



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 95 OF 2014

REPUBLICRESPONDENT

VERSUS

MARY WANJIRU MUTE.....ACCUSED

JUDGMENT

1. The accused **MARY WANJIRU MUTE** was charged with murder contrary to **Section 203** of the **Penal Code** as read with **Section 204** of thereof, the particulars of which were that on 28th day of September 2014 at Kabete area in Dagoretti District Nairobi County murdered **PETER MUTE KAHWAI**.

2. To prove its case against her, the prosecution called and examined a total of ten witnesses and when put on her defence the accused gave unsworn statement of defence.

PROSECUTION CASE.

3. **PW1 DAVID MUTE THIONGO** states that he was with the deceased on the material day at 11.00 a.m. at the local shopping centre drinking up to 1 p.m. when he left for his home while in good health. The following day he was informed that he fell ill and died while undergoing treatment at Kenyatta National Hospital.

4. **PW2 MONICA NJERI NGARACHA** was at home when she heard noise coming from the house of the deceased and the accused who were her neighbours. When she looked over the fence she saw the accused outside at the veranda with the deceased inside the house. She heard the deceased saying that the accused was not his lawful wife to which the accused responded that the place was hers and that it was either the deceased killed her or she will kill him. She then saw the deceased bleeding from the chin. She thereafter saw the accused closing the gate and leave the compound with the deceased asking for light, having been told by the accused to stay in the house and that they shall settle their dispute the following day.

5. It was her evidence that on Sunday, her husband was called to take the deceased to hospital while she proceeded to church. In cross examination she stated that she could not see the people in the house of the deceased but heard the deceased say that he would chase the accused away. She stated that the last person she saw with the deceased was his sister Mary Gathoni.

6. **PW3 FRIDAH MUMBI MUTE** a daughter of the deceased and the accused was at the house on 25th September, 2015 up to 1.00 p.m. While preparing to go to work the deceased came home while drunk and abusive. She left the accused, the deceased, Samuel Mbugua and PW2 at the compound. When she came back home, she found Samuel Mbugua (PW5) with the baby who told her that her father came back and started fighting the accused causing the baby to fall down and that she ran away. She returned at 1.00 a.m. and at about 6.00 a.m. the accused told her that the deceased was vomiting and could not talk. She rushed to their room and found the deceased lying on bed. She then went for help from PW4 who confirmed that his pressure was too high and was taken to Kenyatta National Hospital from where he died.

7. **PW4 BERNABETTE NYAMBURA NDUNGU** proceeded to the house of the deceased where she found him lying down on bed. She asked the accused whether he was diabetic and confirmed that his sugar level was high. She did not see any injuries on him and recommended that he be taken to hospital.

8. **PW5 THOMAS KAHWAI MUTE** was called by the accused and informed that the deceased was sick and had been taken to Kenyatta. She told him that he had fallen down from the bed. When he visited him at the hospital he did not see any injury on him. On cross examination he stated that the deceased used to drink and would pick up quarrels with everybody.

9. **PW6 SAMUEL MBUGUA WACHUKA** stated that he was living with the accused at the time and that at 1.00 p.m. the deceased who

was drunk, came home and hit the accused, who ran out of the house with the deceased running after her before falling down at the door step. The accused ran away and called a sister of the deceased who spoke with him. At 3.00 p.m the deceased left the house until 9.00 p.m. when he came back while drunk and complaining of headache, asking for medicine and was given piriton. The next day he was called by PW3 who told him that he was sick. He found him on the bed having vomited and urinated on himself. In cross examination he stated that there was no fight between the accused and the deceased as the accused ran away.

10. PW7 MARY GATHONI NDUNGU stated that she was called by the accused to go talk to the deceased who was her brother. She went to their house and found the deceased bleeding from the forehead who reported to her that the accused had hit him on the wall. She advised them to sit down and resolve their problems. He told her that the accused had told him that she would kill him and that the deceased was beating her because she had other men. She advised him to go to the hospital but he declined. She then left for her house. On 27th she met a boy who told her that her brother had been taken to hospital in critical condition. She called the accused who confirmed that he had been taken ill and was later informed that he had died. Under cross examination she confirmed that the deceased was bleeding from the head.

11. PW8 GEORGE MUTE KAMAU a brother of the deceased stated that he was with him on 27th up to 3.00 p.m. and was in good health. He stated in cross examination that they met at a bar. **PW9 GEORGE NGANGA NDUNGU** stated that on 27th September, at 7.00 p.m. his wife told him that the deceased who was their neighbour was fighting with his wife but did not take any action. On 28th at 8.30 a.m. he was requested to take the same to hospital which he did. At that time the deceased could not walk and talk.

12. PW10 CORP. POLYCARD MAGAI on 9/10/2014 received a report of the death of the deceased from his family. They had a postmortem report carried at Kenyatta National Hospital. He thereafter arrested the accused who was subsequently charged. He produced the said post-mortem mortem report. In cross-examination he stated that the accused confirmed that there had been a commotion between her and the deceased.

DEFENCE CASE

13. DW1 MARY WANJIRU MUTE testified that on 27/9/2014 the deceased came home at 1.00 p.m. and started ordering them out. She decided to run away and called his sister who advised her to report to the police. when the sister asked him why he was disturbing them he replied that he was using his money to drink and the house was his. The deceased thereafter left for the club up to 9.00 p.m. When he came back and asked for pain killers. He then went to sleep up to 2.00 a.m. when he woke up to go to the toilet and fell down but declined to be assisted. At 6.30 a.m. the accused called him but was unable to talk. He was thereafter taken to Kenyatta National Hospital from where he died. When she returned home, she found the relatives of the deceased including PW7 who alleged that she had killed him. She was arrested and told the police that the deceased had died out of sickness.

SUBMISSIONS

14. On behalf of the accused it was submitted that there were fundamental gaps in the prosecution case which left room for other possible hypothesis contrary to the dictates of Court of Appeal in **REPUBLIC v KIPKERIN ARAP KOSKEI & ANOTHER** . It was submitted that the prosecution failed to prove that the accused caused death of the deceased with malice aforethought, since the only evidence tendered was that there was confrontation between the accused and the deceased on 27th September, 2014 and that the deceased fell while chasing the accused. It was submitted that the prosecution did not advance any evidence to corroborate the doctrine of last seen, as none of the prosecution witnesses stated that they heard or saw the accused attacking the deceased. It was submitted that the accused defence that the deceased sustained injuries from a fall was not dislodged thereby fulfilling her duties under **Sections 111(1) and 119 of the Evidence Act**.

15. It was further submitted that the cause of death was consistent with the accused account. It was contended that the prosecution did not prove malice aforethought on the part of the accused and that the conduct of the accused was that of innocence rather than guilt. It was stated that the accused was a victim of domestic violence who was occasionally being assaulted by the deceased. The prosecution relied upon their submissions at no case to answer stage where it was submitted that there was a commotion in the homestead of the deceased and the accused and it took twelve hours before the accused decided that the deceased needed treatment while she knew that he had been injured thereby proving malice aforethought. It was contended that the injuries were inflicted by none other than the accused who had a long history of fighting with the deceased and was responsible for the injuries suffered.

ANALYSIS AND DETERMINATION

16. To sustain a conviction on a charge of murder the prosecution must prove beyond reasonable doubt the following element of the offence:-

a. The fact and cause of death.

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

c. That it was committed with malice aforethought - mens rea on the part of the accused as defined in Section 206 of the Penal Code.

17. The cause and fact of death of the deceased is not in dispute. All the prosecution witnesses confirmed the death of the deceased at Kenyatta National Hospital whereas the cause of death was proved through the evidence of **PW10 CORP POLYCARP NAGAI** through the production of post-mortem mortem report by Dr. Rugena dated 30/9/2014 which confirmed that the deceased had the following injuries:-

- Irregular abrasion of sheen 20x10mm associated with bruising
- Ovoid red bruise left medial upper arm 60x50mm,
- Lateral left upper arm 30x40mm, green ovoid bruise
- 4.3x5 abrasion right supraorbital area associated with bruising.
- Bilateral marked oedema
- Superficial gastric erosion liver dark with micronodules marked fatty changes.
- Left multiple cortical cysts of kidney
- Large biparietal frontal subdural haematoma
- Fracture/dislocation c4 with diffuse bruising of the spinal code.
- Bruised spinal code.

As a result of the examination the cause of death was subdural haematoma and cervical spine injury due to blunt force trauma. It therefore follows that the fact and cause of death was proved beyond reasonable doubt.

18. On whether the said death was caused by unlawful act on the part of the accused;- there is no direct eye witness who saw the accused hit the deceased. PW2 only heard noise from the compound of the accused and the deceased. She heard the deceased saying that the accused was not his wife, to which the accused responded that the place was hers and it was either the deceased to kill her or she will kill him. She then saw the deceased bleeding from the chin. The accused then left the compound closing the gate. PW3 stated that the deceased came home drank and picked up a quarrel with them before leaving home. When she returned back, the accused was not at home. PW4 confirmed that the deceased pressure and blood sugar were high when she was called.

19. PW6 who was at home with the accused and the deceased confirmed that it was the deceased who hit the accused with his fist and that the deceased fell down while running after the accused. PW7 found the deceased bleeding from the forehead which he told her was caused by the accused who hit him on the wall. PW7 who was called by the accused on 28/9/2014 at 7.00 a.m, was told by the accused that the deceased had fallen down on the way from the toilet. She confirmed that his sugar level was too high, confirming that he was suffering from a medical condition.

20. As submitted by the defence, it is clear therefore that the prosecution case against the accused was based on circumstantial evidence and for the prosecution to succeed the Court of Appeal in the case of **ABANGA ALIAS ONYANGO V REPUBLIC CRA NO. 332/1990** states that they must satisfy the following:-

- a) The circumstances from which inference of guilt is sought should be drawn and must be cogently and firmly established.**
- b) The circumstances should be of a definite tendency unerring pointing towards the guilt of the accused person.**
- c) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probabilities the crime was committed by the accused.**

21. In this case save for the fact that there was a commotion between the accused and the deceased as confirmed through the evidence of PW2 who did not see the accused hit the deceased and PW6 who saw the deceased hit the accused before falling down, there is no evidence tendered by the prosecution to point at the accused hitting the deceased. The evidence of PW7 to the effect that the accused had hit the deceased on the wall is purely hearsay and is not corroborated by any other evidence on record. It is also not very clear as to whether the alleged injuries were sustained on 26th or 27th. I have further looked at the conduct of the accused who instead of being confrontational with the deceased ran away both on 26th to go and call PW7 his sister and further on 27th when the same came back home drunk and started a fight as per the evidence of PW5.

22. From the evidence of PW6 that on the material day the deceased returned home at 9.00 a.m. complaining of an headache from which he sought medication, these raises the possibility of the deceased having sustained the injuries from which he died while outside the home as the period of time between when he left the pub and when he got home at 9.00 p.m. remains unaccounted for thereby breaking the chain of the link, between when he had commotion with the accused.

23. I have further noted that the prosecution did not dislodge the accused person's account as to what happened on the material night whereas the accused was the last person with the deceased on the night of 27th, the prosecution failed to establish the motive on the part of the accused to cause the death of the deceased and as stated by this court in the case of **REPUBLIC v ELIZABETH ANYANGO OJWANG CR. Case No. 11 of 2011:-**

“22. In a case depending largely upon circumstantial evidence there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule

out a reasonable likelihood of the innocence of the accused. The court must be watchful and avoid the danger of allowing the suspicion to take place of legal proof for sometimes unconsciously, it may happen to be a short step between moral certainty and legal proof.”

29. In cases like this where the prosecution case is solely based on circumstantial evidence it is very important for the prosecution to establish motive as one of the chains linking the accused to the crime. Where the prosecution is not able to establish a motive behind the alleged crime it assumes importance as the proof of motive on the part of the accused person to commit the offence satisfied the judicial mind about the authorship of the crime. In the absence of motive the court is then required to have a deeper search into the circumstantial evidence tendered so as to link the accused to the crime.”

24. I am unable to find any motive on the part of the accused person to cause the death of the deceased at this stage where they were in their marriage, which as per the evidence on record had not been rosy for a long time but she had lived with him. The accused went out of her way to seek assistance thereby portraying an innocent mind, despite the fact as submitted by the defence that she had been a victim of domestic violence. I am not pursued by the submissions by the prosecution that the fact that the accused did not take deceased for treatment confirms malice aforethought as there is evidence on record that the deceased had earlier declined an offer for medical intervention both from the accused and PW7 his sister and that he was later on offered medication by PW6.

25. From the evidence tendered I am satisfied that the prosecution failed to prove beyond reasonable doubt that the death of the deceased was caused by unlawful act on the part of the accused and mere suspicion as raised by the relatives of the deceased however strong cannot form a basis for conviction in a criminal trial.

26. I therefore find the accused not guilty of the murder and consequently dismiss the charges and acquit the same thereof. The accused should be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Nairobi this 22nd day of **January, 2020**

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J. WAKIAGA

JUDGE

In the presence of:-

Ms Gikonyo for the state

Mr. Thiongo for Wakaba for the accused

Court assistant: Karwitha

Accused present