



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO. 104 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

EVERLYNE WANZA KILUNGYA.....ACCUSED

JUDGEMENT

1. The accused **EVERLYNE WANZA KILUNGYA** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on the 30<sup>th</sup> day of October, 2015 at Kwa-Reuben Slums Industrial Area Makadara Sub-county within Nairobi County murdered **JOHN ONCHIRI OGAO**.

2. She pleaded not guilty to the said charge and to prove its case against her the prosecution called a total of ten (10) witnesses and when put on her defence the accused gave sworn statement of defence and called no witness.

PROSECUTION CASE

3. The prosecution case was that **PW2 LABAN OBIRI MOIRO** who was living together with the deceased at 8.00 p.m. found him fighting with the accused and separated them. The accused then ran to where she had been selling vegetables only to come back with a knife and stabbed the deceased on the neck causing him to fall down before stabbing him again on the back. The deceased was taken to nearby clinic before being transferred to Kenyatta National Hospital where he died. It was his evidence that he had known the accused for a period of six (6) months as the deceased lover.

4. **PW5 CATHERINE MARTHA KASMIL** corroborated **PW2's** evidence and stated that on the material day the deceased whom she knew went to her shop with someone she did not know to buy sodas. Since there was a black out she closed the kiosk and on her way she met the accused and the deceased holding each other by the neck. The deceased was asking for cell phone sim card while the accused wanted a mobile phone from him. She then told them to settle their dispute amicably before **PW2** came and asked the deceased to go with him to their house and the accused went back to her kiosk only to return back and started to follow the deceased and **PW2** before getting hold of the deceased and stabbing him in the neck. She was able to see what happened and heard the deceased ask the accused why she had stabbed him. She stated that though it was slightly dark she was able to see.

5. **PW6 JOHN MUCHARI OGAO** a brother of the deceased was called and informed of the incidence. He rushed to the scene and found that the deceased had been taken to Kenyatta National Hospital. He was then informed by **PW2** that the deceased had quarreled with the accused whom he knew as his girlfriend and that the accused had taken herself to Ruben Police Station where she was locked up.

6. **PW7 OMWERI NYAKORA** testified that on 31/10/2015 while from night shift, he was told of the incidence. He went to the scene and was told that the deceased had withdrawn money from an M-pesa shop and sent the accused to go for it but the shop attendant declined to give her the said money so she left. In the afternoon the deceased went for the money but the attendant refused to give him the money since he had her mobile phone battery. The deceased left the shop and was shortly found stabbed.

7. **PW9 SST. CAROLINE MUTISO** the investigating officer stated that she received a report on the incidence and proceeded to the scene and found Kwa-ruben Police Post under siege from members of the public who were baying for the blood of the accused and re-arrested her. On 4/11/2015 she revisited the scene with **PW1** the scene of crime officer who documented the same. The scene was near the accused kiosk. They recovered a kitchen knife therefrom which was forwarded to the government chemist for analysis. She then commenced investigations and recorded statements from potential witnesses which made her charge the accused with the offence before court.

8. **PW4 HAPPINESS MONYENDE OGAO** identified the body of the accused for purposes of post mortem examination in the presence of **PW1 PC DANIEL KIHENI** who took photographs confirming the injuries sustained by the deceased. **PW3 PAUL OICHOE OMWAMBA** visited the deceased at Kenyatta National Hospital and later attended to the postmortem examinations in which he confirmed

that the deceased had been stabbed on the neck and at the back. **PW8 DR. BENARD MIDIA** conducted postmortem examination on the body of the deceased who had signs of fresh injuries and concluded that the cause of death was penetrating chest injuries due to sharp force trauma.

**9. PW10 LAWRENCE KINYUA MUTHURI** a government analyst received exhibits from the investigating officer which he examined and concluded that DNA profiles generated from the knife, sweater and T-shirt matched the deceased blood sample. The sweater had been indicated to belong to the accused which she did not dispute.

#### **DEFENCE CASE**

**10.** When put on her defence the accused stated on oath that on 30/10/2015 she did not go to work but went to the market to buy items for her kiosk. In the evening she left a lady called Mary at the kiosk while she went for worship. When she came back, there was a power blackout forcing her to use a candle at the kiosk. While cutting a mango for a customer someone came and held her by the neck calling her a prostitute. She fell down with the said person on top of her. Since she had a knife in her hand she felt blood on her neck and saw people beating the man. She then went and reported to the police that she had been attacked by someone she did not know. While at the police station two youths came and reported that the man had been taken to the hospital. The next day the police took her clothes which were blood stained and two knives. She stated that she used to see the deceased who wanted a relationship with her which she declined in the area.

#### **SUBMISSIONS**

**11.** On behalf of the prosecution it was submitted by Mr. Okeyo that the accused placed herself at the scene in her defence by confirming that she was involved in a fight with the deceased who she claimed attacked her. It was submitted that she confirmed that the knife and blood stained clothes produced as exhibits were hers. It was submitted further that it was established that the accused stabbed the deceased and the second stabbing established malice aforethought.

**12.** On behalf of the accused it was submitted by Mr. Njuguna that there was no evidence led by **PW9** on where the knives produced in court had been collected from and whether the scene of crime had been secured to avoid tampering. It was stated that two witnesses **PC Kiogora** and **Kieng** did not attend court to explain how they found the knife alleged to have been used to stab the deceased. It was submitted that the evidence of **PW2** and **PW5** was marred with contradictions and inconsistencies which went to the root of the case and the case of **PHILIP NZAKA WATU v REPUBLIC [2016] eKLR** was tendered in support.

**13.** It was submitted that having blood stained items does not per se unerringly point towards the guilt of the accused as there could be an innocent explanation for the blood stains for which the case of **SOLOMON KIRIMI M'RUKARIA v REPUBLIC [2014] eKLR** was tendered in support. It was finally stated that the prosecution did not establish a case against the accused beyond reasonable doubt and it should therefore be dismissed.

#### **ANALYSIS AND DETERMINATION**

**14.** For the prosecution to sustain a conviction on information of murder the following ingredients of the offence under Section 203 of the Penal Code must be established beyond any reasonable doubt which Justice Mativo in **PHILIP MUIRURI NDARUGU v REPUBLIC [2016] eKLR** had this to say:-

*“Reasonable doubt is not mere possible doubt. It is the state of a case which after the entire comparison and consideration of all evidence leave the mind of the court in that condition that it cannot say it feels an abiding conviction to moral certainty of the truth of the charge. In 1997 the Supreme Court of Canada in REPUBLIC v LIFCHUS [1997] 3 SCR 320 suggested the following explanation:-*

*The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.*

*. . . the term “beyond a reasonable doubt” has been used for a very long time and is part of our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.*

*A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.*

*Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.”*

**15.** The ingredients of the offence are:-

*a) The fact and the cause of death of the deceased.*

*b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.*

*c) That the said death was with caused by malice aforethought or necessary intention on the part of the accused.*

16. The fact and cause of death of the deceased was proved beyond reasonable doubt through the evidence of the following prosecution witnesses:- **PW2** who was his roommate confirmed that he was taken to Kenyatta National Hospital from where he died. This was further confirmed by **PW4, PW4, PW6** and **PW7** who witnessed the post mortem examination conducted by **PW9** whose evidence supported by the postmortem report confirmed that the cause of death was penetrating chest injury due to sharp force trauma. The accused did not by way of evidence dispute the fact and cause of death of the deceased. I therefore find and hold that the fact and cause of death was proved beyond reasonable doubt.

17. On whether the said death was caused by unlawful act on the part of the accused person:- It is the defence submission that the prosecution case was marred with contradictions and inconsistencies and to that end she has pointed out the evidence of **PW2** and **PW5** as contrasted with her evidence in defence. It is pointed out that **PW2** does not mention **PW5** when he reached the scene of the incidence and that according to **PW5** the two said stabbing took place outside her shop contrary to the evidence of **PW2**. It was further submitted that one vital prosecution did not testify which should be taken into account.

18. In answering this issue I have looked at the evidence of **PW2** who was a housemate with the deceased. He knew the accused very well as the lover of the deceased which fact was confirmed by **PW6 JOHN OGAO** the brother of the deceased. **PW5 CATHERINE MARTHA KASMIL** an owner of the kiosk where the deceased and his friend took a bottle of soda identified the accused as the owner of the adjacent vegetable kiosk who she knew as "Mwikali". Both **PW2** and **PW5** put the accused at the scene. Both confirmed that there was an altercation between the accused and the deceased over the issue of mobile phone. Both confirmed that the accused and the deceased were holding each other by the neck. It was **PW5** evidence that she advised the duo to settle the issue amicably and as they were talking **PW2** came by and went away with the deceased as the accused went to her kiosk.

19. Both **PW2** and **PW5** were clear in their evidence that the accused whom they both knew well came back following the deceased and **PW2** before stabbing the deceased. The accused in her defence also put herself together with the deceased at her kiosk and further that she had a knife in her hand at that time. I therefore find the evidence of both **PW2** and **PW5** consistence without any contradiction. The only contradictory evidence was that of **PW7** but this was only in respect to the dispute between the deceased and one **SUSAN** who was his M-pesa shop attendant. I however find this evidence relevant as it confirms the relationship between the accused and the deceased who had sent her to get some Kshs.3,000/= from the witnesses' M-pesa shop. The accused in her defence confirmed that there was some form of relationship between her and the accused though it was her evidence that she declined his advances which is contradicted by the evidence of **PW2** and **PW6** who confirmed that they were lovers.

20. The accused in her defence placed herself at the scene and confirmed that she was holding a knife in her hand and felt blood on her neck but did not say whether that blood was from her or the deceased. **PW10 LAWRENCE KINYUA MUTHURI** also placed the accused at the scene through the forensic evidence tendered which confirmed that the blood stains found on the kitchen knife the murder weapon and the sweater which the accused was wearing had DNA profile which matched the blood sample obtained from the deceased. It was confirmed that the T-shirt the deceased was wearing had blood stains which matched his DNA profile as proof that he sustained injuries. There is no evidence tendered to show that the accused sustained any injuries and therefore find that the attack on the deceased was not in self defence and or under provocation. I would therefore dismiss the accused's defence herein as unbelievable in the light of prosecution evidence and find her submission that having blood stains on the items recovered from the scene does not point to her guilt as lacking merit having found as fact that she was placed at the scene by material eye witnesses.

21. The post-mortem report produced by **PW8 DR. BENARD MIDIA** further corroborated the eye witnesses' account on the injuries sustained by the deceased which were further corroborated by the evidence of **PW1 PC DANIEL KIHENI** who took photographs of the body of the deceased at the mortuary during post-mortem examination. **PW8** further confirmed that some of the injuries or wounds noted were as a result of medical intervention. I therefore find and hold that the death of the deceased was caused by unlawful act on the part of the accused person.

22. On the issue of malice aforethought **Section 206** of the **Penal Code** states that malice aforethought is established evidence proving any one or more of the following circumstances:-

*(a) An intention to cause death 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, by a wish that it may not be caused.*

*(c) Intention to commit a felony.*

23. From the evidence tendered I find and hold that the accused had the intention of causing death of the deceased with malice aforethought and or to cause grievous harm to the same, not only did she stab the same once but twice after the deceased had fallen down. It is not what the accused herself intended which matters but what an ordinary reasonable man would in all circumstances contemplate as the natural and probable result which in this case was the death of the deceased.

24. I therefore find and hold that the accused actually intended to kill or do actual bodily injuries to the deceased and she actually succeeded. From the evidence tendered before me there was a dispute between the accused and the deceased over the issue of some money sent to her to an M-pesa shop and the accused mobile phone and the deceased sim card, which led to altercation of which **PW2** and **PW5** advised the duo to sort the dispute amicably only for the accused to afterwards run after the deceased and attack him with a knife. By going for the knife from her kiosk I find that the accused had time to think of her action and consequences thereof and did not act at the heat of the moment.

25. Having taken into account the evidence tendered before the court and the submissions thereon, and the authorities tendered I am satisfied and find that the prosecution proved beyond reasonable doubt all the elements of the offence of murder and therefore find the accused guilty and convict the same accordingly of the murder of **JOHN ONCHIRI OGAO** on 30/10/2015 contrary to **Section 203** of the **Penal Code** and

it is so ordered.

DATED, DELIVERED and SIGNED at Nairobi this 24<sup>th</sup> day of **January, 2019**.

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Naulikha for the State*

*Mr. Mogele for Mr. Njuguna for the accused person*

*Accused person present*

*Court assistant Karwitha*