



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 7 OF 2015

REPUBLICSTATE

VERSUS

BENARD LEMARA.....ACCUSED

JUDGMENT

1. The Accused Person, Bernard Lemara, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The allegations are that on the 12th day of November, 2014 at Mutende Trading Center in Njoro Sub County within Nakuru County, the Accused Person murdered Naomi Cherutich

("Deceased").

2. The Prosecution called five witnesses. The evidence emerging from the Prosecution narrative is straightforward.

3. The Accused Person and the Deceased were husband and wife; or at least lived like a couple in their rented house in Mauche. Florence Chepkemai was their neighbour. She testified in the trial as PW3. She recalled that on 12/11/2014 at around 8:00pm she was at home. She went out of her house to collect some clothes from the clothes' line. She heard the sounds of utensils falling. At first she thought nothing of it. Then, she heard some strange noises coming from the Deceased's house. She called out to her.

There was no response. Then, the Accused Person loudly announced: *Hebu kuja uangalie C amejidunga na kisu!*

4. Florence testified that she immediately rushed to the house. She saw blood on the floor. She raised alarm. Other neighbours came. Meanwhile, the Accused Person rushed out of the house and went to get a vehicle to rush the Deceased to the hospital.

5. WC is the sister to the Deceased. She testified as PW2. She testified that she arrived at the Deceased's house in the evening of 12/11/2014 to find the Deceased sitting on a chair with a pool of blood beneath her. She was frothing at the mouth. She could not talk. She had a wound on her thigh. The Accused Person had gone to get a vehicle to take her to the hospital. He soon returned in a vehicle and they used it to take the Deceased to Nakuru PGH. Unfortunately, the Deceased died while undergoing treatment. Winnie did not know what had happened to the Deceased.

6. Neither did Johanna Kimitei Cheruiyot, the landlord who had rented the house to the Deceased. He testified as PW1. He went to his plot on 13/11/2014 in the morning only to find a large crowd there. He learnt that the Deceased had been stabbed in her house but he did not know the details. He called the Police and later went to the Police Station to record a statement. He later went to help W and other family members to identify the body during autopsy.

7. The autopsy was conducted by Dr. Daniel Wainanina on 19/11/2014. The doctor testified as PW4 and produced the Pos-mortem Form as an exhibit. He found a markedly pale body of an African female about 16 years old. It had a penetrating stab wound on the right upper third of the thigh below the femoral triangle through to the posterior aspect of the thigh. The stab had severed the right femoral artery and veins with exsanguination. All other internal systems were normal. The doctor concluded that the cause of death was excessive hemorrhage (exsanguination) with hypovolemic shock following a stab by a sharp object.

8. The Investigating Officer, PC Peter Toshian, testified last as PW5. He was asked by the OCS of Likia Police Station to go investigate the incident on the morning of 13/11/2014. He proceeded to the plot where the Deceased lived and where he met the landlord (Johanna) and was shown Room No. 7 at the far corner of the plot. Johanna told him about the stabbing the night before; and that the Accused Person had run away after the incident. PC Toshian went into the room and examined it. It was a single room and clothes and utensils were scattered all over. He recovered a kitchen knife – but it was not produced in evidence. Later on, he facilitated for a Scenes of Crime expert to take photos of the scene – but the photos were not produced and neither did the expert testify.

9. Put on his defence, the Accused Person gave an unsworn statement. He denied stabbing the Deceased. Instead, he claimed that the Deceased had stabbed herself on the thigh in a bid to commit suicide because she thought that the Accused Person was going to leave her. He said that they had spent the whole day very well and that they had even gone out for dinner and drinks in the evening. That after they got home the Deceased told the Accused Person that she knew that he was planning to leave her for another woman. The Accused Person told the Court that the Deceased suddenly grabbed a knife and stabbed herself on the thigh. The Accused Person said that he took the knife from her and then called for help. He denied that he ran away after the incident claiming that he got “very stressed” and could not attend the burial; and that he was arrested later at his farm.

10. The Accused Person is charged with murder. Murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

11. From this definition, the Prosecution, therefore, is required to tender sufficient proof of the following three crucial ingredients in order to sustain a verdict of murder against the Accused Person:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by *malice aforethought*.

12. On the other hand section 206 of the Penal Code defines the third element of murder - *malice aforethought*. The section provides that *malice aforethought* is established, when there is evidence of:

- i. *Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not;*
- ii. *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;*
- iii. *Intent to commit a felony; or*
- iv. *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.*

13. In the present case, it is common between the Prosecution and the Defence that the Deceased died. The Deceased’s sister, W, and the Deceased’s landlord, Johanna, all testified that the Deceased died and they saw and identified her in the morgue as the doctor performed the autopsy. So did Dr. Wainaina who performed the autopsy. Moreover, all the three witnesses testified about the stab wound in the Deceased’s thigh; and the pathologist concluded that the cause of death was excessive hemorrhage (exsanguination) with hypovolemic shock following a stab to the thigh by a sharp object. The defence did not contest the fact or cause of death – but offered a different cause of the stab wound and the consequent death.

14. The Prosecution and the Defence, therefore, differed on how the Deceased sustained the single stab wound to her thigh. The Prosecution’s theory is that it is the Accused Person who stabbed the Deceased after a quarrel in their home. The Accused Person insisted that he did not stab the Deceased – but that, instead, the Deceased stabbed herself because she was apprehensive that the Accused Person was about to leave her for another woman.

15. The whole case turns on the credibility and plausibility of the two competing theories of the case – and whether, in context, the Prosecution can be said to have discharged its burden of proof beyond reasonable doubt.

16. It is obvious that there is no eye witness here. A guilty verdict will, therefore, have to be sustained by circumstantial evidence. Was the circumstantial evidence here enough to lead to an ineluctable conclusion that it is the Accused Person who stabbed the Deceased on the thigh and caused her death on 12/11/2014?

17. It is true that circumstantial evidence is, often, the best evidence. So said the Court of Appeal in *Neema Mwandoro Ndurya v. R [2008] eKLR*, where it cited with approval an English Case, *R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20* where the English Court stated that:

Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.

18. In *Joan Chebichi Sawe versus Republic [2003] eKLR* the principles that guide the Court in evaluating circumstantial evidence were laid out in three tests as follows:-

- a. *The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;*
- b. *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;*
- c. *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.

19. Earlier on, **Kipkering Arap Koske versus R. [1949] 16 EACA 135**, long considered a *locus classicus* on this issue, had compressed the principles into two thus:

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

(b) *The facts must be capable of no other conclusion or explanation except the guilt of the accused.*

20. However, as several Courts have pointed out, even where the Court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above threshold to the facts before it. As the Court of Appeal remarked in **Simon Musoke versus Republic [1958] EA 715** while citing **Teper versus R. [1952] AC 480,489** before drawing the inference of an Accused Person's guilt from circumstantial evidence it is necessary for the Court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

21. Applying these principles to the present case, can we truly say that the “*circumstances taken cumulatively... 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 Persons and none else*”?

22. I am persuaded that the circumstantial evidence in this straightforward case permits the inescapable deduction that it is the Accused Person who murdered the Deceased. There are three reasons which strongly point to this finding while militating against the plausibility of the Accused Person's narrative.

23. *First*, there is no question that it is only the Accused Person who was in the house with the Deceased and, therefore, the only one who had an opportunity to inflict the injury on the Deceased.

24. *Second*, the circumstances of the incident including the scene of crime strongly point to an altercation between two lovers in which one opted for the fatal decision to use an offensive weapon rather than one of a rebuffed lover who opts to end her life. I say so because the neighbour heard commotion in the house before finding the Deceased stabbed. She also heard the Deceased cry out – and it took a while before the Accused Person responded to allegedly say that the Deceased had stabbed herself. If, indeed, the circumstances were as the Accused Person claims, he would have raised alarm vigorously and quickly. This is not what happened. Instead, he only responded when Florence, the neighbour, inquired what was going on; and even then, only after a lag of time. This behavior is inconsistent with one who has just witnessed his lover attempt to commit suicide by stabbing herself.

25. *Third*, the injury which the Deceased suffered is inconsistent with suicide through a self-inflicted knife wound. There are two reasons why this is so. One, is the fact that suicide by means of self-inflicted stab wound to the thigh is extremely rare (See, for example, **James M. Badger, et al, Non-fatal Suicide Attempt by Intentional Stab Wound: Clinical Management, Psychiatric Assessment, and Multidisciplinary Considerations, Journal of Emergencies, Trauma and Shock. 2012 Jul-Sept; 5(3):228-232.**) Two, the force used to inflict the injury leading to a penetration through the femoral triangle to the posterior aspects of the thigh rule out the possibility that the Deceased inflicted the stab wound on herself. This is the kind of force which could only have been inflicted by another party; and the Accused Person was the only other person in the room.

26. *Fourth*, the post-incident conduct of the Accused Person is inconsistent with his innocence. Immediately after it became obvious that the Deceased had died, the Accused Person disappeared from the area and became a fugitive of justice. He was only arrested more than two months later. He never presented himself to the Police to explain the circumstances or record a statement.

27. *Lastly*, the narrative by the Accused Person about how the Deceased came to stab herself is so implausible that it has so implausible that there is no inherent possibility that it could be true. While the Defence is not required to demonstrate that its defence theory or narrative is reasonably plausible or probable but it is only required to demonstrate that its version of events or its theory of the case is reasonably possibly true in substance, in this case, the Defence narrative does not meet even this low threshold in order to raise reasonable doubt. The correct test is whether it can be said that the Defence narrative is so improbable that it cannot reasonably possibly be true. (See **S v Shackell (4) SA 1 (SCA)**). In my view, it is not possible to say that the Accused's Person's version of events has any reasonable inherent probability that it is true.

28. As for malice aforethought, this is supplied by the fact that the Accused Person attacked the Deceased with so much force that it is clear that, at a minimum, he intended to inflict grievous injury to her. That kind of assault undoubtedly evince malice aforethought for murder.

29. On the basis of the existing record, there is little doubt that all the elements of murder have been established against the Accused Person. Consequently, I find and hold that the Accused Person, Bernard Lemara, is guilty of the murder of NC contrary to section 203 as read together with section 204 of the Penal Code and I hereby convict him accordingly.

30. Orders accordingly.

Dated and delivered at Nakuru this 23rd day of April, 2020

.....

JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Verne Odero, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media and select members of the public were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.