



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRC NO. 200 OF 2017

FORMERLY MACHAKOS HCCRC 28 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MWANZIA MUSEMBI.....ACCUSED

JUDGMENT

1. **Mwanzia Musembi** the accused is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the accused on the 25th day of June 2016, at Katavani village in Kiboko within Makindu sub-county of Makeni county murdered **Florence Nduge Mulwa**.

2. He denied the charge and the case proceeded to full hearing with the prosecution calling seven (7) witnesses. It is the prosecution case that the accused person and his late wife lived in Kiboko at Kiboko market in a rental house. On 25th June 2016 at 5:20 am Pw1 **Anastacia Mbithe** and her husband heard the accused enter the corridor of the plot while making noise saying “*leo nimepata picha zako zote nitakumaliza*” as he called out “*mama mama*”

3. Pw1 and her husband came out of their house and found the accused and deceased standing outside their door. The deceased was in her petticoat and ladies’ vest. Pw1’s husband held the accused’s hand and told him to cool down. The deceased remained silent. The accused promised not to make noise. He however suddenly jumped towards the deceased and stabbed her from behind. She ran into the house followed by the accused person. The deceased then came out of the house running and pursued by the accused. He knocked her down at the gate and stabbed her left side of the ribs. Pw1 and her husband, accused and deceased lived on the same plot.

4. Meanwhile Pw1 and her husband were screaming. People came and pursued the accused amidst threats of him finishing anyone following him. He still held the killer knife. He disappeared into the bushes. Some people rushed the deceased to the hospital. Police officers came to the scene and took photos (EXB 1a – u). Pw1 stated that the plot had about (9) rooms and only one was unoccupied.

5. In cross examination she said it was dark as there was no electricity. The neighbours would peep and close their doors. She confirmed that the accused slept in the deceased’s house every night and that they had been in the plot for not more than a month. She saw the accused holding the knife as her husband tried to calm him down. She did not see any strange man on the plot and neither did she see any man coming out of the deceased’s house.

6. Pw2 **Rose Wayua Musyoki** a neighbor heard noises and ongoing out found the deceased already stabbed and lying outside the plot with protruding intestines. She also had an injury on the back. She did not see the accused at the scene.

7. Pw3 **Kithome Samuel** was the deceased’s uncle. He learnt of the death and went to Kiboko police station. He proceeded to the scene with police officers. They found blood in the house and outside upto about six (6) meters. Photos were taken. At the mortuary he saw injuries on the deceased’s back and abdomen. He identified the body for the postmortem.

8. In cross examination he said the deceased had two (2) children prior to her marriage to the accused person. She got other five (5) children with the accused.

9. Pw4 **Dr. James Mbui** produced the postmortem report (EXB2) by **Dr. Kavuli** with the consent of the defence. The deceased’s body had the following injuries:

- Penetrating wound on chest
- Blood in both lungs

- Penetrating cut on small intestine
- Spleen severed
- Liver severed
- Penetrating wound on abdomen
- Cause of death was excessive bleeding from a penetrating abdominal trauma

10. Pw6 No. **87864 P.C Patrick Gitonga** was at Kibwezi police station on 25th June 2016 at 7:50 pm when he received the accused who informed him that he had stabbed his wife after finding her with a man in their house. He arrested him and searched him. The only relevant item he saw were the blood stains on the shirt. He handed over the shirt to the DCI Makindu.

He recorded accused's report in the occurrence book produced as (EXB2).

11. In cross examination he said the shirt was sky blue and the blood stains were on the chest of the said shirt. He confirmed that the accused had brought himself to the police station.

12. Pw7 No. **63937 Sgt. Samuel Mbat**i confirmed receiving a compact disc from Pw5 No. **230770 Mr. Jimmy Arold Kimalwa** in a sealed envelope. Pw5 requested him to print the photos. This was taken to DCI headquarters for printing. Pw7 is gazetted under Gazette Notice No. 4562 of 7th July 2003. He produced the photos of the entire scene as EXB1a – u.

13. Pw5 No. **230770 Mr. Jimmy Arold Kimalwa** the DCI Makindu testified that he received the murder report on 25th June 2016 at 7:30 am. The report had been made by a neighbour. He proceeded to the scene at Kiboko on a plot with about nine (9) units. He carried out investigations and interviewed witnesses. He drew two (2) sketch plans (EXB4a and b) and took photos of the scene.

14. He went to the mortuary and also took photos of the body which had three (3) stab wounds on the back, shoulder (upper) and stomach with hanging intestines. On the same evening information was received that the suspect had surrendered himself at Kibwezi police station and confessed to the killing. Arrangements were made for him to be taken to Makindu.

15. When placed on his defence the accused elected to give an unsworn statement. He stated that the deceased was his wife. He worked in Kibwezi while she lived in Kiboko. One time he came visiting and found her still at work. He learnt from an unnamed female neighbour that the deceased used to bring men to the house. He asked her about it and she apologized.

16. A week later and upon her request they shifted to another house. On the date in question which was a week after shifting she called severally inquiring if he was coming to Kiboko. He finally confirmed to her at 5:00 pm that due to lack of money he would not travel. However, at 7:00 pm the boss gave him money and he travelled and went to a bar to drink upon arrival.

17. He left for the house at 3:30 am while drunk. He knocked the door and moved two steps behind and called the deceased. She opened but stood at the door and refused to switch on the lights. He pushed her back into the house as she held on to the door. Behind the door was a man. He jumped on the man and held him and they fell at the door. He saw some lighting which was a knife. He snatched it from the man and threw it away.

18. He stated that the deceased came to separate them and she fell down. He heard the deceased scream as he followed the man. On returning he never saw the wife though he had left her at the door. He went out to look for her and found her having fallen at a corner on the path. People came demanding for his arrest. He took off upto the stage and boarded a lorry to Kibwezi. At 7:00 pm he went to the police station and reported the incident.

19. Both counsel filed submissions. Learned counsel Anne Gakumu for the prosecution after doing a summary of the case submits that the prosecution had successfully proved its case beyond reasonable doubt. She further submits that the accused had full knowledge that the act of stabbing the deceased severally would probably cause death or grievous harm to the deceased.

20. Counsel contends that all the three ingredients falling for proof under section 203 of the Penal Code had been established. She states that the accused was seen by Pw1 holding a small knife which he used to stab the deceased. Pw1 was confirmed by Pw5 to be a neighbour to the accused and deceased. He produced photos of the scene.

21. On whether malice aforethought was established she referred to the accused's utterances as he made noise. That Pw1's whole narration of what happened is a demonstration of a man who had full knowledge of his actions and was determined to cause death or grievous harm to his wife.

22. On further proof of the charge she relied on the case of **Republic –vs- Samuel Muigai Chege (2019) – High court Kajiado** where Justice Nyakundi while addressing himself to the question as to whether the prosecution had discharged the burden of proof beyond reasonable doubt quoted the case of **Woolmington –vs- DPP 1935 AC 462 and Miller –vs- Minister of Pension 1947) 2 ALL ER 372** where Lord Denning in determining the judgment in Miller stated with respect to the State's standard of proof that;

“The degree is well settled – It need not reach certainty, but it must carry a high degree of probability. Proof of beyond reasonable doubt does not mean beyond shadow of doubt ..”

23. Mr. Kyalo for the accused in his submissions and while referring to the accused's defence submits that the accused person concedes that he killed the deceased though accidentally. That he had found the deceased in bed with another man after she had spent the night from the home and was unreachable on her phone.

24. Counsel while referring to section 207 of the Penal Code contends that the accused and deceased lived together happily. That the accused acted out of provocation before the passion could cool. He referred to the case of **Yovan –vs- Republic (1970) E.A 405** where the court said

“Heat of passion refers to both a state of anger and any emotional state caused by the provocation.”

25. Further while referring to section 107(1) and (2) Evidence Act he submits that an accused person assumes no burden to prove his innocence. That any defence or explanation put forward by an accused person is only to be considered on a balance of probabilities. On the other hand, the burden of proof by the prosecution is beyond reasonable doubt. He referred to the cases of **Woolmington –vs- DPP (supra) Republic –vs- Derrick Waswa Kuloba (2005) eKLR; Hau –vs- Areginam (1954) 21 EACA 276.**

26. Counsel has submitted that under section 9 of the Penal Code a person is not criminally responsible for an event which occurs by accident. He referred to the case of **Rex –vs- Jehoshaphat Rugambi Mwaniki (1942) 9 EACA 40** where the court held that:

“Where the defence of accident is put forward by the accused person and is rejected by court, the court still has the duty to consider the probability of manslaughter, even though the accused does not put forward the defence and if there is some evidence to support it.”

He prayed for the accused's acquittal.

27. This is now the case before the court for determination.

28. The charge facing the accused is defined under section 203 of the Penal Code:

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

Further, malice aforethought is defined under section 206 of the Penal Code as follows:

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.

29. From these provisions and decided cases the ingredients which must be proved in a charge of murder are:

i. Fact and cause of death.

ii. Whether the accused's act of omission or commission caused the deceased's death (*actus reus*)

iii. Whether the act by the accused was accompanied by malice aforethought. (*mensrea/intention*)

Fact and cause of death.

30. The evidence by all the witnesses including the deceased have confirmed that indeed the deceased died on 25th June 2016. Her uncle (Pw3) identified the body at Makindu mortuary for purposes of post mortem. Pw4 **Dr. James Mbui** who produced the postmortem report (EXB2) on behalf of **Dr. Kavuli** gave the cause of death as excessive bleeding from a penetrating abdominal trauma. I therefore find the fact and cause of death to have been proved. Who committed the act that led to the deceased's death?

31. Pw1 **Anastacia Mbithe** was clear in her evidence that she saw the accused stabbing the wife who is the deceased. This evidence was not shaken. Another neighbour (Pw2) confirmed hearing noises that early morning. On going out, she met Pw1's husband who told her the accused had killed the deceased.

32. Pw6 **No. 87864 P.C Patrick Gitonga** a police officer at Kibwezi police station testified that on 25th June 2016 at 7:50 pm the accused came to the station and reported having stabbed his wife. This was entered in the station's occurrence book produced as EXB2. He was placed in cells.

33. In his defence the accused admits having been at the scene. According to him he only pushed the lady. Thereafter she came to separate him and her man friend as they struggled. He heard her scream. He later found her body lying at the corner of a path.

34. Considering this evidence plus the submissions by both the prosecution and the defence it is very clear that it is the accused who stabbed the deceased after pushing her down. The cause of death was as a result of the injury in the abdomen (EXB2) which is one of the injuries inflicted by the accused. I therefore find that the accused's act of stabbing the deceased led to bleeding that led to the death.

Did the accused act with malice aforethought?

35. The accused has pleaded provocation. Mr. Kyalo has submitted so much about the accused being such a loving husband and father to their only child. Further that he had found the deceased in bed with a man after being away from home the whole day and not answering her phone the whole day. This submission is not based on any evidence adduced before this court or even in cross examination. I will therefore not consider that line of submission.

36. What the accused stated in his defence is that he was provoked by the deceased's infidelity. That he had found a man in his house when he returned home. Killing on provocation is defined under section 207 of the Penal Code as:

“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.

37. Section 208 of the Penal Code goes further to define provocation as:

”(1) 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.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to another person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

38. In the case of **RC –vs- Republic (2005) 2 KLR 239** the Court of Appeal held thus:

(1) Under section 207 of the Penal Code, an unlawful killing in circumstances which would constitute murder would be reduced to manslaughter, but only if the act which causes death is done in the heat of passion caused by sudden provocation. It is a question of fact whether the accused in all the circumstances of the particular case, was acting in the heat of passion caused by grave and sudden provocation when the killing was done.

39. Further in the case of **Peter Kingori Mwangi & 2Others –vs- Republic (2014) eKLR** the Court of Appeal stated that “for provocation to exist the following two conditions must be established:

1. The subjective condition that the accused was actually provoked so as to lose his self-control and
2. The objective condition that a reasonable man would have been so provoked.

40. The position in law is that an accused person is under no duty to prove his innocence nor is he required to call evidence to spruce up his defence. The burden of proof never shifts to an accused person to establish the defense of provocation. It is the duty of the prosecution to prove malice aforethought. See **Benson Mbugua Kariuki –vs- Republic (1979) eKLR**.

41. Bearing the above principles in mind, I now wish to embark on analyzing the evidence of the prosecution in respect to proof of malice aforethought. Pw1 narrates clearly what she and husband witnessed that early morning. Pw1 and her husband lived on the same plot with the accused and deceased. From the photos EXB1 produced herein their houses were closely knitted.

42. It is Pw1's evidence that the accused's noises were heard before he made entrance into the corridor of the plot. The words he uttered were **“Leo nimepata picha zako zote nitakumaliza”** translated it means *“today I have found all your photos, I will finish you.”*

When he entered the plot corridor he was calling *“mama mama”*.

43. It was at that point that Pw1 and her husband came out. They found the accused outside with the deceased at the door in a petticoat and a ladies' vest. Pw1 was categorical that she never saw any non-resident male on the plot nor any man come out of the deceased's house.

44. From this evidence it's clear that the accused had not entered the house and the deceased must have been woken up by the accused's noises since she was in a petticoat and ladies vest. Pw1's husband tried to calm the accused who said he would not make noise. He then suddenly jumped on his wife and stabbed her with the knife he already had. She ran to the house and he followed her there.

45. She returned outside and he still pursued her and knocked her down at the gate and stabbed her the more. He did this in the presence of Pw1 and her husband. He only took off when people came out. All this shows he was armed with his knife all through and did all that he had planned to do.

46. His own defence betrays him. According to him he had been told of his wife's infidelity at their former plot. On this day he says he lied to his wife that he was not coming home. He arrived in good time but went drinking and came home drunk. This all goes to show that he had been planning to do whatever he did. When he came to the plot he came making noise and was armed. There was no man in his house that night. He was just suspicious of his wife.

47. If indeed there was any man in that house Pw1 and her husband would have seen him run out or even heard noises of a fight between the person and the accused or even the deceased. The only noises heard were those of the accused as he got into the plot and while outside his house. Nobody had attacked the accused in anyway, for him to claim that the deceased came to separate them and was injured in the process of trying to separate him. Could a fall tear her abdomen to the extent of intestines coming out? The answer is "No".

48. He strategically stabbed her on the back, chest and abdomen causing her intestines to come out. He had the knife in his hand before the attack. His intention was to kill or cause grievous harm to the deceased. The defence of provocation was an aforethought.

49. I am satisfied that the prosecution has proved a case of murder against the accused. I hereby convict him accordingly.

Orders accordingly.

Delivered, signed & dated this 30th day of July 2020, in open court at Makueni.

.....

H. I. Ong'udi

Judge