased with an iron bar. Besides that, he saw him together with his grandmother escort the deceased back to her house.

The accused's sister-in-law, TWK (PW3) testified that the accused assaulted the deceased on the material night. It was her evidence that the accused and his mother closed the deceased's door. On the following morning, she noticed that the door had been locked from outside with a padlock yet she did not hear the deceased leave the house the previous night.

The evidence that the accused struck the deceased with an iron bar, particularly on the head was corroborated by the pathologist's observations that the deceased had sustained several fractures on the head; I have no doubt in my mind that the fractures were as a result of the blows inflicted by the accused. She also broke ribs also which, no doubt, was as a result of these blows.

This evidence, in my humble view, points to the accused as the person who inflicted the injuries to which the deceased succumbed. It is possible that the deceased died on the material night she was battered. Although she is said to have been 'escorted' to her house, the evidence shows that she was neither taken there nor went there by herself. From what I gather, she never recovered from the blows she received at the hand of the accused at her co-wife's house. If the accused carried her from that house because of those blows, and if the evidence of the pathologist is anything to go by, there is no way that the deceased would have walked back to her house. The deceased must have died at her co-wife's house and it is possible that the accused, with the help of his mother carried the body to the pit latrine where her remains were found.

Going by TWK's (PW3's) evidence, the two locked the deceased's door either immediately before or soon after they disposed of the deceased's body. It is improbable that considering the battering she had received, the deceased could have left the home that night. She died in the hands of the accused and in an attempt to suppress the evidence of this heinous crime, he disposed of her body in the pit latrine.

It is worth noting that the accused did not make any attempt to deny in his unsworn statement of defence that he assaulted the deceased. Neither did he controvert his own children's account and that of his sister-in-law of what transpired on the night that the deceased disappeared.

I also do not accept the accused's allegation that he attempted suicide because the police were beating him. If that was the case, nothing stopped him from raising this issue when cross-examining the investigations officer. In any event, there was no shred of evidence that the accused could have been assaulted in the course of investigations.

In my assessment the accused made an attempt on his own life when the police focused their search of the possible evidence of the deceased's disappearance at the pit latrine; it is then that it dawned on the accused that, contrary to his misplaced belief that he had either covered or destroyed the evidence that may link him to the murder, the investigations were closing in on him. The only escape route left open to him was therefore to commit suicide. Fortunately, or unfortunately for him, he did not succeed thanks to the quick response by the investigation officers to save his life.

I am therefore satisfied that it was proved beyond all reasonable doubt that the accused murdered his wife.

The final question for determination is the motive or malice aforethought of the murder. Malice aforethought is the mental element of murder and it is either express or implied; it is express when it is proved that there was an intention to kill unlawfully (**see Beckford v R [1988] AC 130**) but it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm (**see DPP v Smith [1961] AC 290**). It has a statutory underpinning in section 206 of the Penal Code which basically prescribes the circumstances under which malice aforethought may be deemed to have been established; it reads as follows:

206. Malice aforethought

Malice aforethought shall be deemed 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 grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent 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.

The evidence relevant to this issue was mostly from the accused's own family members; some aspects of that evidence were corroborated by the pathologist particularly as far as the extent and the nature of the injuries to which the deceased succumbed are concerned.

It was their evidence that it was almost normal for the accused and the deceased to quarrel or fight. Their marriage was not a happy one. I gather from this evidence that on the fateful night, they did not fight but that the deceased entered her co-wife's house in defiance of the accused's orders. Once she entered the house, the accused forcefully tried to remove her but she firmly held on the bed. It is at this point that the accused resorted to battering her with an iron bar.

This brutal attack was unwarranted because there is no evidence that the deceased was armed or she ever attempted to fight the accused; it cannot even be remotely argued that the accused may have been acting in self-defence. considering the extent of the injuries such a defence wouldn't even have been viable because the force of the attack was excessive.

There is evidence that the deceased had been in that house earlier to cook for the accused's children because their mother was away. She went back to her house and only returned to her co-wife's house when she was informed that the accused had now come back from work. In these circumstances, I am unable to figure out, and no reason was given, why the accused should have battered his wife to the extent of

killing her. The reason cannot simply be that he did not want her in his elder wife's house.

I would conclude that the only reason why the accused struck his wife several blows with such a weapon as an iron bar on the head and fractured different parts of her skull and also the ribs and the spinal cord was because he intended to cause her death or to cause her grievous bodily harm. In the alternative, he must have been aware that by striking his wife the way he did, death or grievous harm would result and he did not care whether any of these results was likely.

For present purposes I am satisfied that malice aforethought has been proved beyond all reasonable doubt. In the ultimate, I hold that the state has proved its case against the accused to the required standard; accordingly, the accused is hereby convicted of the offence of murder as charged.

Dated, signed and delivered on this day of 9th April 2020

Ngaah Jairus

JUDGE