



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 17 OF 2011

REPUBLIC

VERSUS

MICHAEL MWANGI KARANGI.....ACCUSED

JUDGMENT

The accused was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**, cap 63; according to the information, on the 16th day of June, 2011 at Giगतिका Trading Centre in Mathira West District of Nyeri County, the accused murdered Jeniffer Mumbi Kinyua (herein “the deceased”).

By a psychiatrist’s report presented to court by Dr Mwenda Richu (PW9) the accused was found to be mentally stable and therefore fit to stand trial; he pleaded not guilty to the charge.

The background of the prosecution case is that on 16 June 2011, at about 7.30pm the accused attacked the deceased at her house; she sustained head injuries to which she eventually succumbed. The accused and the deceased had lived together as husband and wife but due to what may have been irreconcilable differences they were estranged.

In prosecution of its case, the state called twelve witnesses of whom **Samuel Macharia Muchemi (PW1)** was the first to testify. He testified that he was the assistant chief Mbagaini sub location where both the deceased and the accused lived at the material time and that on the material date, at about 8.30pm he received a call from one George Wamae telling him that the accused had attacked and killed the deceased. He proceeded to the scene where he found the deceased’s lifeless body. It was his evidence that he also saw a metal rod, a framed picture of the deceased together with the accused and a note, addressed to him, in Kikuyu language; all these items were next to the deceased’s body. He was stood down to allow the state obtain an English translation of the note. It later emerged that he couldn’t be found and therefore he did not testify any further and neither was he cross-examined on his evidence.

Ejidio Kamwaro (PW2) testified that on 16 June 2011, he was at Giगतिका shopping centre for a youth fellowship and also to buy milk. He arrived late for the meeting when the rest of the members had left and only the chairman was still around. He identified him as Peter Njage Mugwima who was also known as John Njage. This was around 6.30 PM.

Ejidio testified that the fellowship members had borrowed an extension cable from the deceased. He and John Njage returned it to the deceased that evening. While at the deceased’s house, he heard the deceased answer a call on her phone. The conversation between the caller and the deceased appeared animated. He also heard the deceased tell somebody that if the caller called again, he should answer the call and insult caller. They then left.

It was while he was at his home that he heard screams. His mother rushed to the scene to check what the matter was. She came back and told him that the deceased had been killed by the accused.

Kevin Muchemi (PW3) told the court that on the material date at around 7 PM while at Giगतिका shopping centre, the accused told him about his domestic problems with the deceased. The accused called the deceased on speaker phone but a man answered the call. The man warned the accused not to contact the deceased. The accused then left for his house. About five minutes later, he saw the accused pass by with a paper bag. He entered the deceased’s residence. Soon thereafter he heard one Monica Wamuyu screaming and saying “he has killed her”. The person she was referring to as “he” was the accused. He rushed to the scene where he found the deceased on the ground bleeding.

The witness thought that the man who was answering the phone was Mwangi Kamwaro (PW2) because he saw him leave the deceased’s house together with Njagi Mugwima.

Corporal Masden Kahindi (PW7) testified that he went to the scene together with his colleagues after he was informed of the incident by the officer in charge of Kiamachibi police station. The deceased’s body was lying outside a toilet and she was bleeding from the forehead. They recovered the deceased’s photograph with the accused from the scene. They also recovered an iron bar. The assistance chief of the area

(PW1) gave them a hand-written note by the accused explaining why the accused killed the deceased. They removed the body to the mortuary.

The officer testified further that the accused came to the police station accompanied by the then area councilor, Justus Munyiri Kibera (PW10). He was taken to custody.

Police Constable Charles Odhiambo (PW8) testified that he was the investigation officer and that he was on night patrol together with two of his colleagues when he got information of the deceased's murder on the material evening. They proceeded to the scene where they found the deceased's body outside a toilet which was at the end of a row of residential houses; the deceased lived in one of these houses. He confirmed having collected a picture of the deceased and the accused together with a metal rod from the scene.

The officer established that the accused and the deceased lived separately and that on the material day, they had a bitter exchange over the phone. They were initially married but they had been living separately five years before the incident.

Daniel Mwangi Ngunjiri (PW4) testified that on 21 June 2011 he was called by his cousin Wanjeru Esther who informed him that her brother, the accused, had killed the deceased and that he was in the custody of the police at Karatina police station. He went to the crime office from where the accused then recorded his statement. The statement was recorded in Ngunjiri's presence.

According to Ngunjiri, the accused told the police that he had a dispute with the deceased and this dispute had been aggravated by a man who had answered his call when the accused called the deceased. He went to the deceased's residence and found the man. He wanted to hit the man but he accidentally ended up hitting the deceased. The witness testified further that he was related to the accused and he had known him since his childhood.

Susan Wanjiku Kinyanjui (PW5)'s evidence was to the effect that she was the deceased's aunt and she identified the deceased's body during the post-mortem exercise. Similarly, Timothy Mureithi Maranga (PW6), the deceased's brother in law also testified that he too identified the deceased's body at the mortuary for post-mortem purposes.

Justus Munyiri Kibera (PW10) testified that on 16 June 2011 at about 9 PM he was at home when he received a call from his brother in law, Ngunjiri (PW4) to the effect that the deceased had been killed and that the accused was on the run. At about 1 AM. the morning following, someone knocked at his door. He learnt that it was the accused person. He opened the door and found the accused looking scared and crying. He told him of a confrontation he had had with the deceased and asked Kibera to accompany him to the police station; he never told him of the deceased's condition though. Kibera took the accused to the police station.

The evidence as to the extent and the nature of the injuries the deceased sustained, and subsequently the cause of her death was given by **Dr. Stephen Wang'ombe (PW11)**, on behalf of Dr. Kareithi who performed the post mortem on 21 June 2011. It was his evidence that the deceased sustained a severe head injury, multiple compound fractures of the skull and leaking brain matter. He opined that the cause of death was cardiorespiratory arrest resulting from severe head injury caused by blunt force. He certified the deceased's death and issued a death certificate to that effect.

Senior Superintendent of Police George Mutonya (PW12) testified that the accused confessed to the murder. It was his evidence that he wrote the accused's confession and that it was dictated by the accused himself in Swahili language. At the material time, he was the chief inspector of police.

According to his evidence, police constable Odhiambo (PW8) requested him to take a statement from the accused. The confession was taken in the presence of the accused's cousin's and friend, Daniel Mwangi Ngunjiri (PW4). The accused preferred the statement to be taken in Swahili language. He confessed having hit the deceased with a metal bar on the head after he disagreed with her. He was apparently angered when he called the deceased only for the call to be received by a man who claimed to be the deceased's husband. It is then that he went to the deceased's residence and hit her. The confession was duly admitted in evidence.

In his sworn statement of defence, the accused told the court that on the 16 June 2011, Kevin Muchemi Mugweru (PW3) informed him that his wife, the deceased, was with a man in her house. He then went to Mugweru's (PW3's) house from where he called the deceased; a man answered the call. The man identified himself as the deceased's husband. In fury, he went to his house where he found the deceased with a man. A fight erupted between himself and the unidentified man. As they fought outside the deceased's house, the deceased appeared with a metal rod; he grabbed it from her. He attempted to hit the man but the blow landed on the deceased. She then fell down. He went to look for a taxi, apparently to take her to hospital but when he came back there were many members of the public at the scene. He went to his cousin's (PW10's) place. He reported that he had fought with the deceased. Together with his cousin, they proceeded to the police station and reported the incident. He only came to learn that the deceased had died the following day. It was his evidence that he killed the deceased by mistake.

Section 203 of the **Penal Code, cap.63** defines the offence of murder in the following terms:

203. Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

It follows that one may only be convicted of this offence if it is established, beyond reasonable doubt, that a person has died; that the death was unlawful; that it was committed by another person as a result of his act or omission; and finally, the act or omission that resulted in the death was motivated by malice aforethought, express or implied.

That a person died in the present case is not a question in dispute; there is evidence beyond doubt that one Jeniffer Mumbi Kinyua lived and was alive and well till 16 June 2011 when her life was terminated. Besides the evidence of Kamwaro(PW2), Muchemi (PW3) and police officers Kahindi (PW7) and Odhiambo (PW8) that they saw the deceased's body soon after she had been murdered, the deceased's relatives Wanjiku(PW5) and Maranga(PW6) confirmed that they identified her body at the mortuary when the post-mortem was conducted. To cap this evidence of the death was the certification by Dr Stephen Wang'ombe (PW11) of not only of the deceased's death but also the cause of her death. In short, I find and hold that death of a person as contemplated under section 203 of the Penal Code has been proved beyond all reasonable doubt.

Was the death as a result of an unlawful act of another person? There is substantial evidence in support of proof of the fact that indeed it was. According to the prosecution witnesses who saw the deceased's body at the scene, the deceased had sustained a blow on her head from which she was bleeding profusely. She certainly succumbed to this injury because according to Dr. Wang'ombe, the deceased died of cardiorespiratory arrest as a result of head injury caused by a blunt object. The fatal injury was not self-inflicted and couldn't have been self-inflicted but it was an act of another person.

The question whether the accused was the perpetrator of this injury to which the deceased succumbed is also beyond dispute. There is first, the circumstantial evidence that having been infuriated by a man who received his call to his estranged wife, the accused proceeded to the deceased's house and attacked her. The accused himself did not dispute this evidence save to say that he intended to attack the man rather than the deceased.

There is also a confession by the accused himself. A confession as a term of art is defined in section 25 of the Evidence Act, cap. 80. It reads as follows:

A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

Sections 25A and 26 of the Act describe situations when confessions are not admissible against an accused person. For instance, according to section 25A(1), the confession will not be admissible unless it is made in court before a judge, a magistrate or before a police officer (other than the investigations officer) as long as such an officer is not below the rank of a chief inspector of police and a third party of the accused's choice.

Section 26 on the other hand is to the effect that the confession must be voluntary; if, for instance, it is obtained as a result of threats, inducements or promises, it will not be admissible against the accused.

There is nothing in the evidence of the investigation officer (PW8), the accused's cousin (PW4) and the senior superintendent of police George Mutonya (PW12) who recorded the accused's confession that suggests that the confession obtained from the accused is not admissible on any of the grounds set forth in sections 25(A)(1) and 26 of the Act. To be precise, the confession was made before a police officer of the rank of a chief inspector of police and in the presence of a third party who was not only related to the accused but was also the accused's person of choice. The third party himself confirmed that the accused was composed and he voluntary made the confession.

More importantly, the confession was not contested by the accused; as a matter of fact, he admitted, in no uncertain terms, that he recorded the confession. In these circumstances, I find that the confession is admissible.

On whether it is the accused who assaulted the deceased, there is a paragraph in the confession that answers this question directly. According to the accused, he went to the deceased's house; she was not in but he met two young men walking out of the house. He picked an iron from the house and left. He met the deceased coming from the toilet. He asked her why he allowed a man to answer his call when he called her. She replied that the person who received the call was her husband. He got annoyed and struck her on the head. She fell down as he left.

It is therefore apparent that it is the accused who fatally injured the deceased. Thus, it was proved beyond all reasonable doubt that the accused caused the death of the deceased by an unlawful act. The act was unlawful because it was not justified.

The last question to determine is the motive or malice aforethought; in other words what was the motive behind the accused's heinous act?

Malice aforethought is the mental element of murder; it is express when it is proved that there was an intention to kill unlawfully (**see Beckford v R [1988] AC 130**), but it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm (**see DPP v Smith [1961] AC 290**). It has a statutory underpinning in section 206 of the **Penal Code**; this section prescribes circumstances under which malice aforethought may be deemed to have been established; it provides as follows:

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 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.

The circumstances under which the deceased was murdered are clear. According to the evidence available, the deceased's death was precipitated by a simmering disagreement between the deceased and the accused. They previously lived together as a married couple but because of the disagreements between them the deceased left to live on her own; her residence was not very far from where their matrimonial home was and where the accused lived.

The accused's phone call to the deceased on the evening of 16 June 2011 seems to have been the last straw that broke the camel's back. According to Kevin Muchemi Mugweru (PW3), the accused called his estranged wife only for his call to be received by a man. To add insult to the injury, the man is alleged to have claimed that he was the deceased's husband and the accused shouldn't bother calling anymore. The accused himself, in his defence testified that he only went to the deceased's house because of the man who answered the call.

Looked at in totality, my assessment of the evidence is that the accused's sole mission when he went to the deceased's house was to harm her. It could be true that a man answered his call and that probably he was angered by the response he got but the evidence is irresistible that he was out to hurt his estranged wife. I say so because though it may be true that a man answered his call, there is no evidence that he found the man in the deceased's house or that he fought with such a man as suggested in his defence. In fact, his statement in this regard contradicts what he said in his confession. According to the confession, only met two 'young men' coming out of the deceased's house; no other man is mentioned. He confronted the deceased outside a toilet and it is from there that he struck her and left her for dead.

His confession that he met the deceased as she came out of a toilet is consistent with the investigation officer's testimony that the deceased's body was found outside a toilet. It is therefore not true that the accused started a fight with another man in the deceased's house and that the two combatants moved outside the house where the deceased was struck when she attempted to intervene in the fight. The man who answered the phone may have one of the two people he met at the deceased's door and who he described as 'two young men'.

The manner in which the deceased was struck would suggest both or either of the two things; that it was the intention of the accused to cause the death of or to do her grievous harm or, that the accused knew that the injury to the deceased would probably cause her death or grievous harm and, in any event, he was reckless whether death or grievous bodily harm would result. Any of these things would prove that the accused's action was actuated by malice aforethought.

Even if the accused was to be believed that he intended to harm some unidentified man but struck the deceased instead, he would still be culpable for the offence of murder because under section 206(a) and(b) of the Penal Code, it does not matter that the person who ends up dying was the target of death or the harm perpetuated by the accused.

In his submission, the learned counsel for the accused suggested that the accused may have acted out of provocation. Indeed, provocation is a statutory defence to an offence of murder; it is so provided under section 207 of the Penal Code. This section reads as follows:

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

Provocation itself is defined in section 208(1) of the Penal Code in the following terms:

The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

The problem with the accused's defence along this line of provocation is that first, the deceased did not provoke him and the accused himself admitted as much. Secondly, there is no evidence of existence of a man whom he allegedly engaged in a fight and who is alleged to have provoked him.

In the final analysis, I find that the state has proved the offence of murder against the accused beyond all reasonable doubt. Accordingly, the accused is convicted of the offence of murder as provided in section 203 of the Penal Code.

Dated, signed and delivered in open court this day of 13th day of March 2020.

Ngaah Jairus

JUDGE