



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 60 OF 2016

REPUBLICPROSECUTOR

VERSUS

PETER MUTUMA M'LUIBUTAACCUSED

JUDGMENT

1. On 19/9/2016, the accused herein, **Peter Mutuma M'Luibuta**, was arraigned before this court and charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that on the 5th day of September, 2016 at Laare Market Antuabui Sub-location, Igembe Sub-County within Meru County murdered Grace Kaimuri. He pleaded not guilty to the charge, and the prosecution paraded 5 witnesses in support of its case.

The prosecution's case

2. **PW1 LM**, a minor who after voir dire gave unsworn testimony, said that on 5/9/2016 he had come from school for lunch at 1.00pm and found his mother seated on a plastic chair that inside the house. He tried talking to her but she did not respond but only shook her right leg. He served himself lunch as his mother was not responding and went back to school since there was nobody else in the house. On his way back to school, he found his father at Peter Kabira's place, washing Peter's vehicle. He told him that his mother was not responding and his father left for home. He came back home at around 3.00 pm, after school, and found his father at the door. He took the key and went to change his uniform but when he was returning the keys to his father's bedroom, he found his mother sleeping on the floor having changed her clothes. The chair she had earlier been seating on was also in the bedroom. She did not have her nails as they had been cut and there was a basin with blood. Her clothes were also red and his father was just standing at the door. They did not speak and he went to play with his colleagues. The government, his brother and sister came home on that day.

3. In cross examination, he stated that on the material day, he found food at home but does not know who cooked it. His father was not at home when he came home for lunch and nobody else was at home apart from his mother. He recorded his statement with the police and denied that his father gave him Kshs. 200 for lunch. He stated that his father did not drink at all, but his mother was taking alcohol and was taking beer when seated at the chair, and she could not even speak from being drunk. She used to buy beer for herself and was not brewing it. His mother used to always drink and even drunk money for their food and used to go away from home at her own volition. His parents used to fight when he was younger but stopped when he grew up. He did not see his father beat his mother on the material day and he was the one who told his father that his mother was not talking. His father did not have a weapon with him and he did he see the clothes his mother was wearing during lunch.

4. **PW2 HMW**, testified that she lived at Laare and sells eggs. On 5/9/2016 her younger brother MK informed her that their father had said their mother was critically ill and had taken her to hospital. He informed her again that her mother had died and their father had taken her to the mortuary. She went home and found only their mother lying down. She tried calling her but she did not respond. She went out and started screaming and met with her father outside the gate with her younger brother, who asked her why she was screaming. She borrowed a torch from them and saw that her mother had been injured on her neck and had other injuries on her body. She rushed out and called her younger sister with whom they went to report to the police station where the father told the police that their mother, the deceased was sick and he should be given a vehicle to take her to hospital. The witness then told the OCS that the deceased was not sick but dead, and that it was her father who had killed her. Her father was then arrested. The police took the body to Meru General Hospital Mortuary and she and a police officer witnessed the postmortem. She said that her parents were fighting all the time and her father said her mother was a drunkard.

5. In cross examination, she stated that M came to her place at 9.14 pm and told her that their father had told him their mother was sick. It took her about 5 minutes to get to their home. That day in the morning, she had met her mother at the gate and she was fine and alive and she only saw her father at night that day. She found her mother on the floor with her head on a plastic chair and there was nobody else there. Her mother was not bleeding but had a swollen nape and hands. Her mother used to drink but her father did not drink. She is the one who told the police that it was her father who had killed their mother even though she never saw him kill her mother as much she did see them fight. She denied ever discussing with her younger brother, PW1 whether he witnessed anything. On the material day when she saw her mother, she

was not drunk but maybe she drunk later. She never talked to her father as she was angry. Her mother used to drink at a club about 300 m from home.

6. **PW3 CPL John Kimutai** testified that he was attached at Laare police station. On 6/9/2016 at around 0700 hours, he was at the station when he received a report of murder which occurred on 5/9/2016. The report was made by Winnie Makena. PC Lambela and himself visited the scene and found the deceased inside the house lying on the floor. They searched the house and recovered a panga with blood stains, a rungu, a pair of scissors, 1 long trouser with blood stains belonging to the accused, a green scarf belonging to the deceased, a torn bedcover, which he produced as exhibits No 2 -7. He made a sketch map of the area which he equally produce as exhibit 8. Having made the said recovery, they removed the body and arrested the accused, took the body to the mortuary, recorded statements and a postmortem was done.

7. In cross examination, he averred that he received the report on 6/9/2016, collected the body on the same day at 7.00 am, but the murder took place the previous day. To be clear, he said that the initial report was made on 5/9/2016 and body collected on 6/9/2016. There were other items in the house but he collected the murder weapons. He stated that no analysis was done on the blood stains, and no sample was taken. The trouser he affirmed, belonged to the accused as his children identified it to belong to him.

8. In re-examination, he stated that the accused's younger son's evidence informed their decision to charge the accused. The accused was also not reporting the murder and they suspected him. Their investigation did not show any other person committed the offence.

9. **PW4, Dr. Timothy Riunga**, a medical officer at Meru General Hospital since 2015, had with him the postmortem report completed by Dr. Njeru, whom he confirmed he had worked with, between 2015 -2019, and was familiar with his signature. The report was in respect to the body of one Grace Kaimuri which examination was conducted on 19/9/2016. The body was positively identified by a Winnie Makena and Sabina Nchooro. On the body, the report said, were multiple bruises obscured on the legs, left and right shoulders and swelling around the left eye. There was contusion of the scalp, blood clot on the left side of the head, internal bleeding- sub-dural hematoma and he concluded the victim's cause of death was head injury due to assault by a blunt object. He produced the postmortem report as exhibit 9. In cross examination, he stated that he did not author the report, and by the time the postmortem was being conducted the death certificate was being processed.

10. **PW5, MK**, a son to the accused with deceased, testified that on 5/9/16 at about 7.00 pm, he was at work and that on his way home, he met the accused at the gate, and asked him where his mother was and the accused told him she was dead and he went to Winnie and reported to her the news.

11. In cross examination, he stated that he got home at about 7 pm and met his father at the gate but did not go to the house to view the body at that time. With the 5 witnesses the prosecutions case was closed, the accused found to have a case to answer and was thus put on his defence.

Defence Case

12. Having been put on his defense, the accused chose to give sworn testimony and testified that he was a driver by profession who woke up on 5/9/16 at 8 in the morning and went to work. He left his wife, the deceased at home and only came back at 8 pm when he found the deceased alone in the house on the ground, and he tried to wake her up but she was non responsive. He saw her head was bleeding and wiped some of the blood with a t-shirt he was wearing. He lifted her and saw more blood oozing from her head. There was no other injury save for the head, and he tried to put her in the vehicle so as to take her to hospital. It was in this process that his clothes got blood stains. He left her and went to the police to make a report that he had found his wife dead in the house. He was put in a cell as the police went for the body and brought it to the police station. The deceased was drunk that day but they did not drink together. He found the door open and did not know where the body was taken as he has been in custody.

13. In cross examination, he averred that in his house, there were 3 people namely MK, Kawira, LM and himself and reiterated the fact that on the material day, he woke up at 8 am and went to work with the vehicle belonging to Peter Kabera, and came back at 8 pm. He found the deceased down on the floor, tried speaking to her but she did not respond. The rest of the people were not there as they had gone to the grandmother. He admitted having heard the evidence of PW1 that on that day, they met at 1 pm having gone to his place of work, because his mother had not prepared lunch. From his place of work to his house, it was about 1.5 kilometers. He did not have immediate neighbors so he did not seek assistance from anybody. He was the one who made the report not Winnie Makena. He admitted that the police recovered a knife and scissors but did not know about the recovery of bloody sticks or blood stained panga and that he was the first person and alone when he found his injured wife.

14. In re-examination, he repeated that he was not present when the police visited his home to take the body and he did not know what they recovered and further that on that day, there were no children in the house as they had gone to visit their grandmother.

Submissions

15. The prosecution in their submissions filed on 16/9/2021, take the position that the accused had the chance and means to commit the offence as he had battered his wife before and the bloodied items belonged to him and were recovered in his house. He had the motive as the wife was a drunkard who used to spend money left for food on alcohol. He also had the opportunity to commit the offence as he was left with the deceased, who was well in the morning and was found with the deceased in the evening, hence, it is, to them, quite clear that the prosecution's case was well corroborated and consistent throughout and the case was proven beyond reasonable doubt.

16. The accused in his submissions filed on 23/9/2021, submitted that no eye witness testified in this matter ever said categorically that they saw the accused person beating or committing the offence, and as such all are left to speculate and make our own conclusions. It was stressed that the evidence on record is to the effect that the deceased was a lover of liquor and she had taken beer and that the only evidence placing the accused at the scene of crime is the mere fact that it was his house and the deceased was his wife. The court was said to have been only left with circumstantial evidence which must be treated with caution before making a conclusion. To the defense, the prosecution did not

prove its case beyond reasonable doubt to warrant a conviction in this matter, and therefore, it was urged that the accused should be acquitted on a benefit of doubt.

Analysis and Determination

17. I have considered the evidence and submissions presented before the court by both the prosecution and the defence. This being a charge for murder, the prosecution must prove beyond reasonable doubt; the fact and cause of death, that the death was as a result of an unlawful act or omission on the part of the accused persons and that there was malice aforethought.

18. There is no doubt the prosecution has been able to prove the fact and cause of death of the deceased to the required standard. It was established by PW4 that the cause of the death of the deceased was head injury due to assault by a blunt object. That finding sits well in consonance with the evidence of the three children of the couple (accused and the deceased) as well as the evidence of the police officer who retrieved the body from the scene.

19. The issue in contention is whether the said death was caused by an unlawful act of omission or commission on the part of the accused and if there was malice aforethought. It is also incontestable that none of the prosecution witnesses could attest that it was indeed the accused who had actually killed the deceased. The matter then remains to be decided on the circumstantial evidence revealed by the totality of the evidence by PW1, PW2 and PW5. I summarise that corpus of evidence to be that the deceased was alone at home on the material day and was found by the minor, PW1, at about 1 pm in a non-responsive state. PW1 informed the accused of that position and the accused then went home and was home by 3 pm when pw1 came back to the home and met the accused at the door while the deceased was now on the ground in the bedroom with different clothing. In addition the child saw a basin with blood outside the house. That evidence was never meaningfully challenged on cross-examination. I do find that the evidence not only places the accused at the scene of the crime but also show that he had the opportunity to commit the offence or had a duty to explain how and by whom the deceased was moved to the bedroom and sustained the fatal injuries. In fact it questions the defence of having been away and only came back at 8pm.

20. Added to that evidence was that of pw2 who said that she reported the matter after 9pm on the material day and that the accused came to the home at about 9pm wielding a torch. That evidence tell me that the accused was aware of the deceased injuries at about 3pm and did nothing about it, not even reporting to the police. I find that the circumstances point to no other hypothesis other than that the accused was the author of the injuries that resulted in the death of the deceased. I find his evidence of being away between 8 am and 8pm to be unbelievable on the evidence by the PW1 and 5 that he had been at the scene prior to 8pm that evening.

21. From the evidence on record, there is sufficient circumstantial evidence that directly links the offence to the accused even in the absence of direct evidence by the prosecution witnesses that any saw the accused assault or attack the deceased.

22. Being left with only circumstantial evidence to determine the case, the approach I take is that is well trodden path of the court of appeal in numerous of its decisions in among others **Sawe vs. Republic [2003] KLR 364 ; Wambua & 3 Others vs. Republic [2008] KLR 142, Kipkering Arap Koskei & Kirire Arap Matetu [1949] EACA 135, Peter Mugambi vs. Republic [2017] eKLR**, in which the following guiding principles have been crystallized, namely:

(i) The inculpatory facts must be incompatible with the innocence of the accused.

(ii) They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused.

(iii) There must be no other existing circumstances weakening or destroying the inference.

(iv) Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.

23. Upon analysis of the evidence in the light of the above principles, it is my finding that there are incriminating factors that place the accused at the scene of the murder of the deceased are the evidence of PW1 who saw appellant twice and spoke to him. That evidence by the minor who the court found to be intelligent and appreciates the duty to talk the truth stands out as unimpeached and unshaken. For circumstantial to be the basis of a conviction it must point out to no other hypothesis but that of guilt of the accused

24. Based on the foregoing conclusion I find that the prosecution has discharged its mandate to prove the case against the accused beyond reasonable doubt and therefore convict the accused of the offence of murder contrary to section 203 as read with section 204 of the penal code. For sentencing purposes, it is directed that the probation officer files a victim assessment report within 14 days from today. Mention on 16/12/2021 for mitigation and sentencing

Dated, signed and delivered this 29th day of November, 2021

Patrick J.O Otieno

Judge

In presence of

Mr. Maina for the prosecution

Mr. Ondieki for the accused.

Patrick J.O Otieno

Judge