



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE (MURDER) NO.52 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

JGM ACCUSED

JUDGMENT

1. The accused **JGM** was on the 28/9/2016 **charged with the offence of Murder of one LM (Deceased) on the 8/9/2016 at [particulars withheld] Estate – Elburgon in Molo Sub County within Nakuru County.** He denied the offence to the charge of **Murder Contrary to Section 203 as read with Section 204 of the Penal Code.**

2. The prosecution's case is that the deceased was married to the accused and while they were quarreling at night, the accused stabbed the deceased with a knife at the stomach which injury caused the death.

Out of the six prosecution witnesses, **PW2**, PNM a minor daughter of the couple, then five (5) years old, was the only eye witness.

Upon being taken through a voire dire examination, the court observed and held that she was too young to take an oath and therefore gave unsworn evidence.

3. **PW2's** evidence was that on the fateful night she was sleeping on the same bed with her mother, the deceased. She testified that the accused and the deceased were quarreling when the accused beat her with a pipe and while she was lying on the bed, and crying out to the accused to stop beating her, he stabbed her with a knife at the stomach. It was her further evidence that she saw blood at the deceased's stomach. It was her evidence that she knew the accused and saw what happened.

The accused did not cross-examine PW2.

4. **PW1** and **PW3** are relatives of the deceased. They were called after the event.

5. **PW4** Gabriel Njoroge Munyaka a University Student testified that on the **8/9/2016** about 9:00pm, the accused who was his neighbor went to his house where he was with his sisters, brother and mother to seek help, stating that his wife had been stabbed with a knife. Together they followed the accused and found the deceased lying 50 meters away from their house, and about 100 meters outside her house, lying upside on the road. It was his evidence that the accused kept calling her but she did not respond. The accused then brought a motorbike which he and the accused used to take her to the hospital. It was his testimony that he remained outside the doctor's clinic as she was being attended to in the presence of the deceased.

6. This witness further testified that as he waited outside, he saw the accused running away from the hospital when he was told that the wife had died. Together with police officers, who were called, they visited the deceased's house where they found a pipe and a knife that had no blood marks. It was his evidence that the officers took the pipe and knife, and other than two small children, there was nobody else in the house. He later on recorded a statement.

On cross-examination, PW4 testified that he did not see any blood stains in the deceased's house.

7. **Dr. John Biket PW5** – conducted a post mortem on the deceased's body on the **10/9/2016** at Elburgon Sub-County hospital. He also examined the accused at the hospital with a history of having fallen from the hospital balcony and physical fight with his wife who had died at the hospital. He produced a treatment sheet – PGH 1 – and P3 Form – Exhibit 2.

The postmortem report is dated 10/9/2016. **The cause of death is stated as massive hemorrhage from ruptured abdomen iota from a stab wound; with bruises on face, thigh and arm.**

8. The **Investigating Officer (PW6)** relied heavily on PW2 and PW4's evidence. It was his evidence that he took the knife and the pipe the accused is alleged to have used to beat and stab the deceased to the Government chemist but a report returned that both had no blood stains.

Upon cross-examination, the Investigating Officer testified to have seen no trail of blood or stains in the deceased house, nor on the knife.

9. In his unsworn statement of defence, the accused stated that the deceased stabbed herself with a knife when he went outside the house, to take his motor bike into the house. He further testified that the deceased had suspected him of having another wife, and she had asked him about it when he got home.

He further testified that he immediately took her to the hospital with PW4 but she died while being attended to. He denied that they had fought nor that he stabbed the deceased.

10. I have considered the evidence as well as submissions by both defence and prosecution counsel.

Analysis and determination.

11. The only eye witness to the murder was PW2, the deceased's child of 5 years at the date of the crime and six years at trial. While this eye witness testified to having been present and saw the accused beating the deceased with a pipe and then stabbing her with a knife at the stomach, while she lay on the bed, the accused in his unsworn statement of defence denied that the two were quarreling and that it was the deceased who stabbed herself with the knife that was recovered at the scene of crime.

The cause of death was certified by Dr. John Biket who conducted the post mortem by a report dated 10/9/2016 – Pexhibit 3, as massive hemorrhage on the abdominal iota due to a stab wound. The doctor also noted bruises on the face, thigh and arm on the deceased's body.

12. The investigating officer **PW6** testified that at the accused house where he visited on the same night, there were only two minor children including PW2, PW4 also confirmed having seen the deceased lying outside their house with a knife stab wound when he went to help the accused to take the deceased to the hospital where she died while undergoing treatment. PW also confirmed having seen the accused ran away after jumping from the hospital balcony when he was informed that his wife had died.

13. The **offence of murder is defined** as the unlawful premeditated killing of one human being by another.

Black's Law Dictionary Tenth Edition Page 1776 states murder to be the killing of a human with malice aforethought.

Section 203 of the Penal Code states:-

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

Section 206 provides that

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following

(a) An intention to cause the death of or to do grievous harm to any person----

(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 actually killed or not----

(c) An intent to commit a felony.

14. Issues for determination:

*(a) Whether the prosecution has established, by evidence, the requirements **under Section 206 of the Penal Code.***

(b) Whether the accused murdered the deceased, or whether the deceased killed herself.

15. It was submitted by the defence that the evidence of **PW2**, the only eye witness was contradictory and inconsistent, hence should be disregarded.

I have considered the evidence of the six (6) year old child. The only contradiction I find is that her mother was taken to hospital by the police officers. Whether her evidence was that her mother was taken to hospital by the police officers or other people is immaterial. The truth is that the deceased was taken to hospital by the accused, and PW4.

The accused admitted as much, and further admitted that the murder weapon was a knife, which the investigating officer, PW6, testified to have picked on the floor inside the accused's house, the scene of murder.

16. It is trite that minor contradictions by a witness that do not go to the merits of a valid finding ought not invalidate a valid findings or judgement – **Benson Njoroge Ngugi Vs. Republic (2019) e KLR.**

While there may have been minor contradictions and inconsistencies in the minor's evidence, I find that such contradictions do not go into the merit of the case and ought not to invalidate the entire prosecution evidence – **Criminal Case No. 311 & 309 of 2013 (Consolidated) Joshua Mula Nzalu & Another Vs. Republic (2019) e KLR.**

17. It was submitted by the defence that no blood trail or stains were seen either in the house where the crime is alleged to have been committed, or outside the house, or on the murder weapon, the knife.

PW6, (I.O) found no blood stains at the scene of the murder. The Government Chemist too did not find any blood stains on the murder knife.

The explanation to this as submitted by the prosecution in my considered opinion is that, the accused was the only adult person in the house with the deceased. The deceased was found by PW4 lying outside the house, 100 meters from the house. PW4 saw the stab wound. He stated that she was badly injured.

18. It is the accused who went to call PW4 to help him take the deceased to hospital. The only explanation that is plausible, and rightfully alluded to by the prosecution is that upon stabbing the deceased, and blood having been seen by **PW2** the deceased's minor daughter, on the deceased's stomach, the accused must have cleaned all the blood, including from the knife, to cover the trail and any stains, before he went to call **PW4**.

19. The accused, having testified that the deceased stabbed herself with a knife inside their house, it would ordinarily follow that the knife would have had blood stains, but it did not have. The above is the only explanation that can be attached to the lack of blood and or blood stains on the knife or at the bed or in the house, the scene of crime.

20. I do not agree with the defence submission that the accused's reaction of jumping from the hospital balcony and running away, including failure to report the wife's death for three days was due to shock. The prosecution submitted that the said conduct was upon realization that he had indeed murdered his wife, by stabbing her with a knife.

21. The intention –*mens rea*– is an ingredient that must be proved for a conviction to be sustained in a murder offence.

PW2 testified that the accused was beating the deceased with a pipe as she lay on the bed, then stabbed her with the knife, and that she saw blood on the deceased's stomach. **Under Section 206 of the Penal Code** (stated above), the intention and acknowledgment are subject to proof.

When the accused stabbed the deceased on the stomach he ought to have known that such an act would cause grievous harm to the victim. In his own evidence, the accused testified that he was not quarrelling with the deceased, and that he did not stab her, yet the minor child testified to them having been quarrelling in her presence and saw the accused stab her mother at the stomach.

He opted not to cross examine PW2 the eye witness. He lost the golden chance to shake the minor's evidence by cross examination, to test the credibility of the only eye witness.

22. There is no doubt that the minor child knew the accused very well, by name and identified him in court without any difficulty.

I find her evidence to have been honest, truthful and credible – **HMN Vs. Republic (2017) e KLR.**

Indeed all the prosecution witnesses' evidence was unchallenged. The accused testified that it is the deceased who stabbed herself while he was outside their house. If that were so, the court would wish to ask, how then no blood stains were found on the bed, house or on the knife? What about the bruises on the face, thighs that the Doctor noted? Would it have been possible that after inflicting the knife stab on herself, at the stomach, that she would have also proceeded to wipe and clean away the blood, and took herself outside the house? The accused did not testify as to whether it was himself, or the deceased, who removed herself from the bed and house, and placed her outside the house, 100 meters away from the door, and 50 meters from PW4's house.

23. I find and hold that the only credible and reasonable conclusion is that the fatal knife stab to the deceased's stomach was inflicted by the accused, who then proceeded to cover the blood trail from the house and the murder weapon before calling for help to take the deceased to hospital where she died. The accused was placed at the scene of crime, and his conduct from the time of committing the crime up to the time the deceased was pronounced dead cannot be explained otherwise than that he is the one, and no other who committed the heinous crime.

24. The upshot is that the accused is found guilty of the offence of murder as charged. He is convicted accordingly.

Mitigation shall be taken on a date to be fixed.

Delivered, signed and dated this 12th day of March 2020.

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J.N. MULWA

JUDGE.