



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRC NO. 04 OF 2017

REPUBLIC..... PROSECUTOR

-VERSUS-

LUCAS MUNANDU MALILE.....ACCUSED

JUDGMENT

1. **Lucas Munandu Malile** the accused stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the accused on the 21st of February, 2017 at Kaliani sub-location in Githungo location within Makueni county in the Republic of Kenya, murdered **Christine Nthenya Mutunga**.

2. The accused denied the charge and the case proceeded to hearing. The prosecution called ten (10) witnesses while the accused gave a sworn statement of defence without calling a witness.

3. **Pw1 Muli Maisu** is the chairman of Nyumba kumi in Mbooni. He testified that on 17th February 2017 he was asked by the area assistant chief to go to Miatani Munyatani where he would meet the deceased's father (Pw2). He went to the deceased's matrimonial home where he found her seated but in pain. She told him she had been hit with a hammer by the accused who was her husband. Her pain was in the stomach and leg which was swollen. Her father (Pw2) was present.

4. Pw1 went to look for the accused and found him at Kitandi but he ran away on seeing him. He returned to the deceased's home where he found her mother in-law (Pw6). On inquiring from her what may have happened she denied having heard anything. As the deceased was being helped to rise up by her sister in-law in order to be taken to hospital she fell down. She was carried away by a boda boda in the company of her father. He got a call on 21st February 2017 informing her that the lady had died.

5. **Pw2 Domic Mutunga Muthoka** is the deceased's father. He said he had been called by the deceased on 17th February 2017 informing him of having been beaten by her husband (*the accused*) on 13th February 2017 who also locked her in the house. He left for the deceased's home and met with Pw1 with whom he went to the home. They found the deceased lying down and the accused's sister was also present.

6. The deceased was not able to walk, as her leg and shoulder were swollen and they had to hold her for her to be able to walk. He took the deceased to his home using a boda boda. They planned to go to hospital the next day. In the early hours of the morning accused came to his home while armed with a panga. The matter was reported to the assistant chief.

7. In the morning he took the deceased to Mbumbuni hospital after reporting to Mumbuni police station. She was treated and they went back home. He had been advised to take her to Wote for an x-ray. Two days later her condition worsened and she was taken to Mbumbuni on 21st February 2017 where she died. The accused had been arrested on 20th February 2017. The hammer used to assault the deceased was shown to him by the deceased.

8. In cross examination, he said the deceased had delivered a week before the incident though he did not visit her in hospital.

9. **Pw3 Faith Kanini Mutunga** is the deceased's mother. She gave similar evidence to that of Pw2 on the condition of the deceased who had injuries on her legs, upto the waist and on her upper arm.

10. **Pw4 Salome Kanini Maweu** is a village elder in Uiini village. She received a report of the happenings on 18th February 2017 at 8:00

am and went to Pw2's home. She found the deceased who was walking with a lot of pain. She told her the accused had beaten her and she had just delivered. He had hit her on the leg with a hammer and burnt her clothes. She had been taken to hospital and was to be taken to Wote. Later she learnt of the deceased's death.

11. **Pw5 Benard Kilonzo Muthoka** is a brother to Pw2. On 21st February 2017 he met with the deceased being taken to hospital. He later on the same day learnt of her death. He was at Makueni mortuary for the postmortem and identified the body of the deceased.

12. **Pw6 Kavaati Malile Vuundi** is the accused's mother. She testified that on 13th February 2017 the deceased carried the child towards the shamba behind the house and the accused followed her. They later returned home and entered their house and she did not hear of anything strange. On 17th February 2017 Pw1, Pw2 and Mwonga Mutiso (*village elder*) came home. They told her that Pw2 had come for his daughter.

13. The deceased was by then washing the baby's clothes and preparing vegetables. Pw2 told the daughter to pick all her belongings which she did. She took the baby and left on a boda boda. Her other two (2) children were carried by Pw2.

14. She further testified that in the night Pw2 called her and told her that the accused was at his compound roaming with a panga. She called accused at his house and he responded. When she next called Pw2 he hang up and then switched off his phone. After the deceased's death Pw2 called her to tell her about the hammer and the accused's presence at Mbumbuni police station. She said the deceased had no injuries and neither was she limping when she left her home.

15. **Pw8 No. 61897 Sergeant James Kimatu** was the investigating officer. He confirmed receiving a report of a death on 21st February 2017. The accused had been re-arrested by **Pw7 No. 92653 Pc James Mburu** and **Pc Kiplagat**. Investigations commenced and a postmortem examination was done. He saw bruises on both of the deceased's hands, shoulders, elbows and swollen knees. He learnt that the accused had used a hammer to beat the deceased on both knees on 13th February 2017. The situation worsened upto the time she died

16. **Pw9 Dr. Alex Makau** produced the postmortem report (EXB1) by Dr. Loiposha as the defence had no objection. The deceased had 1st degree burns on upper limbs, right thigh and right hip joint dislocation with a blunt force injury in the right region. Four (4) organs lacked blood. The cause of death was haemorrhage secondary to crushed artery and vein due to a blunt force injury.

17. In cross examination he said the bleeding was not due to the delivery she had undergone. He however admitted that such injury can be caused by a person carrying a heavy object.

18. **Pw10 Miriam Nyakio** produced the deceased's treatment card, referral form and the deceased's copy of identity card (EXB 3a –c). She confirmed that the deceased had been treated at Kisau sub-county hospital Mumbuni on 18th February 2017 and 21st February 2017. She said the deceased had a swollen/tender knee. She claimed to have been beaten with a hammer. No x-ray was done despite the referral. She said the deceased had open wounds on upper limbs.

19. In cross examination she confirmed that such injury can be caused by a fall or by one carrying a heavy load. She further said a hammer hitting someone would cause such injuries.

20. In his sworn defence the accused said he took the deceased to Kaliani hospital on 7th February 2017 when she went into labour. She delivered and went back home and progressed well. On 11th February 2017 he came home from work at 3:00 pm and found her sleeping. She told him she had fallen and injured her leg.

21. He massaged her leg which was swollen and she improved. On 14th February 2017 the deceased called her mother to inform her of the birth of her child. On 17th February 2017 Pw2 came home in his absence and when he arrived home at 5:30 pm he did not find the deceased.

22. His mother (Pw6) explained to him what had happened. He later that night learnt from his mother that it was being said he was at the deceased's home. He tried to reach Pw2 by phone in vain. On 20th February 2017 he was called by a lady who asked him to go to Kyambusya which is near the deceased's home. He complied and went and that's how he was arrested by police officers from Mbumbuni.

23. The next day he learnt of the death of his wife. His wife and parents had come to see him at the police station, on 21st February 2017, with Pw3 carrying the baby as the deceased was limping. That she had explained to him on 17th February 2017 that she had fallen after feeling dizzy and skidding in some mud.

24. In cross examination he said they had three (3) children and had been married for a year. He was only aware of the knee injury which was from a fall. He said he had collided with Pw2 who had given the deceased Kshs.1000/=. He denied knowing Pw3 and Pw4 and Ngotho the assistant chief.

25. Mr. Hassan for the accused in his written submissions contends that the deceased left with Pw2 and boarded a boda boda to their home. From Pw6's evidence the deceased was fine when she left and

whatever happened was while she was in Pw2's custody. That the hammer and panga were not from Pw6's home. His submission is that the prosecution failed to prove that the deceased died as a result of any omission or commission on the accused person's part. He urged the court to acquit the accused.

26. The prosecution elected not to file any submissions and relied on the evidence on record.

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

Analysis and determination

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

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:

(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;

29. From these definitions I find the following to be the ingredients which must be proved for the charge of murder to be established.

- i. The fact and cause of death.
- ii. That the accused committed the unlawful act of commission or omission which caused the death of the deceased (*actus reus*).
- iii. That the accused had malice aforethought/intention in committing the said act (*mens rea*).

See **Anthony Ndegwa Ngari –vs- Republic Court of Appeal Nyeri (2014) eKLR**

(i) ***The fact and cause of death***

30. There is no dispute about the fact of death. Pw2 and Pw3 (*parents of deceased*) and other witnesses have testified to that. Pw2 and Pw5 witnessed the postmortem. Pw9 who produced the postmortem report gave the cause of death as haemorrhage secondary to crushed artery and vein due to a blunt force injury (EXB1).

(ii) ***That the accused committed the unlawful act of commission or omission which caused the death of the deceased (actus reus).***

31. Besides what the deceased allegedly told accused, her parents (Pw2 & Pw3), Pw1 (*nyumbakumi chairman*) and Pw4 (*village elder*) there is no one who witnessed the said assault on the deceased. I will therefore examine their evidence. **Pw6 Kavaati Malile Vuundi** who is the accused's mother denies hearing any commotion between the accused and deceased in their house on the date in question.

32. The accused and deceased had been living together as husband and wife for about a year. They had a total of three (3) children, the first two being children the deceased had come with. The 3rd child was less than two weeks old.

33. It is Pw2's evidence that he was called by the deceased on 27th February 2017 who informed him that she had been beaten and hurt by the accused who even locked her in the house. The beating had taken place on 13th February 2017. He advised her to get onto a boda boda and go to his home. She informed him she could not walk. Pw2 decided to go to where she was but after reporting to the police assistant chief who called the nyumba kumi chairman (Pw1).

34. Pw1 and Pw2 were together at the deceased's house but the accused was not there. The two witnesses were categorical that they found the deceased writhing in pain. She complained of pain in the leg and stomach and the leg was swollen. She told them she had been hit by her husband (*the accused*) with a hammer. She also told them that the accused had burnt her clothes.

35. **Pw4 Salome Kanini Maweu** a village elder went to Pw2's home upon receiving a report from the assistant chief of the deceased's assault by the accused and the accused's invasion of Pw2's home the previous night. She received the report on 18th February 2017 at 8:00 am. She went to Pw2's home and found the deceased walking with a lot of pain.

36. This witness said the deceased told her the accused beat her and she had just delivered. That she tried to run away but the accused forced her back and hit her on the hip with a hammer. He also burnt her clothes. Pw4 said the deceased's upper arm appeared burnt. She advised Pw2 to take the lady to hospital.

37. The evidence of the doctor (Pw9) and (Pw10), the treatment notes (*EXB 3b and c*) the postmortem report (*EXB1*) and the photos (*EXB2a – d*) speak volumes. EXB2a – d show the burnt upper and lower limbs of the deceased. The card EXB 3b shows that when she appeared in hospital on 18th February 2017 the history she gave was

of having been assaulted by her husband. She had a lot of knee joint pain (*right*) and her body was swollen, tender and inflamed.

38. The postmortem examination (EXB1) revealed visible *1st degree equal to 15% burn wounds on both upper arms; visible right thigh*

oedema/bruises; visible right hip dislocation; femoral arteries/veins were crushed plus intrafascicular haematoma of extensive tissue damage due to blunt force injury. This post mortem report gives a picture of a person who was seriously injured. It also confirms the evidence of Pw1, Pw2, Pw3 and Pw4 of what they saw of the deceased when they were with her on 17th and 18th February 2017.

39. On the other hand, Pw6 who is the accused's mother rubbishes all this and explains that on 13th February 2017 the accused, deceased and child were at the shamba and safely went to the house and nothing happened. She further states that when the deceased left her home on 17th February 2017 she was in very good health and was not limping.

40. She may have seen the accused, deceased and child on 13th February 2017 at the shamba and back to the house. She could not however tell the court what happened in that same house during the night of 13th February 2017 as she was not living in the said house.

41. Secondly for her to say the deceased was 100% well and healthy when they left home on 17/02/2017 in the face of all that Pw1, Pw2, Pw3 Pw4 and the medical evidence have revealed is being most untruthful. Pw1 is a neutral witness and an administrator. He was sent to that home by the area assistant chief. There is no reason why he would lie about his findings. The same goes for Pw4 who is a village elder.

42. In his defence the accused confirmed that his wife had delivered a baby on 7th February 2017. He also stated that on 11th February 2017 she had fallen and hurt her leg which was swollen. He assisted

by massaging her and she improved and he never saw the need of taking her to hospital. He also never saw the serious injuries seen by Pw1, Pw2, Pw3, Pw4 and the medical team.

43. In cross examination he says he did not know what happened to the deceased when she was at her parents' home. In other words he implies that the burns and serious blunt injuries were inflicted on her at her parent's home. There is no reason why all these witnesses would gang up to lie against him. The injuries were not fresh.

44. In his defence, he lied by saying that upon his arrest on 20th February 2017 and while in the cells Pw2 and Pw3 plus the deceased visited him on 21st February 2017. That Pw3 carried the baby as the deceased was limping. Under the same breath he denied knowing Pw3. The evidence of Pw2, Pw3, Pw5 and Pw10 is that early morning of 21st February 2017 the deceased's condition worsened and she was rushed to the hospital in Mbumbuni.

45. After being attended to, her condition worsened and she was pronounced dead on 21st February 2017 at 10:20 am. With all this evidence the accused still claims he saw the deceased at Mbumbuni police station when indeed she was dying at the hospital!

46. There are many decisions by the superior courts on circumstantial evidence and how it should be treated. In the case of **Abanga alias Onyango –vs- Republic** (*supra*) the Court of Appeal set out the tests which should be applied when dealing with circumstantial evidence. These are:

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.
- iii. 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.

47. Later in the case of **Nzivo –vs- Republic (2005) I KLR 699** the Court of Appeal held thus:

(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 co-existing circumstances which would weaken or destroy the inference.

48. Upon analyzing the evidence set out above, I find Pw1, Pw2, Pw3 and Pw4 to have been truthful witnesses. They were indeed told by the deceased on 17th and 18th February 2017 that her husband (*the accused*) had beaten her with a hammer, burnt her clothes and locked her in the house. All the injuries mentioned were later confirmed through the postmortem (EXB1).

49. There is no reason why the deceased would lie against the accused if indeed he did not assault her. There is equally no reason why Pw1, Pw2, Pw3 and Pw4 would lie against the accused if the deceased did not tell them what they said. The injuries were not fresh and so could not have been inflicted on 17th February when she went to Pw2's home.

50. On the other hand I have found Pw6 and the accused to have lied to the court. The evidence on record irresistibly points to none other than the accused as the person who inflicted on the deceased the injuries that led to her death. The accused was arrested by the assistant chief and police officers.

(iii) That the accused had malice aforethought/intention in committing the said act. (*mens rea*)

51. Section 206 of the Penal Code defines what malice aforethought is. In the case of **Republic –vs- Tubere S/O Ochen (1945) 12 EACA 12** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. See **Ogelo –vs- Republic (2004) 2KLR 14; Nebart Ekaita –vs- Republic (1994) eKLR**.

52. Further in **Nzuki –vs Republic (1993) KLR 191** the court stated thus:

“Malice aforethought is a term of art and emphasized that:

Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

i. The intention to cause death.

ii. The intention to cause grievous bodily harm.

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of those acts, it does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely to ensue from his conduct is not by itself enough to convert homicide into a crime of murder. (See also Hyman –vs- DPP (1975) E.A 55.)

53. As already indicated above, the accused and deceased were living together as husband and wife. Nobody testified on having witnessed what transpired between the two. There is evidence that the accused did not take the deceased to the hospital despite the serious injuries she had suffered.

54. Considering the weapon used in this case which was a hammer and the targeted parts of the body which were not only hit but burnt plus the conduct of the accused after the assault, I am left with no doubt in my mind that the accused had the intention to kill or to cause grievous harm to the deceased. From the postmortem report (EXB1) the deceased had internal bleeding from a crushed right femoral vein/artery secondary to blunt force injury. This confirms the cause of death. He simply executed what he had well planned.

55. I find malice aforethought established by the prosecution as required by the law. For my part I find the accused guilty of murder contrary to section 203 of the Penal Code and I convict him accordingly.

Delivered, signed & dated this 12th day of November 2020, in open court at Makueni.

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H. I. Ong’udi

Judge