



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 23 OF 2012

REPUBLIC

vs

PETER GATHOGO GITHUL.....ACCUSED

JUDGMENT

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He is accused of having murdered **NELSON WARUI MUZEE** on the 8th day of July, 2012 at Maria Village along Ngorano Kabiruini road within Mathira West sub-County. The accused had a mental assessment test conducted by a Dr. M. J.N.Thuo (**PW2**) who produced the report which was marked as '**PExh.2.**' The accused was found fit to plead and to stand trial and upon taking plea the accused pleaded not guilty to the charge.

2. At the hearing the accused was represented by Learned Counsel Mr. Kimani Njuguna whereas Ms. Gicheha was the Prosecuting Counsel for the State; The prosecution called a total of six (6) witnesses to buttress its case and upon the close of the prosecution case this court found the accused had a case to answer and he was placed on his defence; His rights were explained to him and he elected to give a sworn statement of defence. Hereunder is a narration of each party's case.

THE PROSECUTION'S CASE

3. **PW1 Alice Wanjiku Muthee** the mother of the deceased testified that on the fateful night of 8/07/2012 she was in her house when she heard her son saying "**Gathogo you want to kill me**"; the said Gathogo then retorted that he must kill someone in the deceased's house as he had been falsely accused of stealing **PW1s** phone; indeed, **PW1** acknowledged that her phone was taken on the 7/07/2012 when she and Gathogo were in the same shamba popularly known as '**Kwa Nyaga**'; under cross-examination the witness stated that it was not very dark and her visibility was 10 to 15 metres but she could not tell the colour of clothes that the accused was wearing; she also told the court that she did not see the accused with a knife and never witnessed the incident and that all she heard was her son saying '**you have stabbed me**'; she confirmed that she had not reported the theft of the phone to the police.

4. **PW2** Simon Kirunyu Githaiga was a cousin of **PW1** and his evidence was that he was in attendance at the Post Mortem of the deceased;

5. **PW4 Wilson Mitambo Ngatia**, testified that on the night of 8/07/2012 as he heading home he found the accused and the deceased quarreling and insulting each other at the gate of the deceased's home; the deceased's mother and his brothers came out of the house and told them to stop quarrelling; although it was dark the witness stated that he recognized their voices and the deceased's mother also called out their names; during cross-examination the witness confirmed that he knew the accused and the deceased very well as they all hailed from the same area;

6. Dr. Paul Kimathi (**PW3**) was the pathologist attached to Mukuruweini Sub-County Hospital and he conducted the post mortem on the deceased at Karatina District Mortuary and produced the Post Mortem Report ('**PExh.1**'). He testified that there was a stab wound to the heart and the cause of death was due to cardio pulmonary arrest secondary to haemorrhage and secondary to a penetrating chest injury.

7. **PW5** Chief Inspector Charles Odhiambo, the investigating officer, described the investigations he carried out; on 8/07/2012 he recorded a report from members of the public on a murder that had occurred at 23.45 hours; he proceeded to the scene of crime with PC Chepkonga and the parents of the deceased took them to the homestead of the accused who confessed to having stabbed the deceased because he had been accused of stealing the deceased's mother's mobile phone; neither the mobile phone nor the murder weapon were recovered; under cross-examination he confirmed that he was the one who recorded the accused's confession and that it was within his purview as an investigating officer to record a confession on a matter he was investigating.

8. **PW6**, PC Kipkemoi Chepkonga testified that he was the arresting officer and upon receiving a report on 8/07/2012 of a murder in the company of the OCS Chief Inspector Charles Odhiambo (**PW5**) they proceeded to Kabiorini Village; the deceased's family directed them to the home of the accused who readily confessed to having stabbed the deceased who had accused him of stealing his mother's phone; upon being cross examined he told the court that the accused had confessed to both him and **PW5** but he did not know whether a confession was

later recorded;

9. It was the prosecution's case that there was uncontroverted circumstantial evidence that pointed to the accused as the person who committed the offence and prayed that he be found guilty of murder.

THE DEFENCE'S CASE

10. The accused **DW1** made a sworn statement of defence and stated that on the fateful night the deceased came to his gate and threatened him by saying '*utaniona*'; the deceased hit him on the face and he retaliated by kicking him on the chest and the deceased fell down and was bleeding; after kicking him he did not bother to check on the deceased and just entered his own house; he further stated that there was no one at the scene at the time and that he had no weapon; that he did not stab the deceased neither did he make any confession to the police officers and to support this he testified that the police officers produced no confession in court; under cross-examination he admitted that he and the deceased were friends and hailed from the same village; he refuted the allegations of having stolen **PW1's** phone or ever having worked with her at the shamba;

11. In his submission the accused submitted that the testimony of **PW1** ought to be treated with the utmost caution as she was not a candid and credible witness and that her evidence was overly exaggerated and self-serving; at first she had stated that there was no one at the scene other than the accused and the deceased but later changed and stated that **PW4** was present and that the evidence of **PW4** varied with that of **PW1**;

12. The investigations were casually handled and bungled by **PW5** and only implicated the accused in an alleged confession that he got from the accused; being the investigating officer he could not have taken the confession as he lacked legal capacity; needless to say no confession was ever produced as an exhibit;

13. The burden of proof lies with the prosecution and that it is trite law that it is not upon the defence to fill in the glaring gaps left by the prosecution; the upshot was that the evidence adduced by the prosecution fell short of the threshold required and as there was no credible or compelling evidence that the court could use to convict the accused, he urged the court to find him Not Guilty.

ISSUES FOR DETERMINATION

14. After the full hearing of the case and the hearing of the final submissions made by both the prosecution and defence counsel this court has framed the following issues for determination:

- (i) Fact of death of the deceased and the cause of death;
- (ii) Whether the accused caused the death of the deceased by either an unlawful act or an act of omission; and
- (iii) Whether the accused in causing the death had malice aforethought.

ANALYSIS

15. In a charge for murder the prosecution has to prove three ingredients of the offence. It must prove the fact of death, the cause of death and that the accused caused the unlawful act or omission that caused the death. Lastly, it must prove that the accused had the intention to cause death.

Fact of death; the death of the deceased and the cause of death:

16. On the fact and cause of death; Dr Paul Kimathi (**PW3**) was the pathologist who conducted the post mortem on the body of deceased at Karatina District Mortuary and he prepared and produced the Post Mortem Report ('**PEXh.1**') which indicated that the deceased had a stab wound to the heart; He concluded that the cause of death was due to cardio pulmonary arrest and haemorrhage occasioned by the penetrating chest injury;

17. From the medical evidence of **PW3** on the cause and fact of death of the deceased and the Postmortem Report which he had prepared which was admitted into evidence and was marked as '**PEXh.1**' this court is satisfied that this ingredient was proved by expert evidence as required by Section 48 of the Evidence Act.

Whether the accused caused the death of the deceased by either an unlawful act or omission:

18. The difficulty the prosecution had was that there was no direct evidence on the '*actus reus*' therefore its entire evidence was based on circumstantial evidence as to what actually transpired before and up to the incident.

19. Circumstantial evidence must be examined in the light of the principles set out by the Court of Appeal in **Sawe vs Republic [2003] KLR 364**. The court held as follows;

"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. There must be other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution,

and always remains with the prosecution. It is a burden, which never shifts to the party accused”

20. The prosecution relied on the evidence of **PW1** and **PW4** to prove that the accused caused the death of the deceased; the evidence of **PW1** was based on the circumstances prior to the fight; that there was bad blood existing between the accused and the deceased as the accused had been implicated by the deceased as having stolen her phone; on the fateful night the deceased confronted the accused and being infuriated by the accusations an altercation ensued mingled with insults; **PW1**'s evidence was corroborated by that of **PW4** as both testified that on that night they both heard the tirade between the accused and the deceased and even though they did not witness the incident nor saw the accused with any weapon, both placed the accused at the scene of the crime on that fateful night;

21. This court reiterates that the prosecution needed to adduce evidence to prove that the accused was the one who inflicted the injuries on the deceased that led to his death; but the peculiar circumstances of this case is that there is overwhelming and uncontroverted evidence from the prosecution witnesses **PW1** and **PW4** that they identified the accused by his voice and placed him at the scene of crime on the fateful night and the accused person's defence supports the prosecution's case that an altercation ensued at the gate of the house and that he confirmed having kicked the deceased in the chest; according to the evidence of **PW3** the doctor who performed the post mortem on the deceased was that his death arose as a result of the penetrating chest injury;

22. After the kick the deceased then fell down and was bleeding from the mouth but the accused un-botheredly walked away and entered his house;

23. It is this court's considered view that these facts and evidence brought forth by the prosecution are enough to enable this court to draw an irresistible inference to the exclusion of any other reasonable hypothesis of innocence that the unlawful act that led to the death of the deceased was committed by the accused;

Whether the accused in causing the death had malice aforethought

24. The definition of malice aforethought is found at Section 206 of the Penal Code which 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 p

(b) person actually killed or not;

acknowledge 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.”

25. According to the above section malice aforethought is deemed to be established by evidence which proves an intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not.

26. The malice aforethought can be garnered from the evidence of **PW1** which was that she heard the accused shouting on that fateful night **“utania”** and the deceased shouting back **‘Gathogo you want to kill me’** but this evidence is uncorroborated as **PW4** evidence was that he just heard the two trading insults;

27. The facts and evidence brought forth by the prosecution shows that there is no evidence that prior to the incident that there was any pre-meditation on the part of the accused and there is no doubt in the court's mind that the death of the deceased arose fortuitously from the deliberate act of the accused in forcefully kicking the deceased in the chest; the force may have been excessive but this court is satisfied that there was insufficient evidence adduced by the prosecution to establish malice aforethought;

28. From any angle the peculiar circumstances of the case the prosecution evidence clearly establishes beyond reasonable doubt the lesser offence of manslaughter, in that his unlawful use of force resulted in the death of the deceased and the death was not intended or anticipated;

29. This court hereby substitutes the charge of murder against the accused with the lesser offence of Manslaughter c/s 202 as read with Section 205 of the Penal Code and accordingly convicts him on the lesser offence of Manslaughter.

FINDINGS AND DETERMINATION

30. For the foregoing reasons this court makes the following findings and determination:

(i) This court finds that the fact and cause of death was proved by expert evidence.

(ii) This court finds that the accused committed the unlawful act that caused the death of the deceased;

(iii) This court finds that malice aforethought necessary to constitute murder has not been established.

(iv) The accused **PETER GATHOGO GITHUI** is hereby found **GUILTY** of the offence of Manslaughter and is convicted accordingly.

It is so Ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 27TH DAY OF MAY, 2021.

HON. LADY JUSTICE A.MSHILA

JUDGE