



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL CASE NO. 12 OF 2018

REPUBLICPROSECUTION

VERSUS

MOSES KIRIANI KINYANJUL.....ACCUSED

JUDGMENT

The Facts

1. Moses Kiraini Kinyanjui is charged with the murder of his mother Sophia Wambui Kinyanjui contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on 31st May, 2018 at Lakeview Estate in Naivasha, he murdered Sophia Wambui Kinyanjui.
2. The undisputed evidence is as follows. On 24th May, 2018 the deceased, the accused, two of her employees Lucy Mwangi (PW2) and Henry Njugua (PW3), the accused's wife Lucy and their son, had driven to Nairobi's Lang'ata Cemetery for a funeral of the mother of one of the deceased's employees. After the funeral at about 2.00pm, they set off on their way back to Naivasha.
3. On reaching the deceased's home at Lakeview, the deceased got out of the car and called for the gate to be opened. It was about 5.30pm. The car was being driven by Henry Njuguna PW3. Her househelp, Sarah, went to open the gate. The accused followed his mother out of the car. The gate was opened and the accused and his mother went into the compound.
4. Suddenly a scuffle broke out between the accused and his mother inside the compound. The deceased fell to the ground. The accused held his mother's shirt and hit her cheek with his fist. Henry Njuguna came out of the car, stopped the fight, and told the accused to get back into the car. He did. Henry drove the accused and his wife to their home on Villa Estate. The accused went into the house.
5. PW1, Milkah Njoki, the deceased's daughter, had witnessed the scuffle and ran out of the compound to get help from boda boda riders. She was confused and did not return to the house until about 7.00pm. She found her mum in the house, but did not see any injuries on her. Later the deceased complained that her blood pressure was up, and she asked for her blood pressure medicine. Milkah brought these to her. Things seemed to go back to normal after that.
6. The next day the deceased went to work at Silver Hotel which is owned by the family. PW7, John Ndungu who operates a boda boda took her there. At the hotel, the deceased told Lucy Mwangi her blood pressure was high and they went together to buy medicine. After they got the medicine, the deceased went home.
7. On 28th May 2018, the deceased told Milka (PW1) she was going to Nairobi to see her lawyer about a certain case. The deceased went by the hotel before she travelled to Nairobi. Her daughter, Tabitha Wanjiru who lives in Nairobi, picked her up at the bus station. Together, they went to the office of Ngure Mburu, her mother's lawyer. At the reception the deceased told Tabitha that she had had an argument with the accused about him selling land. They did not get to see the lawyer that day, but they paid Kshs 80,000/= for a case the deceased was going to be involved in on 12th June, 2018.
8. After the visit to the lawyer, the deceased said she had not taken her blood pressure medicine, so they bought some at a chemist and she took it there. They then went home to Tabitha's house in Jamhuri Estate at about 6.30pm. The following morning, 29th May, 2018, the deceased woke Tabitha up at about 3.00am. She had a headache, was sweating and feeling unwell. Tabitha gave her some blood pressure medicine. At 5.00am her headache had not receded so Tabitha called the deceased's doctor. He came to the house, took her pressure, and found her heart beat rate was high. He injected her with a pain killer and her headache receded. She then slept.

9. At about 3.00pm the deceased was sweating again. Tabitha called the doctor and he came to Tabitha's house again. He said she could be sweating from pain. It is not clear whether he gave her any medication. In the evening she had supper, took her blood pressure medicine, and went to sleep at 11.00pm.

10. The following day, 30th May, 2018, Tabitha's househelp called her at about 6.00am and told her the deceased was unwell. With her husband, they went to the deceased's room to check on her and decided to call the doctor. They then got a taxi and took the deceased to the Coptic Hospital a few kilometres from Jamhuri Estate. Tabitha testified that her mother, the deceased, had had blood pressure problems for more than two years.

11. On arrival at the Coptic Hospital, the deceased was rushed to the emergency ward and placed under oxygen. By this time Moses had arrived from Naivasha and they went to see the doctor who had taken a CT scan of the deceased. He told them she had a blood clot on both sides of her head. Tabitha testified that according to the doctor, the blood clot was caused by the use of the blood pressure medicine. A neurosurgeon was called to see the deceased. He said he would be available the following day, 1st June, 2018. However, before the neurosurgeon's arrival, the deceased died on 1st June, 2018. Her body was taken to Jamani Funeral Home.

12. None of the family members reported the assault to the police. It was PW9 Hon. Stephen Mburu who reported the incident to the police. He knew the deceased as his constituent. He had been told that the accused battered the deceased to death. He had some two court cases in which the deceased was involved. After the death of the deceased, the Deputy DCIO Chief Inspector Yugi called PW10 Corporal Johnson Wambua and told him of the alleged assault. He made an OB Report, recorded PW9's statement and started investigations.

13. The investigations led to the taking of statements from family members, and to the disclosure of the fight between the accused and deceased. However, the investigator did not make any follow-up on the medical history of the deceased.

Issues

14. All the foregoing evidence is undisputed. What is disputed and the only issue for determination in this case is whether the accused caused the death of the deceased by hitting her with his fist. It is a question both of fact and of law. The starting point is the post-mortem report.

Analysis and Determination

15. Pathologist Dr. Titus Ngulungu, PW6, conducted the post mortem on the deceased's body on 6th June, 2018 at Jamani Funeral Home. His report was admitted as P. Exhibit 1. The circumstances of the death are recorded as follows:

“The deceased was assaulted by her son namely Moses Kiriani on 24th May 2018, who is said to have beaten her on the head and chest. It is said that the assailant threw her on ground and fell on stones on ground. Please ascertain the course (sic) of death.”

16. Nothing stated in the circumstances disclosed to the pathologist anything concerning the deceased's medical history, and in particular, her high blood pressure condition and use of medications to control it. PW6 examined the body. On external examination the doctor noted bruises on the right inguinal region and dorsum of the hands, arm and forearms. Some of the bruises related to medical intervention others related to trauma.

17. On internal examination of the body, the pathologist found the following issues: Significantly, the heart was mildly enlarged, the head had a contusion on the left temporal/frontal area and subdural haematoma; it also had brain laceration aggravated by intracerebral haematoma which he observed. In his report, the doctor stated he formed the opinion that the cause of death was:

“Brain injury attended by contusion/subdural haematoma and laceration due to blunt trauma to the head in a body with enlarged heart.”

He explained this as follows: that there was the effect of trauma in the head and the effect of an enlarged heart i.e. hypertension.

18. In cross-examination, the doctor said that the cause of the enlarged heart was due to increased workload on the heart i.e. hypertension; that blood pressure is when the heart has increased activity; that the heart showed cardiac tensions. Ultimately he said:

“There could be two sources of death. Hypertension and from head trauma. The date of death is not indicated.”

The contusions on the head referred to bleeding below the skin of the head caused by blunt force on the head.

19. According to the prosecution, the accused's unlawful act of hitting his mother was the blunt force trauma that led to brain injury which, though not the immediate or sole cause of the death, was part of the chain of causation of death. **Sections 213** of the **Penal Code** was relied upon. It provides:

“A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases—

(a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in

good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;

(b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

(c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;

(d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.”

20. The prosecution argued that the trauma to the deceased was caused by the intentional and unlawful act of the accused. They argue, relying on Nyakundi J in **Republic v Riziki Karisa [2020] eKLR** that the criteria to be observed of the accused is the voluntariness of his conduct. The judge in **Riziki** cited **S v Cunningham [1996] 1 SACR 631** where the court observed:

“That the state in discharging the onus is assessed by the natural inference that in the absence of exceptional circumstances a same person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged actus reus and, if involuntary, that this was attributable to some cause other than mental pathology.”

21. As far as proof of malice aforethought is concerned, the prosecution’s case is that the accused had a brawl with his mother regarding land to be sold. PW1 witnessed the brawls and PW8 accompanied her mother to the lawyer’s office where the deceased confided in her that she was angry because the accused wanted to sell her land, and she would not allow it. It was this refusal to sell land that explains the accused’s intention to grievously harm the deceased. Further that the accused in his evidence did not counter the prosecution evidence or show the prosecution had a motivation to lie.

22. The defendant’s submissions are, in material particulars, that the Investigating Officer failed to visit the Coptic Hospital in order to ascertain the medical history of the deceased and the cause of death; that medical records of the deceased would have assisted in the carrying out of the post-mortem; and that these gaps were critical to proving the case.

23. They argue that the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis. On this point the defence cited **Criminal Appeal No. 24 of 2001 Evans Kanai Karanja v Republic** where the Court of Appeal in Nakuru quoted **Omar Mzungu Chimera v Republic Criminal Appeal No. 56 of 1986** (unreported) where the court was not satisfied that the evidence was:

“... complete, and incapable of explanation on any other hypothesis than that of the guilt of the accused.”

24. This was stated by the Court of Appeal in **Evans Kanai** where it was further held that:

“.....applying the usual principles applicable in criminal cases, we find that there was a reasonable doubt on the evidence of the prosecution. The benefit of that doubt ought to have been given to the appellant. We must do so now, with the result that we quash the conviction recorded against the appellant, set aside the sentence of death imposed on him and order that he be released from prison forthwith unless he is held for some other lawful cause.”

25. The defence thus argued that the benefit of doubt ought to be given to the accused.

26. I have considered all the evidence, the documents availed and the parties submissions. The question is: what was the cause of the deceased’s death and was the accused party to it?

27. **Section 213 of the Penal Code** sets out the acts and circumstances under which death, though not immediate, has its roots in some act of the accused. In addition it is trite that *“all homicides are presumed unlawful unless excusable by law or reasonable defence of property or person”*. (**Republic v Guzambizi S/O Wesonga v [1948] 15 EACA 65**).

28. An unlawful act is any act punishable as a crime or involving penalties; or an act constituting an actionable wrong; or an act contrary to public policy or morality or injurious to the public. (See **Andrew v DPP [1937] AC 576**).

29. As for causation **HLA Hart, & Another** in English Law says:

“For causation to amount to murder by a defendant at the time of death, the defendant’s acts or omissions must be the operating and most substantial cause of death with no novus actus interveniens to break the chain of causation.” (Emphasis added)

30. The post mortem report shows that the deceased died from:

“brain injury attended by contusion/subdual haematoma and laceration due to blunt trauma to the head in a body with enlarged heart.”

The cross-examination of the pathologist led him to admit that:

“There could be two sources of death. Hypertension and from head trauma.” (Emphasis added)

and:

“There was the trauma in head and effect of enlarged heart i.e. hypertension.”

31. The police did not disclose the deceased’s full history to the pathologist that not only had the accused assaulted the deceased, she also had a history of blood pressure, a condition that she was under medication for. Neither did the pathologist indicate, in his report, that the deceased’s enlarged heart indicated hypertension. This came out in cross-examination.

32. It was nevertheless clear from the pathologist’s evidence that subdural haematoma or bleeding in the brain occurred due to blunt force trauma. He observed a contusion or bruise on the left temporal frontal area of the deceased’s head, and a brain laceration or tear/cut that was aggravated by the intercerebral haematoma or bleeding. These, with the deceased’s hypertensive condition from an enlarged heart had the residual effect of causing her death.

33. The clear evidence as to head trauma can be readily be attributed to the blows the accused meted on the deceased’s head, witnessed by PW1 who saw the accused hit the deceased’s head with his fist. Similarly, PW3 also witnessed the brawl with the accused holding the deceased by the collar on the ground, although he did not see the blows hitting the head. It is not clear from the evidence how many times the accused hit the deceased on the head since it was the househelp who reported to PW1 that there was a brawl outside in the compound, and when he got there he did not see her being hit.

34. There can be no doubt that the accused’s hitting of the deceased was an unlawful act, punishable as a crime. The hitting involved a fist to the head. I accept that it could result in trauma to the head and to bruises or contusion as described by the pathologist. The fact that the deceased also had an enlarged heart does not reduce the unlawfulness of the accused’s act. So that, the remaining issue is whether by hitting the deceased he intended her death i.e. whether there was malice aforethought.

35. **Section 206** of the **Penal Code** describes 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 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. (Emphasis added)

36. In **Nzuki v Republic [1973] KLR 171** the Court of Appeal held that intention to murder is proved if the following are demonstrated:

“(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 form his conduct is not by itself enough to convert a homicide into a crime of murder. (Emphasis added)

37. The accused was not ignorant of the deceased’s longstanding medical condition of the hypertension as she was his mother. Wilting or slapping and holding his mother by the collar on the and pinning her to the ground, speaks of a tussle of unnecessary force and procedures on addressing what seemed to be a family issue in the circumstances and thus, on either account, the accused satisfies the second and third

intentions as elucidated in **Nzuki v. Republic**(supra)

38. The honourable Court in the case of **Republic v. Godfrey Ngotho Mutiso [2000] eKLR** on the intention to cause the death of another or an intention to cause grievous harm to another contrary to **Section 206 (a) and (b)** of the **Penal Code**. It is observed as follows on the inference of malice that, “*the injury on the head was grievous. The deceased’s head was hit against the wall and as a result the deceased bled through the mouth*”.

39. Can it be said that malice aforethought can be inferred from these injuries? In the case of **Republic v. Tubere S/O Ochen [1945] 12 EACA 63** in this case the assault was of a serious nature causing severe injuries which the victim died shortly afterwards. The court held that it is the duty of the Court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it was used and the part of the body injured, and the conduct of the accused before, during and after the incident.

40. 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.”

41. In **Republic v Nedrick [1986] 3 ALL ER1 Lord Lane CJ** on malice aforethought held:

“What then do a jury have to decide so far as the mental element in murder is concerned? They simply have to decide whether the defendant intended to kill or do serious bodily harm. In order to reach that decision the jury must pay regard to all the relevant circumstances, including what the defendant himself or herself said and did.

In the great majority of cases a direction to that effect will be enough, particularly where the defendants actions amounted to a direct attack on his victim, because in such cases the evidence relating to the defendants desire, or motive will be clear and his intent will have been the same as his desire or motive. But in some cases, which this is one, the defendant does an act which is manifestly dangerous and as a result someone dies. The primary desire or motive of the defendant may not have been to harm that person or indeed any one. In that situation what further directions should a jury be given as to the mental state which they must find to exist in the defendant if murder is to be proved?”

42. Taking all the authorities into account, it is clear that malice aforethought connotes an intention, at the time of killing, wilfully to take the life of another or to cause grievous harm from which the victim succumbs to death.

43. In seeking to identify the mind of the accused here, I have also considered his conduct. From the evidence of PW3, when he saw the brawl, he got out of the car and went to stop it. He told the accused to cease and he did. He then asked the accused to get into the car and he did. From this conduct I do not see the mind of a man who intended grievous harm or serious harm. He was probably angry due to the disagreement and reacted inappropriately. When told to stop he did so.

44. Ultimately, and taking all the evidence together, I accept the evidence that the accused actions caused death of the deceased in terms of **Section 215** of the **Penal Code**. However I do not consider his intentions to have been to achieve that outcome. I do not see the intention of murder.

45. Accordingly, I find the accused caused the death of the deceased and is guilty of manslaughter contrary to **Section 205** as read with **Section 202** of the **Penal Code**. He shall be sentenced on a date to be agreed after a hearing on mitigation which shall be fixed forthwith.

46. Orders accordingly.

Dated and Delivered at Naivasha this 27th Day of April, 2021.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Maingi for the State
2. G. M. Njuguna for the Accused
3. Accused - Moses Kiriani Kinyanjui - present in court
4. Court Assistant - Quinter Ogutu