



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
HCCR CASE NO. 15 OF 2016
REPUBLIC.....PROSECUTOR
VERSUS
MARY WAWIRA NGARI.....ACCUSED

J U D G M E N T

Introduction

1. **Mary Wawira Ngari**, the accused person herein, is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence as per the information dated 23/09/2016 are that on the 12/09/2016 at Karumande Town Centre within Kirinyaga County the accused unlawfully murdered one Rose Wanjira.
2. The accused pleaded not guilty to the charge and the prosecution called a total of ten (10) witnesses in support of its case.

Brief facts of the case

3. On 12/09/2016 at around 5.00 p.m., the deceased was stabbed on the neck with a knife. Screams were heard after that incident and the accused was seen running away from a mob that was chasing her. She was soon arrested by members of the public who were running after her and taken to the APs post at the chief's camp and later transferred to a police station. The deceased was rushed to hospital but she later succumbed to the injuries. The matter was investigated by the police who eventually charged the accused with this offence.

Prosecution's Case

4. PW1, Fredrick Kanyatta Ngure testified that on the material day at around 5.00 p.m., he was at his place of work when he heard screams coming from a place where there were many women. He saw the women chasing somebody and went to find out what had happened. He saw a woman being chased and together with Peter Wangai (PW2), they chased after the woman, caught her and arrested her. According to PW1, the woman they caught was the accused person herein and she had blood stains in her hands and on her clothes. She however did not have any weapon on her at the time of the arrest. They then took her to Karumandi APs Post and left her there. The following day, PW1 heard from the radio that the deceased had passed away.
5. PW2 corroborated PW1's evidence. He testified that he heard commotion near his shop. He went outside and saw a mob chasing after a woman and started running after her. He managed to arrest the accused before the mob could attack her and took her to the police. According to PW2, the accused was wearing a whitish blouse and a skirt. He left the accused at the APs at the Chief's Camp and went back to where the deceased had been stabbed where he recovered a blood-stained knife, picked it from the ground and took it to the Chief's Camp. On cross examination, PW2 stated that he did not know how the knife got there and that there were no photographs that were taken of the scene.
6. PW3, I.P. Jackson Kirathe Macharia is a police officer and testified that on the material day at around 5.20 p.m., he received a call from CPL Karani, the in-charge of Karumandi AP Post. He was informed that there was a case of aggravated assault where a woman had been stabbed and the assailant arrested by members of the public. CPL Karani needed assistance to have the suspect removed from the camp and taken to Kirinyaga Police Station. Accompanied by other policemen, PW3 proceeded to the A.P. Post where he picked the accused together with bloody clothes of the victim and a knife.
7. PW4, Dr. Godfrey Njuki Njiru, was the doctor who conducted a postmortem examination on the body of the deceased on 19/09/2016. He stated that the deceased's body was pale, an indication that she had lost a lot of blood. The body had a stab wound on the left side of the neck, and a stab wound on left shoulder of the lumber region. He concluded that the deceased died as a result of severe external bleeding due to the severed veins on the neck. He then took a blood sample for purposes of finding out whether they match with the stains on the alleged murder weapon. He produced the postmortem report and the request for D.N.A. sampling as prosecution exhibits 1 a & b.

8. PW5, Elizabeth Waitthera Oyiego, was the government analyst who received the blood samples from the deceased, the knife alleged to be the murder weapon and the deceased petticoat. According to PW5, the knife and the petticoat were heavily stained with blood of human origin. He did a D.N.A. analysis on the items and concluded that the D.N.A. from the knife and the petticoat matched the profile generated from the deceased's blood sample. He then compiled a report which he produced as P.Exhibit 2.

9. PW6, Monica Njoki Nyaga, recalled that on the material day she heard screams from the town. She went to find out what had happened and found some men and women carrying a woman who had been injured. They were taking her to the hospital. She recognized the injured woman as the mother of John. Her clothes were heavily blood stained. PW6 assisted them and they took her to Karumandi dispensary. In the hospital, she saw that the deceased had an injury in the neck. The doctors dressed the wounds and said that she should be taken to Kerugoya Hospital. On being transferred to Kerugoya Hospital, the doctors there confirmed that she had died.

10. PW7, Teresia Ndege Kirengwa, is the deceased's husband. he recalled that on 19/09/2016, he was called from Kianyaga Police Station and told to go identify the body of his wife who had been killed. He went and identified the deceased to the doctor who performed the postmortem.

11. PW8, Dr. Joseph Thuo, is a psychiatrist working at Embu Level 5 Hospital. He examined the mental fitness of the accused who is a murder suspect and found that she was fit to stand trial. He produced the report he prepared in that regard as P.Exhibit 3.

12. PW9, John Muriithi Mwaniki, is the deceased's nephew and on 19/09/2016, he was among those who identified the deceased's body at the funeral home before postmortem was done.

13. PW10, Julius Koskei, is the Investigating Officer in this case. He recalled that on 13/09/2016 he was called by the D.C.I.O. who informed him of the subject murder case. PW10 teamed up with CPL Munyesi and proceeded to Karumandi where he recorded statements and received exhibits. He stated that the murder weapon was recovered by a witness who took it to the AP at Karumandi before it was handed over to police officer Ruiitha who then handed it over to him. He produced the exhibits of the blood-stained petticoat and the knife as P.Exhibits 3 and 4 respectively. He also produced his memo to the government analyst as P.Exhibit 5.

14. On cross examination, PW10 testified that he recorded a statement from one James Munene Karani who he was later informed had died.

Defence

15. The accused person testified that on the material day, she was on her business of buying food when she got arrested and taken to the chief's office and later taken by policemen from Kianyaga and remanded. She denied committing the offence she is charged with. The accused, through her advocates on record, filed her written submission on 15/01/2021. She submitted that the case is purely based on circumstantial evidence which failed to prove a direct connection between the accused person and the murder of the deceased. She stated that the murder took place in a market where there are many people who could have stabbed the deceased. It was the accused's submission that the prosecution had failed to prove the charge of murder to the standard required by law to warrant her conviction. The accused thus urged this court to acquit her under **Section 215 of the Criminal Procedure Code.**

Issues Arising for Determination

16. This Court is called upon to decide whether the accused is guilty of the offence of murder. **Section 203 of the Penal Code (Chapter 63 of the Laws of Kenya)** defines the offence of murder and requires proof of the following ingredients if the offence of murder is to be established:

- a. malice aforethought on the part of the accused,
- b. death of the deceased,
- c. the cause of the death by an unlawful act or omission on the part of the accused.

17. These ingredients were laid down by the Court of Appeal in the case of **Anthony Ndegwa Ngari -v- Republic (2014) eKLR** where the court stated that the prosecution is required to prove:

1. The death of deceased.
2. The accused committed the unlawful act which caused the death of deceased.
3. The accused had malice aforethought.

18. In this case that the following are the main issues for determination by this court:

1. Whether there is proof of the fact and cause of death of the deceased.
2. Whether the accused caused the death of the deceased. And if so,
3. Whether the acts of the accused, resulting in the deceased's death, qualify as murder (intentional killing).

It is trite law that the prosecution in a criminal trial bears the burden to prove the charge beyond any reasonable doubts. This is based on the constitutional principle in criminal trials that an accused person is presumed innocent until proved guilty. **Article 50 (2) (a) of the Constitution** provides:

“Every accused person has the right to a fair trial, which includes the right— (a) to be presumed innocent until the contrary is prove”.

This is a principle of fair trial and requires that the guilt of the accused be proved beyond any reasonable doubts.

The law is well settled that the legal burden of proof in criminal matters never shifts and remains thought the trial in the ‘court’ of the prosecution. In the celebrated case of **Woolmington -v- DPP 1935** which has held ground over the years on legal burden of proof in criminal trials it was stated as follows:

“ Through out the web of criminal law one golden thread is always to be seen, that it is the duty of prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception..... No matter what the charge or where the trial the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

This holding is in line with the constitutional provisions which I have cited on the right of accused to fair trial which includes the right to be presumed innocent until proven guilty. An accused bears no role, not even to prove her innocence, he/she has the right to remain silent and not give any incriminating evidence. The question I have to answer is whether the prosecution proved the charge against the accused beyond any reasonable doubts.

Proof of the fact and cause of death of the deceased

19. PW7 and PW9 are the deceased’s husband and nephew respectively. On 19/09/2016, they identified the deceased’s dead body before a postmortem examination was conducted on the body by PW4. PW6 also knew the deceased and testified that she saw the dead body of the deceased as she was among those who took her to hospital. It is therefore not disputed that the deceased indeed died.

20. On the issue of what caused the death of the deceased, PW4 produced the postmortem report as P.Exhibit 1a which he had prepared after examining the dead body of the deceased. From the said postmortem report, the death of the deceased was caused by cardiopulmonary arrest from massive external bleeding due to severed left major veins which transport blood to the head and were severed on the left side of the neck. The prosecution discharged the burden of proof that the deceased died as a result of external wounds on her neck.

Did the accused cause the death of the deceased?

21. PW6 heard screams from the town centre and when she went there, she found a woman who had been stabbed being carried by some people who were taking her to hospital. The material incident took place at a market in Karumande town centre at around 5.00 p.m. This is the same place that the accused was arrested by PW1 and PW2 who testified that they ran after the accused as she was being chased by a mob. The accused, in her defence, confirmed that she was the one arrested on the material day and taken to the chief’s camp.

22. On cross examination, PW10 testified that according to PW1’s statement, PW1 saw the accused armed with a knife. However, it was PW1’s testimony that the accused was not armed with any weapon at the time of the arrest. This means that there was no eyewitness account on how the offence was committed. The prosecution’s case was purely based on circumstantial evidence and it is trite that such evidence is as good as any other evidence.

23. The court of appeal in the case of **Musili Tulo v. Republic [2014] eKLR** stated as follows:

“Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”

24. The case of **GMI v. Republic [2013] eKLR** which echoes the *locus classicus* case of **R. v. Kipkering Arap Koske & Another, 16 EACA 135** went on to set out the following principles as the requirements that the court should consider when the evidence linking an accused person to an offence is circumstantial. The court stated as follows: “

- a. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- b. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- c. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”**

25. This court must also consider a further principle set out in the case of **Musoke v. R [1958] EA 715** citing with approval **Teper v. R [1952] AL 480**, that:

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

The counsel for the accused Mr. Ndana has submitted that the evidence does not irresistibly point to the accused to the exclusion of all others within the meaning in R- v- Kipkering Koske and another 16 E.A .C.A 135 where it was inter alia stated that-

“ In order to justify the inference of guilt the inculpatory facts must be incompatible with accused’s innocence and incapable of explanation upon any other reasonable hypothesis other than that of guilt.”

He further submits that the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of accused on the basis of the evidence tendered to connect the accused person to the death of the deceased. Mr. Ndana submits that what is before court is mere suspicion. He relies on Mary Wanjiku Gichira -v- Republic Criminal Appeal No.17 of 1998 (UR) where the court stated that

“ Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.”

He submits, and rightly so, that the burden is on the prosecution to prove facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of guilt and that this burden never shifts. The counsel is saying that there is no evidence tendered by the prosecution to prove that it is the accused who through an act or omission caused the death of the deceased.

26. On the side of the prosecution, Mr. Ashmosi, Assistant Direct of Public Prosecution submits that the evidence of PW1 and PW2 stands out to place the accused at the scene of the murder and was sufficiently identified. He submits that with this evidence the prosecution has proved their case beyond any reasonable doubts.

27. There is no doubt that the evidence relied on by the prosecution is purely circumstantial. The law requires that the inculpatory facts relied on by the prosecution must be incompatible with the innocence and can only be explained on the basis that the accused person is guilty. This is considered based on the chain of evidence that must be strong leaving no factors which would otherwise weaken that chain of evidence being relied on. In this case what triggered the circumstances were screams and there is no dispute that they were made by the deceased. The curiosity of anxious Kenyans in the market is aroused by the screams. PW1 Fredrick Kenyatta Ngiure, he heard screams, saw women chasing somebody. He goes there. He sees they are chasing a woman. He joins the chase and arrests the woman who is the accused. He realizes that the woman has bloodstains on her hands and on her clothes. He hands her over to the police. At the time he arrests the woman, he realizes she had injured another and advises the women to take her to hospital. Peter Wangai (PW2) is also attracted and chases the woman and manages to arrest her before she is attacked by a mob. The evidence shows that the woman being chased was the accused person. Upon her arrest she was examined by Doctor Thuo, a consultant psychiatrist who found her to be normal, with no mental abnormality and was fit to stand. From this analysis, it is expected that if she had not done something wrong, she would not have been running away but would either have been assisting the deceased or chasing the perpetrator. This is what was expected of a normal person. Her running away with bloodstains on her hands and clothes leads to only one reasonable and inevitable conclusion that she was running away after fatally injuring the deceased. PW2- picked a bloodstained knife at the place where the deceased was stabbed. The knife had blood stains which PW 5 confirmed that they were from the blood of the deceased. The knife which was produce as exhibits was no doubt the murder weapon. I find that there is strong circumstantial evidence which points to the guilt of the accused. It is only unfortunate that despite the testimony of PW1 and 2 that the clothes of accused were blood stained, they were not recovered and no analysis was done to establish the source of blood. This however does not weaken the prosecution case as the accused has not denied this fact. She had the blood stains so soon after the deceased was stabbed and leads to an inference that the blood was from the deceased who had a stab wound. The accused had come into contact with the deceased and that could only have happened when she stabbed her to death.

28. The testimonies of PW1, PW2 and PW6 were well corroborated and explain the circumstances surrounding this case as they squarely place the accused at the scene of the crime, at the time of the incident and explain why the accused was running away when she got arrested. PW1 and PW2’s testimony was also that the accused had blood stains in her hands and on her clothes at the time of the arrest. There is therefore no doubt that the accused caused the death of the deceased by stabbing her on the neck.

Was there malice aforethought?

29. Malice aforethought is the *mens rea* in murder. The prosecution had a duty to prove malice aforethought on any of the circumstances stated under **Section 206** of the Penal Code which **defines malice aforethought as follows:**

“206. 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.**

30. What can be deduced from **Section 206 (a) to (e)** of the **Penal Code** is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. The Court of Appeal in the case of Bonaya Tutu Ipu & another v Republic [2015] eKLR stated as

follows:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in REX V. TUBERE S/O OCHEN (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...” ”

See Nzuki -v- R (1993) KLR for a similar holding.

31. In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used in causing death, the number of injuries inflicted upon the victim, the part of the body where such injury was inflicted, the manner in which the weapon was used, and the conduct of the accused before, during and after the attack.

32. PW4 confirmed that the deceased died from external bleeding from stab wounds. PW2 recovered a knife at the scene which had blood stains. According to PW5, the blood stains on the knife matched the D.N.A. profile of the deceased’s blood. It thus follows that the knife produced in evidence was the one used by the accused to stab the deceased. This points to the fact that the accused acted with malice as she must have known that the act of using the knife to stab the deceased on the neck would have caused the death of, or grievous harm to the deceased.

33. ‘Grievous harm’ is defined by Section 4 of the Penal Code as:

“any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense”

34. In this case, although there is no evidence pointing as to what led the accused to stab the deceased, the weapon used (that is, a knife), the body part where the injury was inflicted (that is, the deceased’s neck), and the conduct of the accused (that is, running away from the scene) proves beyond reasonable doubt that the accused had malice aforethought to inflict fatal injuries on the deceased on the material day.

Conclusion

35. I find that the accused person, with malice aforethought, inflicted fatal injuries on the deceased on the material day. The prosecution has therefore proved beyond reasonable doubt, that:

- i. The deceased died as a result of external bleeding due to severed vessels from stab wounds.
- ii. The death of the deceased was the direct consequence of the actions of the accused.
- iii. The accused had malice aforethought to cause the death of the deceased.

36. In the circumstance I find that the prosecution in this case has discharged the burden to prove the charge of murder against the accused beyond reasonable doubt.

I find her guilty as charged and I convict her under Section 322 of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT CHUKA THROUGH VIRTUAL PROCEEDINGS THIS 27TH DAY OF MAY 2021

L.W. GITARI

JUDGE