



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRC NO. 08 OF 2017

FORMERLY MACHAKOS HCCRC 19 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS MULI KIOKO.....ACCUSED

JUDGMENT

1. **Thomas Muli Kioko** the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the night of 3rd and 4th March, 2015 at Misongeni estate in Makindu sub-county within Makueni county, murdered **Judith Nthenya Muthama**.
2. He denied the charge and the case proceeded to full hearing with the prosecution calling eight (8) witnesses.
3. Pw1 **Dr. Emmanuel Loiposha** produced a postmortem report by Dr. Makali (EXB1). The report shows that the deceased (*Judith Nthenya Muthama*) had four (4) stab wounds on the right supra clavicular region, clavical area. Internally, there was a deep cut wound severing arteries and veins with a severe cervical cut. The cause of death was cardiopulmonary arrest due to brainstem injury caused by deep cut wounds in the neck. In cross examination he said the weapon used was very sharp and most likely a panga. The cut he said was very deep and well-intended.
4. Pw2 (**F.M.M**) a minor and daughter of the accused and deceased was taken through a *voir dire* examination and was found fit to testify but without swearing. At the time of giving her testimony she was in standard six (6) at [particulars withheld] primary school. She stated that on 3rd March 2015 when the alleged incident occurred, she was in standard two (2) in Makindu.
5. It is her evidence that on this day she arrived home from school in the evening. Her mother (*the deceased*) served her chapati and sukuma. After the meal she went out to play and was later called by the deceased who bathed her. Both parents were in the house. She identified the accused as her father.
6. The accused asked the deceased to go and shower as he made chapati for her, and this was complied with. After making chapati the accused went to watch television. Pw2 was in the bedroom and the door was open. She saw the accused put off the lights, go out and return with a piece of wood (EXB2) which the witness identified. Accused entered the bedroom with EXB2 and switched off all the lights. What she next heard was the sound of “*mbumbumbumbu*”.
7. She asked him what it was. She next heard groaning and on asking again he told her to keep quiet and sleep. He put on lights in the bedroom and took a pen and paper and started writing. When she asked him what it was he told her “*nyamaza na ulale*”. He put off the lights, took a rope and stepped on the bed with the rope tied on his neck. He struggled and fell down. He then went and changed clothes.
8. He told her he had left kshs.50/= for the deceased to buy her bread when she woke up. He closed the door and went away. When she went to the sitting room, she saw blood and in the bedroom and further saw the deceased on the floor with her neck cut and a knife on her back. She covered her with a lessa.
9. In the morning when the children she went with to school came she told them the door was locked and her mother was hurt. People including James the landrod came to the window to inquire on whether her mother was hurt. Upon confirming, they broke the door and entered. She identified the sisal rope the deceased had tried to hang himself with (EXB3) and the knife on her mother’s back (EXB4).
10. In cross examination she said that deceased used to sell chips and foodstuffs to constructors. She confirmed that her parents were quarrelling that night and both were angry. That the accused switched off the lights in his bedroom. She denied hearing any bang like a door breaking. The bedroom door was defective and so could not be locked. She repeated that she heard the *mbumbumbumbu* sound and the

groaning like of a goat being slaughtered. She denied seeing anyone trying to hang the accused.

11. In re-examination she said their home was never invaded and she witnessed what she had told the court.

12. Pw3 **Jonathan Mutheme Kimeu** who is the father of the deceased received a text message from the accused (*son in law*) on 3rd/4th March 2015 night. The message was that mama F who was her daughter Judith Nthenya was not alive. After reading the message he called his wife to confirm if she had received the same message. Her answer was in the positive. He was by then in Narok doing business and he organized to travel to Makindu. He confirmed that the accused and the deceased were customarily married. He buried the deceased at his home in Masinga.

13. Pw4 **Shadrack Kingoo Mutulu** accompanied Pw3 **Jonathan Mutheme Kimeu** to Makindu on 4th March 2015 in a follow up to the murder of the deceased. They went to the mortuary and identified the body. They visited the scene and said the house was two roomed.

14. Pw5 **James Mutua Mwangangi** was one of the neighbours to the accused. He got some information and went to the accused's house. The house was locked but he was able to talk to the child (Pw2) who was inside via the grill. She told him the mother was dead and there was blood inside. He also saw blood on the backside of her sweater.

15. He reported to the chief and the community board chairman and police were alerted and they came. The grill was broken and the police gained entry. He later fixed the door as he was caretaker of the premises. He confirmed that the house was two roomed.

16. In cross examination he said when he was called by a neighbour he went and saw the child who had blood on her sweater. On 3rd March 2015 he had slept at 9:00 pm and woke up at 6:00 am. He did not hear any noise that night and he never talked with the accused.

17. Pw6 **Anna Mwende Mulu** was the immediate neighbour to the deceased on the plot. She stayed in house No. 4 while deceased lived in house No. 3. On 4th March 2015 at 5:15 am she was on her way home after harvesting vegetables at Pombo when she met Pw5 who informed her of the deceased's death. She had on the previous evening sold vegetables to the deceased and she had also seen the accused and Pw1 there. She went straight to their house and spoke to Pw1 who broke the news to her.

18. Pw1 told her the accused had gone to look for a job and had given her Kshs.50/=. The first door to the house is metallic while the wooden door was locked. The door was broken and they entered the house. In the bedroom they found the deceased having fallen on her stomach and she was naked. She had injuries on her neck having been cut with something like a knife. There was a stick or piece of wood beside her (EXB2). She did not know of any problem between the couple. She never heard any noise from house No. 4 on the material night.

19. Pw7 **No. 59531 Cpl Bernard Mwasia** the investigating officer teamed up with **I.P Ndirangu** and went to a scene of murder at Misongeni village of Makindu. The plot has several rooms. Pw5 showed them house No. 3 where they found Pw1 aged 7 years who had been locked inside. She told them the deceased had been killed by the accused.

20. Upon the grill being opened they entered the house and went to the bedroom. They found a body wrapped in a blanket, a rope hanging from the roof, and a piece of wood besides the bed. They wore gloves and opened the blanket. The body was lying on the tummy with a blood stained knife inserted in the anus.

21. There was a big cut on the neck with a lot of blood in the room. They picked the named items plus the body which they took to the mortuary. He recorded witness statements. Later they received a report that the accused had surrendered himself at Emali police station. He prepared an exhibit memo which he took to the Government chemist i.e. knife, blood samples of (*accused and deceased*) and accused's stained cloth. He drew a sketch plan of the scene (*EXB 5a and b*). He further produced the tree trunk/piece of wood (EXB2); knife (EXB4) and sisal rope (EXB3).

22. In cross examination and re-examination, he said the rope was on the roof in the bedroom. The jeans were not brought to court. He said he recorded the accused's statement in which he said they had been attacked. He confirmed that the accused had taken himself to the police station.

23. Pw8 **Elizabeth Waithera Oyiengo** from the Government chemist stated that on 1st April 2015 they received an exhibit memo from Cpl David Kungu of DCI Makindu with the following items: -

- Items were A and B – blood samples of the accused.
- Item C – blood sample of Judith Nthenya (*deceased*)
- Item D – kitchen knife in a khaki envelop
- Item D – pair of blue jeans trouser of the accused in a khaki envelop.

24. They were to examine the items to determine the presence and origin of any blood stains. They found the bloodstains on the knife to match the deceased's DNA. The jeans trouser had no blood stains (EXB 6a and b).

25. The accused elected to give a sworn defence and called no witness. He testified that on 3rd March 2015 he woke up from Misongeni estate Makindu and went to Emali to check on the motor vehicle he was driving which was being repaired. He left at 6:30 pm before it was ready and reached Makindu at 7:00 pm. He found Pw2 back from school and he left for the bar which was 20-30 metres from his house. He stayed there upto 10:00 pm when power went off.

26. By then his wife (deceased) had come to the bar and was having soda. They remained there for a few minutes and went to the house. She entered the house as he went to the toilet. On reaching the door to the house he felt somebody holding him from behind while covering him with a cloth. The person asked for his wife. He told the person his wife was in the house. He asked for money and he said he had none. He asked if his wife had money and he told him he did not know. The person spoke in a low tone.

27. He was taken to the house with his head covered. He heard other voices and the person with him told him there were other people inside talking about money. He felt a relief and took off, jumping over the fence. He then heard people running after him. He ran to the stage and requested to be taken to Kiboko police post which they found closed. He was then taken to Emali police station from where he saw Pw5 come to report a death on their plot and he was arrested. He said the deceased was his younger wife.

28. In cross examination he said Pw2 was born in 2005 and was his daughter and they had never collided but she had lied to the court. He denied there being any knife in their house. He also denied locking Pw2 in the house. He said the rope EXB3 was used for tying food on the motorbike. He denied committing the offence saying he was suspected because the incident took place at his house. In re-examination he said he did not know where the exhibits had been gotten from since he was not taken to the house upon arrest.

29. Learned counsel for the prosecution Mr. Kihara filed written submissions and restated the evidence before the court. He has submitted that the evidence of Pw2 points to the accused as the aggressor in this matter. Further that the evidence of Pw2 supported by that of the neighbours shows that there was no intruder in that plot on that night and it leaves the accused as the culprit.

30. Counsel submits that the accused's story may appear so real without Pw2's version who witnessed everything and confirmed that it is the accused who clobbered the deceased with a piece of wood. He contends that the accused's plan was well orchestrated to suit him. He argues that the injuries inflicted were so severe and fit within the definition of malice aforethought. He cited the case of **John Mutuma Gatobu – vs- Republic (2015) eKLR** where the Court of Appeal stated:

Malice aforethought in our law is used in technical sense: there is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought.

31. Learned counsel Mr. Mutinda for the accused equally filed written submissions and stated all the evidence adduced by the prosecution witnesses. He identified two issues falling for determination as:

- i. *Whether the prosecution at the close of the case has proved its case beyond reasonable doubt.*
- ii. *Has circumstantial evidence adduced met the standards that such evidence must meet to form the basis of conviction?*

32. Counsel while relying on the case of **Woolmington –vs- DPP (1935) ALL ER 462 and Okale –vs- Republic (1965) E.A 555** submits that the burden of proof in criminal cases depends on the prosecution. This position was also echoed in **Sawe –vs- Republic (2003) KLR 364**.

33. He further submits that the accused has no duty to prove his innocence. That there are a lot of gaps left from the evidence adduced in court. He argues that there was no evidence showing that the Appellant was at the deceased's house on the material date.

34. Counsel urges the court not to rely on the evidence of Pw2 on visual identification as there was no evidence of lighting at the scene and yet it was late in the night. He cites the case of **Republic –vs- Nicholas Ngugi Bungwa (2015) eKLR** where Lessit J. stated that:

“The prosecution relies on the eye witness evidence of Pw7 that the accused visited the deceased from 10:00 pm on the night of 31st May, 2011 and was heard arguing with her that night before her body was found the next morning; that the next morning the accused confessed the murder to Pw3 who promptly took him to the police.

I agree with Mrs. Nyamongo for the accused that the time Pw7 claims to have seen the accused pass to go to the deceased house it was night. There is no evidence of the lighting condition at the plot in issue on the day in question. The evidence of visual identification of accused by Pw7 is therefore unreliable and I place no reliance on it.”

35. He argues that the evidence of Pw3 **Jonathan Mutheme Kimeu** an Pw4 **Shadrack Kingoo Mutulu** was hearsay evidence since neither the message nor the phone were produced as evidence in court. He terms the evidence of Pw3, Pw4, Pw5, Pw6 and Pw7 as hearsay. It is his submission that the prosecution did not establish any circumstances from which an inference of guilt can be drawn. He relied on the case of **Sawe –vs Republic (supra)** to argue this point. Other cases relied on, on the same issue are **Mwangi & Anor –vs- Republic (2004) eKLR 21 and 25, Kipkering Arap Koske –vs- Republic (1949) 16 EACA 135, and Munyao –vs- Republic (2002) 2 KLR 504**.

36. Mr. Mutinda finally submits that where the case against the accused depends almost entirely upon circumstantial evidence the element of motive is one which the court should consider. It's his contention that the prosecution has failed to prove motive in this offence.

37. This is now the case before me for determination.

38. Murder is defined under section 203 of the Penal Code as:

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

For any killing to amount to murder it must have been committed with malice aforethought or the killing must have been pre-meditated.

Malice aforethought is defined under section 206 of the Penal Code as: -

(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;

39. For a charge of murder to be proven the following ingredients must be established:

- (i) Fact and cause of death.
- (ii) An unlawful act of omission or commission by the accused caused the death (*actus reus*).
- (iii) The act was accompanied by malice aforethought (*mens rea/intention*).

i. Fact and cause of death.

40. There is no dispute that indeed the deceased herein died on the night of 3rd and 4th March 2015. This has been attested to by Pw1 – Pw7. Pw3 **Jonathan Muthama Kimeu** and Pw4 **Shadrack Kingoo Mutulu** identified the body for purposes of postmortem. Pw1 **Dr. Emmanuel Loiposha** who did the postmortem and produced the report (*EXB1*) confirmed the death. He also stated that the deceased suffered four (4) stab wounds on the right supra clavicular region. He gave the cause of death as cardio-pulmonary arrest due to injuries caused by deep cut wounds on the neck. It is obvious that this was not a natural death.

(ii) That an unlawful act of omission or commission by the accused caused the death (*actus reus*).

41. The deceased lived with her husband (*accused*) and only child (Pw2) in a rental house on a plot in Misongeni Makindu. Pw6 **Anna Mwendu Mulu** was the next door neighbour to the deceased on this plot. She testified that on the evening of 3rd March 2015 she had sold vegetables to the deceased in the presence of the accused and their daughter F Pw2. She did not hear any noises from their house that night. She was shocked when she learnt of the death from Pw5.

42. Pw2 has given a narrative of what happened that night in their house. She said their house was two (2) roomed. i.e. the bedroom and sitting room. She confirmed that accused was home that evening just as Pw6 had stated. It was Pw2's evidence that the accused would switch on and switch off the lights in the bedroom where she was. She said the parents had quarreled that night and they were both angry.

43. She told the court that upon switching off the light in the sitting room, the accused went out and returned with a piece of wood (*EXB2*) which she identified. This is the wood that was found besides the deceased's body by Pw6 and Pw7. All that Pw2 heard were sounds of *mbumbumbumbu*. She also heard groaning. The *mbumbu* sounds were heard more than once. She tried to inquire from her father what it was but every time he would tell her to keep quiet and sleep.

44. This child also said after the *mbumbu* sounds, the accused took a rope, climbed on the bed with the rope tied on his neck and hanged himself. He struggled and fell down after which he went and changed clothing. Therefore, the jeans trouser he wore to the police station is not what he wore during the occurrence.

45. Pw7 testified that in the room where the deceased's body was, they also found a rope hanging from the roof (*EXB3*) and the piece of wood (*EXB2*) besides the bed. All these findings were on the following morning after the incident at night. Nobody had gained entry into the house since Pw2 had been locked inside. Pw2 could not have planted those items there.

46. In her evidence Pw2 talked about the piece of wood (*EXB2*) and the rope that was used for an attempted hanging. Pw7 (*the investigating officer*) found the rope hanging from the roof. This corroborates Pw2's evidence. Pw7 was one of those who entered the house after the grill of the door was opened. Pw2 was inside and told them the mother had been killed by the father. The accused took himself to the police station.

47. The accused has denied committing the offence. He states this:

"I reached Makindu at 7:00 pm and went to the house. I found my school going child F already back from school. I then went to the bar. She told me the mother had gone for vegetables."

48. From this statement, the accused is claiming he was not home that evening and that the wife went to buy vegetables. The evidence of Pw1 and Pw6 confirms that the accused was home that evening. Pw2 has even explained what the accused was doing before the incident.

49. The accused testified on how he had been attacked and even taken to the house while under siege. If indeed anything of this kind

happened, Pw2 would have witnessed it. He does not mention anywhere where she was. He wants the court to believe that he took off from the house and jumped over the fence leaving his wife and only daughter with strange men in the house? If indeed this was the case, the defence would have put it to Pw2 in cross examination.

50. He even claims to have been taken to Kiboko police post and found it closed and had to be taken to Emali police post to report. Had there been such a team of attackers who had raided them, the neighbours on the plot would have heard. Pw5 and Pw6 never heard any noises on the plot that night.

51. Mr. Mutinda for the accused dismissed Pw2 as a liar and has submitted so much on circumstantial evidence and cited very useful authorities.

52. It is true that Pw2 did not see what was done to the mother but she explained step by step what she saw and heard. In the case of **Sawe – vs- Republic (2003) KLR 364** the Court of Appeal stated this of circumstantial evidence:

1) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

53. Later on **Nzivo –vs- Republic (2005) I KLR 699** the Court of Appeal held that:

(5) In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.

54. Circumstantial evidence therefore means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

55. Those who entered the bedroom found the deceased's body lying naked on the floor. Pw2 had said that the accused had released the deceased from making chapatis and asked her to go and take a shower. The "mbumbumbu" sounds were heard after he came from outside with a piece of wood. The deceased must have by then returned from taking a shower. This explains why the body had no clothes.

56. The defence did not give any reason as to why Pw2 would lie against the accused. Pw2 was intensely cross examined by the defence and she remained firm. Her evidence was not shaken. Some of her evidence has been corroborated by the evidence of Pw6 and Pw7. They squarely placed the accused at the scene of incident. He changed his clothes before disappearing and gave Pw2 Kshs.50/= for the deceased to 'buy' bread for her when she woke up. This was never to be. She gave the money to Pw6 to buy her the bread.

57. Upon analysis of the evidence adduced, I find that the defence by accused is an afterthought. He is the one who killed the deceased by clobbering her and stabbing her with a knife which he then placed in her anus.

(iii) Whether the act was perpetrated by malice aforethought (*mens rea*).

58. The manner in which the murder was executed shows it was well thought and planned. The deceased was stabbed four times; she had a deep cut wound in the neck severing the cervical spine, brainstem, left and right carotid arteries, both jugular veins and trachea (EXB1). There was no way she could survive and that was the intention. There can be no other explanation. I find that the prosecution has established malice aforethought.

59. For my part, I find the case against the accused proved beyond reasonable doubt and I convict him of the offence of murder contrary to section 203 of the Penal Code.

Orders accordingly.

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

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H. I. Ong'udi

Judge