REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO. 12 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL MUHURI WAMBOI.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Lughanje advocate for the accused person

J U D G M E N T

The accused **Samuel Muhuri Wamboi**, was charged and tried for the offence of murder contrary to Section 203 as read with 204 of the Penal Code.

In brief the state alleged that on the 10.10.2018, at Garden village of Langoni, Location Lamu West, accused murdered one **Janet Wambui Nyaga**. During the trial accused who pleaded not guilty was represented by Learned counsel **Mr. Lughanje** whilst **Mr. Mwangi,** prosecution counsel appeared for the state. The prosecution case was based on the evidence of ten witnesses. In answering the charge, it's clear from the record that the accused elected to give a sworn statement of defence. The issue of proof whether the accused committed the offence is vested with the state as expressly stated in Section 107, 108 and 109 of the Evidence Act.

The burden is to proof existence or non-existence of the alleged facts for a trial Court to give Judgment in their favor against the accused person. The standard of proof in such a criminal case is that of beyond reasonable doubt. Fortunately, the accused bears no burden to prove his innocence as provided for under Article 50 (2) (a) of the Constitution. **(See also Woolmington v DPP {1935} ac 462, Ali Ahmed Saleh Anigata v R {1959} EA 654, R v Nyambura & 4 others {2001} KLR 355).**

The accused therefore must only be convicted on the strength of the state evidence and not the weakness of his defence.

It is trite that under Section 203 of the Penal Code, the prosecution must proof the following ingredients:

(a). That the deceased named in the charge sheet is dead.

(b). That the death was caused unlawfully.

(c).That in the killing of the deceased, the accused was motivated with malice aforethought.

(d). Finally, the accused was positively identified as the one culpable.

(1). Generally, if there is no evidence of existence of the death of human being an offence of murder contrary to Section 203 of the Penal Code would be farfetched. That is the reason why the death of another human being sits at the heart of the offence of murder. Under our criminal justice system, death is normally proved by medical evidence. That is the position taken by the Court in **R v Cheya & another {1973} EA 50.** Notwithstanding that legal position, in absence of a postmortem report, death may also be proved by credible and cogent circumstantial evidence.

In the instant case **(PW1) Lucy Wathimu Njogu**, **(PW2) Geoffrey Mureithi Kaburi, (PW3) Eunice Nyawira, Anne Njeri, (PW5)**

Samwel Waihenya, (PW7) IP Michael Lemasi and **(PW8) – Dr. Samuel Kamau** confirmed the death of the deceased. As a consequence, the prosecution has discharged the burden beyond reasonable doubt that **Janet Nyaga** is dead.

(2). Second, is the ingredient whether the cause of death was found to be unlawful.

It is settled Law that the cause of death is the one which implicates an accused person alleged in the information to have murdered the victim. It is a fact proven by medical evidence. In regard to this ingredient. **(PW4) – Anne Njeri** testified that on the 10.10.2018 he had a conversation with the accused at pentagon club where he informed her that he has killed the deceased. Following that shocking news **(PW4)** made attempts to telephone the deceased but her calls went answered. It was also the prosecution case vide the testimony of **(PW7) No. 2023360 Inspector Michael** who told the Court that on interrogation of the accused, he confirmed that indeed his wife is dead due to strangulation which he facilitated himself on the material day. On, hearing this information **(PW7)** mobilized other officers to visit the scene. According to **(PW7)** on arrival at that scene they broke into the house occupied by the accused together with the deceased. In that particular house, **(PW7)** stated he saw the body of the deceased on the floor behind the curtain subdividing the room. According to **(PW7),** he recovered a wooden bar, which he observed was the probable weapon of murder, a curtain wire tied around the deceased neck and a piece of mosquito net which was tied to the wire. The relevance of this circumstantial evidence is important for the very reason that the postmortem examination produced as exhibit 1 by **(PW8)** corroborated critical aspects of the recovered murder weapons by **(PW7).**

There is sufficient proof that the death of the deceased was unlawfully caused going by the opinion of the medical evidence that she died due to strangulation. The strangulation was effected by a third person who engaged in unlawful acts of assault restricting oxygen flow to the entire human system of the deceased.

I find it impossible in this respect that the death of the deceased was based on a narratology of suicide. It appeared from the admission of facts to **(PW1)** that the accused in strangling his wife, the deceased had intended not to occasion harm but terminate her life from the face of the earth.

Consequentially, all the chain of events points to a homicide committed by unlawful acts of assault by the perpetrator of the crime. Third, is the critical element of intention, commonly referred to as malice aforethought as defined under Section 206 of the Penal Code, malice aforethought as defined under this Section **comprises of an intention to cause death of any person or to do grievous harm, whether such persons is the one actually killed or not knowledge that the act or omission causing death will probably cause death of a person, whether that person is the one killed or not, though such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may be caused.**

The questions which bound on this legal definition include:

> **(a). Did the accused forsee any risk of the prohibited consequences of the loss of life.**
>
> **(b). Did the accused reconcile himself to that risk and proceeded to commit the crime.**
>
> **(c). Did the accused desire the outcome of death of his or her victim.**

In the comparative jurisprudence in **S v Sigwahla {1967} SA 566** the Court said:

> **"The expression intention to kill does not in Law, necessarily require that the accused should have applied his or her will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his or her act causing death and was reckless of such result."**

Thus for the finding of malice aforethought, the test and principles at work are as elucidated in the case of **R v Tubere s/o Ochen {1945} 12 EACA 63** where in the context the circumstances manifest on the weapon used, whether lethal and dangerous or not, the part of the body targeted by the accused, the manner in which the weapon was used, i.e. was it one strike, stab, were the injuries multiple etc and the conduct of the accused before, during and after the murder.

Applying the above principles, it is helpful to recall what it is that the unlawfulness requirement which entails conduct judged unlawful as informed by the breach of the legal provisions by the Bill of Rights in the Constitution.

Furthermore, under Article 26 (1) of the Constitution ***"every person has the right to life."***

(3). A person shall not be deprived of his or her life intentionally except to the extent authorized by this Constitution or other written Law. Summarizing what has hitherto been said by the prosecution witnesses. **(PW1) – (PW9),** in respect of the nature and extent of malice aforethought accused's connection is based on circumstantial evidence, in a sense that nobody saw him strangle his wife the deceased.

The Law on this branch of Law has been extensively dealt with by various superior Courts. The whole point about the doctrine in a consequence crime was given in the case of **Abanga alias Onyango v R CR Appeal No. 32 of 1990** the Court stated thus:

> **"It is settled Law that when a case rests entirety on circumstantial evidence, such evidence must satisfy three tests:**
>
> > **(i).The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established.**

(ii).Those circumstances should be definite tendency unerringly pointing towards guilt of the accused.

(iii).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 none else. (See also Simon Musoke v R {1958} EA 75).

In the case of **Pollock CB seems to have started it all in 1866, in Exall** where he said:

> **"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fail. It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be circumstantial evidence there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of."**

In the present prosecution case, hinges on the evidence of **(PW1), (PW2), (PW3)** to whom evidence emerges that accused went to Pentagon Club and did have a conversation with **(PW1).** According to the evidence of **(PW1)** accused refuted to her that he had accomplished the mission of killing his wife. This troubling information necessitated **(PW1)** to inform other members of the family and neighbours. Significant information emerged when **(PW7) IP Michael** and **(PW10) CPL. Odero** visited the scene. First, the door to the house occupied by the accused and his deceased wife was locked. Second, in a search to find the body of the deceased, **(PW7)** and **(PW10)** forcefully broke the door to gain entry. Third, on entering the house they discovered the body of the deceased laid on the floor behind a curtain with a wire insulated in a mosquito net tied around her neck. In addition, a wooden bar lay next to the body of the deceased. These findings corroborated the admitted facts by accused to **(PW1)** that he had killed his wife. There was no evidence that the deceased had hanged herself to a tree, or device, which could have resulted in the death being occasioned by self-inflicted injury through suicide.

This critical appraisal of circumstantial evidence by (PW2) was corroborated by the postmortem examination report that the deceased cause of death was due to strangulation. The deceased on his part denied any involvement as the perpetrator of the crime. He essentially focused on basic routine issues of the day without answering the question how the deceased could have met her death in the same house which he resides.

I find the evidence by the accused not truthful to rebut the circumstantial evidence given by the prosecution witnesses. I have found it extremely difficult to believe the accused's story that he did not kill his wife for a number of reasons. In the first instance, he is the one who made the report of the apparent death of the deceased to **(PW1).** Secondly, there was no other evidence of a third occupant in that house where the body of his wife was recovered motionless with a wire tied around her neck. Third, he talks of calling the wife, who failed to consider, only later to discover that she had hanged herself. Fourth, the accused's subsequent conduct does not tally with the conduct of a person who had been bereaved. He says he found his wife, having committed the suicide, but that stands in contrast with the evidence given by **(PW7)** and **(PW10)** in regard to the surrounding circumstances at the scene. There was no evidence of the deceased that she hanged herself. The body in question according to **(PW7)** and **(PW10)** was lying on the floor behind a curtain separator of the space with another in the same house. The possibility of the deceased having killed herself is very remote and is a hypothesis being propagated by the accused with no support of credible evidence.

This means that the sacrosanct of life of the deceased was breached by the accused. It was a murder committed unlawfully and with malice aforethought. That ingredient has therefore been discharged beyond reasonable doubt by the prosecution.

On identification in **Turnbull v R {1977} QB 224,** guidelines or directions are needed in this case. The prosecution case depended wholly and substantially on recognition evidence. The accuracy of it comes from the honesty of **(PW1)** testimony. The governing principles in relation to self-incrimination by the accused when he told **(PW1)** that mission accomplished is of importance to implicate him with the murder of his wife.

Furthermore, from the accused defence, he gave false alibis and other lies which could not exonerate him from the scene. I am satisfied in this case, for the purposes of identification, a full and complete surroundings had been made at the scene and in those circumstances there is little or no doubt that a crime of murder was committed by none other than the accused. There was sufficient information known to the police to justify the arrest and indictment of the accused as a suspect involved in the killing of his wife. This identification issues were never disputed materially by the accused. The evidence on identification was compelling and untainted by the accused defence.

In the upshot, I find the accused guilt of the offence of murder contrary to Section 203 of the Penal Code and as a consequence he is wholly convicted as per the Law established.

Sentence

In consideration of the mitigating and aggravating factors of the case at bar, and the principles advanced in **Francis Muruatetu v R {2017} eKLR** I do exercise discretion to impose a sentence of thirty (30) years imprisonment to run from the date of arrest.

Sentencing verdict

The convict herein was found guilty of murder contrary to Section 203 as punishable under Section 204 of the Penal Code. The schedule details a maximum sentence of death penalty. In highlighting the policy framework to achieve consistency outside the unconstitutionality mandatory death penalty, the **Supreme Court** in **Francis K. Muruatetu v R {2017} eKLR** generated structured scheme of sentencing which permits judicial discretion taking into account a variety of factors. Such features like the circumstances of the offence, the seriousness and gravity, the age of the offender, the personal antecedents, the viability of alternative sentences, the significant level of mitigation and

aggravating factors and the flexibility of individualized sentences to each particular case. By drawing from the mitigation offered on behalf of the convict by counsel and the strength of it in contrast with the aggravating factors, I think its right not to pass the death penalty against the convict in this case. Unfortunately, there are no sufficient mitigating circumstances to merit leniency for the diminished culpability of the convict.

Having considered the sentencing guidelines in Muruatetu case, the objectives in our sentencing policy, the period spent in custody, aggravating and mitigation factors, I find a sentence of thirty (30) years imprisonment for the convict appropriate with effect from 11.10.2018.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF OCTOBER, 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the State

2. The Accused person