REPU BLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 10 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

DUME KITSAO CHAI.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Ms. Aoko for the accused

JUDGMENT

The accused **Dume Kitsao Chai;** was charged with the offence of murder contrary to Section 203 of the Penal Code for the murder of **Mercyline Kache Charo.** The brief particulars of the offence were that on the night of 2nd / 3rd September 2016, at Sosoni Village, within Kilifi county, jointly with others not before court he murdered, the deceased **Mercyline Kache Charo.**

Ms. Aoko, appeared for the accused whereas **Ms. Sombo**, prosecution counsel represented the state. The case for the prosecution was founded on the evidence of the following witnesses **PW1 Erastus Charo,** the father to the deceased testified that on 31.8.2016 the deceased reported to him that she was not feeling too well and needed to visit a doctor at Mnarani Hospital. In his evidence, (PW1), told the court that the deceased stayed at home to recuperate but before long she went missing from home. That caused anxiety and the issue of her going missing had to be reported to the village elder and eventually the police.

On the 3.9.2016, PW1 heard screams and on rushing to the scene he saw the deceased lying on the ground motionless with no physical injuries. Further, PW1 testified that the police were called in to investigate the cause of death by taking the body to the mortuary for postmortem examination.

In the course of investigations, PW1 gave evidence, that the accused was implicated as the perpetrator of the crime. In this regard, PW1 stated to the court that in company of police officers he visited the house of the accused where he saw blood stains on the mattress, the floor, clothes and the bed itself. The investigations led to the recovery of the deceased clothes in the pit latrine being used by the accused. The witness was able to identify the bra, shoes, a foetus, a leso, mattress cover, three T-shirt, in white, yellow and blue stripes and a blood stained timber.

In cross examination by counsel, the witness denied any knowledge about the pregnancy of his daughter.

PW2 – Rose Mapenzi Charo, gave evidence that on 31.8.2016, the deceased was at home. In the course of the day PW2 saw the accused driving his motorcycle seeking to assist the deceased seek medical help at an hospital. Further, evidence from PW2 was that since she had no idea that her sister was indisposed, she went about her chores of making arrangement to visit the mother at Kaloleni. On her return back home, PW2 told the court that the deceased was not neither at home nor in school. At the end of that day PW2 testified that the deceased body was discovered and the police initiated investigations as to the circumstances in which she must have met her death.

Following the arrest of the accused, she was able to identify some of the personal clothing recovered at the scene of the suspected murder.

In cross examination PW2 told the court that she was not aware of the pregnancy or the abortion claim before the death of the deceased. She also denied knowledge that the deceased was the one who dumped the foetus and her personal clothes in the pit latrine.

PW3 – Zainabu Shami Mohamed, a wife to (PW1) testified that she was living with the deceased in the same compound. PW3 in her testimony confirmed that the deceased had excused herself from attending school so that she can go to the hospital. She therefore wanted PW1 to facilitate it by way of expenses on the material day.

However, according to PW3, the deceased left home and her whereabouts unknown until the 31.8.2016. As this matter became a police case, PW3 confirmed that the deceased body was found outside the accused homestead. On cross examination by the defence counsel, the witness denied any knowledge that the deceased had conceived and she took action to abort the pregnancy.

PW4 – Rebecca Mitzanze, the grandmother to the deceased testified with regard to deceased intimation by (PW1) to visit a hospital for purposes of treatment. In PW4 evidence, the deceased left home with a view of coming back but that did not happen. The witness claimed that when the deceased went missing, a report was made to the police but before long her body was discovered outside a neighbours home.

PW5 – Kombo Kalume Iha, an uncle to the deceased told the court that he came to learn of the death from a telephone call from his wife. PW5 stated in court to have participated during the postmortem examination at Kilifi Hospital Mortuary. It was at that time he saw some physical injuries sustained to the neck of the deceased.

According to PW5, in accompany of the police to the accused home, he was able to identify some of the deceased personal clothing recovered in the pit latrine. Further, PW5 testified that at the home of the accused, blood stained mattress and clothes were also recovered as duly produced in Court as exhibits in support of the charge.

PW6 – Nathaniel Ngumbao Iha, told the court that her daughters who had been sent to purchase credit informed him of the discovery of the deceased body lying under a tree. He was therefore to record a statement and later was part of the family involved in the investigations and subsequent arrest of the accused.

PW7 – Dr. Khadija, the medical officer based at Kilifi County Hospital gave evidence on the postmortem examination carried out on the body of the deceased. At the conclusion of the examination, PW7 told the Court that it was opined the deceased cause of death was fracture of the skull and haemorhage. In this regard she produced the post-mortem report in evidence as exhibit 14.

PW8 George Lawrence Okinda, an analyst with the government chemist gave evidence based on the report involving a DNA profile in respect of Red bed sheet, towel, green lesso, blue/yellow lesso, red T-shirt, mattress cover and black bra. According to PW8 analysis the bed rail, and the foetus generated a DNA profile with the blood sample of the deceased. The analyst report dated 23.2.2017 was produced by the analyst to give credence to the positive findings and causal connection with the crime.

Analysis and determination

The onus to adduce evidence under Section 107 (1) of the Evidence Act to establish the guilt of the accused remains on the prosecution throughout the trial. The accused have elected to remain silent a right stipulated in the constitution does not in any way lessen the burden of proof of beyond reasonable doubt, within the scope of the principles in **Woolmington v DPP (1935) AC 485.** In **Miller v Minister of Pensions (1947) 2 ALL ER 372 – Lord Denning J** said:

> **"That 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 proof beyond a shadow of doubt. The Law would fail to protect the community if it admitted fanciful possibilities to defect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, then the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

In drawing an inference or conclusion from facts proved regard must always be had to the nature of the standard of proof in each particular case.

The offence of murder contrary to Section 203 of the Penal Code constitutes the following ingredients:

> **(1). That the deceased died.**
>
> **(2). That her death was unlawful.**
>
> **(3). That in causing death the accused had malice aforethought.**
>
> **(4). That the evidence on record is capable of positively identifying and placing him at the scene of the murder.**
>
> **The most distinct element when a person is accused of causing death of another is for the prosecution to proof malice aforethought. The term is defined in Section 206 of the Penal Code which consists of intention to cause death or to do grievous harm to any person, or knowledge that the act causing death will probably cause the death of the deceased or some other person, an intent to commit a felony or intention to facilitate the escape from custody of a person who has committed a felony."**

The threshold for malice aforethought is e-echoed in various authorities **Ogeto v R {2004} 2 KLR Guyo Duba v R CRACRA NO. 89 OF 1999, R v Tubere S/o Ochen {1945} 12 EACA 63, Ernest Asami Bwire Abanga alias Onyango v R Nairobi CR Appeal NO. 32 OF 1990** The features in these cases emphasize that the evidence given must show the cumulative aspect of the case made against the accused

on the weapon used, the gravity of the injuries inflicted, how they were inflicted, the parts of the body targeted, an evaluation of the accused conduct, prior, during and after the commission of the offence.

Secondly, the presence of any evidence that shows fundamentally that the deceased sustained multiple injuries calculated and violently aimed at causing death or grievous harm. Grievous harm in this context is defined under Section 4 of the Penal Code as any dangerous or permanent harm or injury which is threatening and endangers right to life. The determinant facts and evidence by the prosecution must provide a basis in line with Article 50 (2) (a) of the Constitution that his presumption to innocence has been disproved to the contrary. In the alternate, the accused having been placed on his defence elected to exercise his Constitutional right to remain silent and not to testify during the proceedings in consonant with Article 50 (2) (1) of the Constitution.

The right to life is sacred and protected under Article 26 (1) of the Constitution. The termination of it unlawfully is acknowledged as one of the serious offences in the Penal Code, particularly when it is not excusable under any of the statutory defences known in Law. I have in mind the defence of self under Section 17 of the Penal Code, and Section 207 as read with Section 208 on provocation.

The crucial element therefore to be proven beyond reasonable doubt is on intention or *mensrea*, of the offence. In **Hyam v DPP {1974} 2 ALL ER 41** The court confirmed that

> **"an intention to cause death or to do grievous harm was sufficient mensrea for murder."**

The obvious dichotomy is for the prosecution to show a causal relationship between the mental state of the accused and the voluntary physical act involved in committing the offence of murder against the deceased. In **DPP v Smith {1960} 3 ALL ER 161** the Court observed interalia that:

> **"Intent in the commission of a crime necessarily involves a conscious choice to bring about a particular state of affairs. If one consciously chooses not to bring a state of affairs, one cannot intend it. In all but the rarest circumstances choosing to do something will mean that one also actively desires it. That rare exception may occur where the desire of the accused is to bring about a result knowing, albeit with regret, that another consequence will, in the ordinary course of events, follows from it, or necessarily involve it. That state of mind is nonetheless intent."**

The intention to kill as grounded under Section 206 of the Penal Code is generally inferred from the facts showing the conduct of the accused person before, during or after committing the offence. The Court in **People v Murray {1977} 1R 360**, the Supreme Court in Ireland in its quest to define this elusive and undefinable state of mind remarked that:

> **"To intend to murder, or to cause serious injury, is to have in mind a fixed purpose to reach that desired objective. Therefore, the state of mind of the accused person must have been not only that he foresaw but also willed the possible consequences of his conduct. There cannot be intention unless there is also foresight, and it is this subjective element of foresight which constitutes the necessary mensrea. Therefore, where a fact is unknown to the accused it cannot enter into his forethought and his cannot be taken to be intentional with regard to it."**

The cogency of the evidence by the prosecution against the accused for conviction to be founded under Section 203 of the Penal Code taken together ought to satisfy the criteria set out in the persuasive precedent of the **People DPP v Douglas & Hayes {1985} ILRM 25, 29** where the Court stated:

> **"In the circumstances of any particular case evidence of the fact that a reasonable man would have foreseen that the natural and probable consequences of the acts of the accused was to cause death, and evidence of the fact that the accused was reckless as to whether his acts would cause death or not is evidence from which an inference of intent to cause death may or should be drawn, but the Court must consider whether either or both of these facts do establish beyond a reasonable doubt an actual intention to cause death."**

This is substantially the approach taken in our jurisprudence as purposed in the case of **Nzuki v R {1993} KLR 171**. The Penal Code therefore discloses a clear scheme, prescribed to prove the elements of the offence of murder being the death caused unlawfully and with malice aforethought. This is clearly the principle by **Charleton McDermant and Bolger** had in mind in their text book on Criminal Law **(Butterworths 1999 at paragraph 1.67)** where they stated that:

> **"People who kill are generally driven to the extreme of passion unless they are socio paths or are trained to pursue killing to earn money or in pursuit of a political ideal. That intention is a simple word which, when it is used in the definition of a criminal offence, requires that a person be proved to have acted with the purpose of causing harm or circumstances outlawed. In other words, what he meant to do what he did."**

For all these principles, I answer the question whether the prosecution has fully discharged the burden of proof beyond reasonable doubt against the accused person. The fact is as the trial played out the prosecution case purely dependent on circumstantial evidence. As far as the test on circumstantial evidence is concerned, the contents of the criterion to be met is cognizance of the principles in the case of **Teper v R {1952} AC** where **Lord Norland** said:

> **"Circumstances evidence must always be examined, if any because evidence of this know may be fabricated to cast suspicion on another. It is also necessary before drawing an inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

It is trite that suspicion alone however strong, is not enough to sustain a conviction. In what circumstances could a court draw an inference and determine the guilt of an accused purely on circumstantial evidence was also firmly stated in **Sawe v Republic, R v Kipkering Arap Koske & Another 16 EACA 135** the postulated classical words in these authorities are that:

> **"In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."**

In the instant case it should be noted that the deceased was at her home and in the presence of PW1, PW2, PW3 and PW4. Their evidence which gave an adverse implication against the accused shows that the deceased complained to (PW1) that she was taken ill and needed some money to visit a doctor for examination and treatment. In this conversation between the deceased and her father (PW1) happened to be in the presence of PW2, PW3 and PW4.

Incidentally, the deceased was never to be seen alive, it is also instructive from the evidence of PW2 that before the deceased could leave for the hospital, the accused drove to the home with his motorcycle apparently to take her to the hospital. Thereafter, the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 alluded to the fact of the deceased body being recovered outside the precincts or near side of the accused house.

Against this background PW1, PW3, PW5 in company of **PW9 – CPL Amos Wambua,** explained that on making a visit to the scene the following salient features abound: ***(1). That the accused house had streams of blood, to the cover mattress, bed sheet, towels, T-shirts, lessos and black bra. (2). In the adjacent pit latrine a foetus was recovered and cloth wear positively identified to be that of the deceased.***

Their evidence was buttressed with that of **George OKinda – (PW8)** the government analyst who on receipt of the exhibits from **PW9 CPL Wambua** did carry out a DNA profile. For instance, PW8 told the court that the bed rail generated a DNA profile that matched the DNA profile from the blood sample of the deceased. The discovery of a foetus would lead one to conclude that the deceased died of premature abortion hence inevitably casting a doubt as whether accused played any role in accelerating the death.

The culpability of the accused is nevertheless found in the medical evidence of the pathologist **(PW7) Dr. Khadija**. According to PW7 the deceased had suffered spinal cord injury with a fracture to the cervical spine and, fracture at the base of the skull. This evidence certainly represents the Law under the offence of murder contrary to Section 203 of the Penal Code. This is more so because the deceased could not have fractured her own spine and base of the skull as a consequence of intending to procure an abortion. The medical view on the cause of death is that primafacie there was unlawful act, inflicting fatal harm. This was diagnosed with certainty by PW7.

Much was made of the evidence that is appealing to the circumstances leading to the death of the deceased. The prosecution circumstantial evidence on recovery of the foetus and some clothes belonging to the deceased, the blood streams on the bed rail, mattress cover, T-shirts and lessos render all of it for the Court to conclude that the crime was committed by the accused in exclusion of any other person.

In my view, procuring an abortion need not occasion fracture of the spine nor the skull as it happened to the deceased. In short, Learned Legal Scholars **Smith and Hogan Devron J on Criminal Law Oxford University Press {2015} 15th Edition:**

> **"Murder was an act or series of acts done by the prisoner, which were intended to kill, and did in fact kill. It did not matter whether Mrs. Mureu's death was inevitable and that her days were numbered. If her life were cut short by weeks or months it was just as much murder as if it was all short by years."**

In drawing the inference as to the guilt of the accused, I bear in mind that the proposition in **R v Bhatt** is novel that once the prosecution discharges its obligations to present a primafacie case there is a legitimate expectation notwithstanding the right to remain silent, the accused would testify and respond to the allegations, under Section 111 of the Evidence Act on matters particularly within his knowledge.

I have obtained support for this view in the case of **R v Jenkins {1908} 14 CCC 221 B.C.S.C** where under the rubric on circumstantial evidence the Court stated:

> **"It is true that a man is not called upon to explain suspicious things, but there comes a time when, circumstantial evidence having developed a man in a strong cogent network of inculpatory facts that man is bound to make some explanations or stand condemned."**

The context of the prosecution evidence in this case was such that the witnesses articulated a dichotomy pointing at the accused person founded on the burden of proof of beyond reasonable doubt. As is evident from the above evaluation in the face of the proven facts in my view all elements of the offence underlying the provisions of Section 203 of the Penal Code have been discharged by the prosecution to justify a conviction for the offence.

In my considered view the crux of the matter is not on the purported abortion but the decisive circumstantial evidence with an irresistible inference of a murder committed unlawfully and with malice aforethought contrary to Section 203 of the Penal Code.

For the reasons I have given, I find the accused guilt by asserting that his silence rendered the case of the prosecution uncontradicted and therefore sufficiently incompatible with the right to presumption of innocence of the accused under Article 50 (2) (a) of the Constitution.

In the case before me, it may be that the evidence is very largely circumstantial but as stated by the prosecution witnesses the actual facts are known to the accused. He had therefore the right under Section (111) of the Evidence Act as it now exists, to explain when and how he parted with the deceased before she met her death. Going by the guide in **R v Jenkins case (supra).** The only rational inference that can be

drawn from the circumstantial evidence is that the accused is guilty of the crime.

With this it would be in order to convict the accused in adherence to the adverse inference that he committed the murder against the deceased, with malice aforethought contrary to Section 203 of the Penal Code.

Sentence

The right to life is jealousy protected in terms of Article 26 of the Constitution of Kenya, 2010. It is provided that:

> **26. Right to life**
>
> **(1). Every person has the right to life.**
>
> **(2). The life of a person begins at conception.**
>
> **(3). A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written Law.**
>
> **(4). Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written Law.**

Initially, the offence of murder is criminalised in terms of section 203 as read with 204 of the Penal Code, Laws of Kenya. The sentence prescribed is mandatory death sentence. The said sections provide as follows:

> **203. Murder**
>
> **Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**
>
> **204. Punishment of murder**
>
> **Any person convicted of murder shall be sentenced to death.**

However, the landmark decision in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015 (2019) eKLR,** brought about a paradigm shift as far as the aforementioned mandatory minimum sentences are concerned. The aforesaid case declared mandatory death penalty (cited above) and its commutation to life imprisonment by an administrative fiat, unconstitutional, null and void. This emerging jurisprudence equips the judge with some measure of discretion in determining appropriate sentences which are proportional to the individual circumstances of the case at hand.

By nullifying the death penalty, the Supreme Court seems to suggest that it is only the mandatory minimum nature which was discarded. However, in appropriate cases, death sentence remains unconstitutional and may be imposed only on a person convicted of murder committed in aggravating circumstances. By the same token the court is also equipped with discretion to vacate the death penalty in cases whose factual matrix exhibits extenuating circumstances or justifies the same.

In assessing an appropriate sentence, the court has to take into consideration the totality of mitigatory factors and sought to weigh them *vis-a-vis*

However, it must be emphasized that a trial Court is permitted to depart from the prescribed maximum sentence whenever it finds a substantial or compelling circumstances, warranting such an alternative sentence.

While the court is entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purpose of meting out the sentence, it is not proper for the court to set out to analyze the evidence as if it is meant to arrive at a decision on the guilt of the accused.

According to **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**:

> **"[71] To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:**
>
> **(a) age of the offender;**
>
> **(b) being a first offender;**
>
> **(c) whether the offender pleaded guilty;**
>
> **(d) character and record of the offender;**
>
> **(e) commission of the offence in response to gender-based violence;**
>
> **(f) remorsefulness of the offender;**
>
> **(g) the possibility of reform and social re-adaptation of the offender;**
>
> **(h) any other factor that the Court considers relevant.**

In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in **Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR,** where the High Court held that the objectives include:

> **"deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."**

In aggravation, the deceased appeared to have been brutally murdered in cold blood and have his body dumped in a river. Further in aggravation is the fact that precious human life was lost unnecessarily and the deceased was stopped from living life to its fullness. The court will not lose sight of the sanctity of human life and that lost human life can never be replaced. In any event no amount of compensation can bring back lost life.

This court is concerned by the prevalence of murder cases in this region. What is disheartening being that such murder cases are being committed by persons of all ages save for children. The mind boggles as to why such persons readily resort to violence at the slightest provocation or at no provocation at all.

The accused persons by unnecessarily resorting to violence as a way of resolving a dispute that may have existed acted in a barbaric manner occasioning the death of the deceased. The court frowns at such violent criminal conduct. We should show displeasure at such violent conduct leading to loss of life by the corresponding sentences imposed.

The circumstances in which the crime was committed and the nature of the crime far outweigh the mitigatory features advanced by the accused. The offence as observed correctly by counsel for the state is an offence deserving a just and appropriate sentence to deter the offender and to punish his unlawful conduct.

In this respect striking the balance between the aggravating and mitigatory factors, and further the summarized test in **Muruatetu case,** the alarming tide of criminality in murder cases which has engulfed and threatened the very fabric of our society calls for Courts to act decisively. In this case the Court has not been told of any existence of substantial or compelling circumstances for the commission of this heinous crime against the deceased.

As much as the Court is expected to consider each factor on equal balance. In this case, I bear in mind the level of violence involved the nature of the lethal weapons which must have been used to inflict such brutality and serious harm, the cruelness of the assault, the vulnerability of the victim a young girl whose right to life was prematurely brought to an end, the potentiality that the victim was not armed nor the accused acting in self-defence or provocation. I also note that right from the time and date accused picked his victim from her home he had premeditation and a plan to execute the crime.

Applying all these guidelines to the matter at hand, I hold that this case indeed falls within the ambit of Section 204 where the rarest of the nature of the crime deserves the death penalty. However, Kenya does appear to be slow in ordering of signing of the executive orders to operationalize the sentence. In the context of all these the fixation of punishment in the range permissible by Law is that of life imprisonment against the accused person.

It is so ordered.

14 days right of Appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF AUGUST, 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Kirui for the state

2. Mr. Gicharu for Aoko for the accused person