



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO 55 OF 2015

REPUBLIC .....RESPONDENT

VERSUS

GODFREY MUCHANJI OJIAMBO .....ACCUSED

JUDGEMENT

1. The Accused **GODFREY MUCHANJI OJIAMBO** 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 17<sup>th</sup> day of May, 2015 at Kibera High-rise in Lang'ata sub-county within Nairobi County murdered **EUNICE OMENDA MATANGA**. He first appeared in court on 4/6/2015 and took plea on 11/6/2015 when a plea of not guilty was entered in his favour. He thereafter made an application to be released on bond and by a Ruling dated 15/12/2015 Justice Mutuku declined to release him on bond. The accused has therefore been in custody throughout the period of his trial.

2. On 15/11/2016 his trial commenced before me in which to prove its case the prosecution called and examined ten (10) witnesses. When put on his defence the accused tendered sworn statement of defence and called one witness in support thereof.

#### **PROSECUTION CASE**

3. The accused and the deceased were married in 1998 and they had seven (7) children of which one died. Their marriage was not a bed of roses but one characterized with a soap opera and action filled thriller. As at the time of her death the deceased had just left her matrimonial home with her last born child aged one year and subleased a room in the house of **PW5 DUNCAN ODOYO JABUYA** who was suspected by the accused to be her lover an action that did not go down well with him.

4. **PW8 JOSEPH OMANYA SONGA** the Area Chief testified that the marriage between the accused and the deceased was characterized with marital problems with allegations that the accused used to beat her up and quarrel with her, as a result of which she sought his help from time to time but when summoned the accused would not honour the summons. The accused's father **PW11 CHRISTIAN MUCHANJI OJIAMBO** would occasionally come to the assistance of the couple in resolving their problems though he denied this in his evidence-in-chief. It was **PW8's** evidence that on the material day he had received intelligence that the accused was seen armed with a knife looking for **PW5 DUNCAN ODOYO JABUYA** who was allegedly cohabiting with the deceased only to learn that the accused later on in the evening met the deceased and a quarrel ensued whereupon he stabbed her with the knife which was intended to be used on **PW5**.

5. **PW5 DANCUN ODOYO JABUYA** stated that he had sublet to the deceased one room in his house for which she paid a deposit of Kshs.3,000/= leaving a balance of Kshs.4,500/= which was to be paid after three days and she moved in. It was his evidence that on 17<sup>th</sup> May 2015 being a football lover he had gone to watch a match at Kasarani and on coming back to his house, he met a lady with a child crying whom when asked what had happened reported to him that his 'tenant' had been killed by her husband. He denied having any relationship with the deceased who had told him that she had separated with her husband and was engaged in her business so she wanted to stay alone.

6. **PW4 JOSEPH OMBATI OGETO** a vegetable vendor at High-rise who used to supply the deceased with vegetables saw her lying down and later on learned that she had been stabbed with a knife. It was his evidence that he did not witness the attack. **PW3 SGT. PAUL MUCHIRI** an Administration Police officer at High-rise Police Post received a report from the members of the public that the accused had stabbed the deceased with a knife. Together with **PC CHARLES MBUVI** he proceeded to the scene where he recovered the following items outside the grocery kiosk:-

a) *A knife with bloods stains.*

b) *Blue jumper jacket with blood stains and two holes thereon.*

c) *Green flash.*

d) *Black leather shoe.*

e) *One grey plastic shoe.*

which items were later on collected by DCI Kilimani. He stated that he had known the accused before the date of the incidence.

7. **PW7 PC JOSEPH MUTEMBEI** then attached to Kenyatta Police Post received the accused accompanied by his father **PW11** who told him to lock him up since he had killed his wife. He re-arrested the accused and recorded the report on the OB, while **PW1 SAUL OMUKATO PETER** received the information of the death of the deceased at night and the following day went to Kenyatta National Hospital where he identified the body in the company of **PW2 SAMMY APOKA KHAYE** a brother of the deceased who had been called by his neighbour's children on 17/5/2015 at 1.30 p.m. with information of the death and on the way to the hospital learned that his other sister called **Josephine Anyosi** had also been hit by a motor vehicle at Shell Petrol Station along Mbagathi Road. At the mortuary they confirmed that the deceased had stabbed wounds on the stomach.

8. **PW6 LAWRENCE KINYUA MUTHURI** a government analyst on 29/5/2015 received the following items at the laboratory for purposes of analysis:-

- a) Blood sample of the deceased,
- b) Blood sample of the accused,
- c) Black trouser,
- d) Light blue jumper,
- e) A knife with wooden handle.

as a result of his examination he concluded that the DNA profile generated from the bloodstains on the trouser, jumper and knife all matched the DNA profile generated from the blood sample belonging to the deceased.

9. **PW9 CORP. WILLIAM SAYANGA** was assigned to investigate the matter on 19/5/2015. Upon examining the accused who was in custody, he noticed that he had two injuries on the right hand and a knife cut on the right foot which he said he had sustained on 13/5/2015 at the house of **PW5** whom he alleged was the boyfriend of the deceased when the two attacked him. The second injury he stated was sustained when he was fighting with the deceased on 17/5/2015 having found her with **PW5**. He later on escorted the accused to **PW10 DR. JOSEPH MAUNDU** who confirmed that the accused had a human bite on the right middle finger and a nail bite. There was also a cut wound on the right leg. He was found medical fit to stand trial.

10. It was **PW9's** further evidence that investigations established that on 16/4/2015 the accused reported to Kenyatta Police Post that he suspected **PW5** of having an affair with the deceased. He went back to Kenyatta Police Post on 22/5/2015 and reported a case of threat from **PW5**. He further learned from **PW8** that in the year 2013 the deceased had reported to him a case of children neglect. He established that the deceased had a Children Care Centre and was also in several *chamaas* so was capable of taking care of the children. The accused was blaming the deceased of coming back home late and was going out with men including **PW5** who she would meet at a Pub in High-rise and that two days before her death she had moved out to stay with **PW5**. He further established that on 15<sup>th</sup> the accused went to **PW5's** house in the company of two of their children and the deceased bit his fingers. The accused later on armed himself with a knife and went out looking for her. He later on met her with **PW5** who escaped and he stabbed her after a physical struggle and in the process the accused also sustained some injuries.

11. In cross-examination, he stated that the accused had not been highly provoked as it had taken days from the date reported to the police and when he armed himself with a knife looking for the deceased he had malice aforethought. **PW12 DR. PETER NDEGWA** performed post-mortem examination on the body of the deceased and formed an opinion that the cause of death was exsanguinations due to penetrating stab wound to the abdomen.

## **DEFENCE CASE**

12. **DW 1 GODFREY MUCHANJI OJIAMBO** the accused testified that in the year 2014 they started having marital problems when he learned that the deceased was having extra marital affairs with **PW5 JACOB ODOYO JABUYA**. They resolved the issue and were okay upto 11<sup>th</sup> May 2015 when the deceased left the house to visit her customers for payment but she did not come back. He later on learned that she had spent the night in the house of **PW5**. On the 14<sup>th</sup> of May she again left the house and never returned back and during that period of time whenever he called her, **PW5** would pick up her phone and threaten him telling him to forget about the deceased. This made him make a report to the chief.

13. It was his further evidence that on 17<sup>th</sup> May in the evening he left the house leaving his four children to go look for foodstuff at High-rise when he met the deceased with **PW5** who started to mock him that he had taken over his wife and he told him that he had reported the matter to the authorities at that point **PW5** slapped him on the face and he responded and a fight broke out between them. He then saw **PW5** rush to unattended kiosk and picked up a knife ready to stab him when the deceased came in between so as to stop **PW5** from stabbing him. He then grabbed the hand of **PW5** which was holding the knife and in the process heard the deceased say she had been stabbed. It was his

evidence that at that stage **PW5** dropped the knife and ran away. He denied stabbing the deceased whom he loved. He stated that he tried to assist the deceased and went to look for a motor vehicle to take her to hospital but later on found that his father had come and took her to the hospital. He denied causing the death of the deceased.

14. **DW2 JUSTUS BWIRE MUCHANJI** a brother of the deceased testified that on 11/5/2015 at 8.00 p.m. heard people shouting that someone had been stabbed and was told it was his sister-in-law. He decided to go to the house of the accused to find out what had happened and found him at home with his six children looking confused. The accused told him that he had gone to look for food for his children when he met his wife with someone called **Odoyo** and when he told the deceased to get back home, he said **Odoyo** started to abuse him. The said **Odoyo** went for a knife and when the deceased tried to stop them from stabbing each other she was stabbed by **Odoyo** who ran away. He confirmed having taken the accused to the police post and denied that he had ran away.

#### **SUBMISSIONS**

15. At the close of the defence case it was submitted on behalf of the same that the fact that the deceased and the accused were living together as husband and wife is not disputed. It was submitted that the testimony of **PW8** and **PW11** contradicted each other on the issue of marital problems between the accused and the deceased. It was submitted that the prosecution did not call any eye witness to the offence despite the fact that the crime was committed during the day time at a public place. It was stated that most of the prosecution witnesses gave hearsay evidence which is inadmissible.

16. It was submitted that the circumstantial evidence on record was not cogent enough hence the prosecution case was not proved beyond reasonable doubt for which the case of **REPUBLIC v CATHERINE KARIMI NYAGA HCCR NO. 28 OF 2015** was submitted in support. It was submitted further that there was no motive attributed by the prosecution to the accused for which the case of **JOSEPH KHATIAKAL VS. REP C.A. NO. 2 OF 2013**, and **MUSILI TULO v REPUBLIC, CR. NO. 30 OF 2013** were submitted.

17. I have had the advantage of reading the authorities submitted by the accused and taken note thereof.

18. It was finally submitted that the accused in his defence stated that the deceased was killed by **PW5** which had not been dislodged by the prosecution. The case of **NZUKI v REPUBLIC 1993 KLR 171** was submitted in support. It was therefore submitted that the accused was entitled to the benefit of doubt raised. It was submitted that the investigations carried out by the police fell below the required standard as there was a strong but untested theory of **PW5** involvement in the murder of the deceased.

#### **DETERMINATION**

19. To sustain a conviction on a charge of murder the prosecution is under evidential and legal duty to prove beyond any reasonable doubt the following ingredients of the offence under **Section 203** of the **Penal Code**:-

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

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

*c) That the said death was caused with malice aforethought as defined under Section 206 of the Penal Code.*

20. The fact and cause of death of the deceased is not disputed. The fact of death was confirmed through the evidence of **PW1** who identified the body at the City Mortuary together with **PW2** for the purposes of post-mortem examination. **PW4** who saw her lying on the ground later on learned that she had been stabbed with a knife. **PW5 DUNCAN ODOYO JABUYO** in whose house the deceased was staying either as a "tenant" or a "lover" met a lady at his house who informed him that she had died. **PW8** the Area Chief received the report of the death of the deceased and her sister. The accused in his statement of defence also confirmed the death of his wife which evidence was further corroborated by **PW11** the accused's father. The cause of death was proved through the evidence of **PW12 DR. PETER NDEGWA** who examined the body and noted perforated bowels, severed mesenteric blood vessels and haemoperitoneum. As a result of the said examination he formed an opinion that the cause of death was exsanguinations due to penetrating stab wounds to the abdomen corroborating the evidence of **PW1** and **PW2** in a scientific manner.

21. At the time of this Judgment there was no report of the deceased having done "the Lazarus' act" of raising from the dead either caused by the power of Jesus Christ or the "Mighty Prophet of God" and therefore find and hold that fact of death and cause thereof was proved beyond reasonable doubt.

22. On whether the said death was caused by unlawful act on the part of the accused person:- The evidence tendered at the trial shows that the prosecution did not call any material eye witness who saw the accused stab the deceased from which she later on died upon arrival at Mbagathi Hospital. **PW1** was called by his brother **James Aburen** who gave him the information of the said death. **PW2** was also called by the two children of his neighbours with information that the deceased had been stabbed with a knife. **PW3** received a report that the deceased had been stabbed by her husband and rushed to Kenyatta National Hospital. **PW4 JOSEPH OGETO** did not witness the incident. This was the position with **PW5, PW7** who received the accused at the police post, **PW8** the Area Chief, **PW9** the Investigating Officer and **PW11** the father of the accused who went to the scene and found a crowd around the deceased before taking her to the hospital where she was pronounced died and the body taken to the city mortuary by his son and daughter.

23. As submitted by the defence the prosecution case against the accused was therefore anchored on circumstantial evidence and whereas the law on circumstantial evidence need not be restated, the court shall proceed to restate the same for purposes of clarity starting with the case of **ABANGA alias ONYANGO v REPUBLIC, CR.A NO. 32 Of 1990** where the Court of Appeal stated the applicable principles thus:-

*“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:*

*(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.”*

24. Where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilty of any other person. See **HUKAM SINGH v STATE OF RAJASHTAN AIR 1977 SC 1063**. These circumstances must be proved beyond reasonable doubt. With this legal position in mind, I shall therefore proceed to gauge the prosecution case in the background of the stated principles.

25. The accused and the deceased were married and at the time of the commission of the offence, the deceased had left her matrimonial home and was living in the house of **PW5 DUNCAN ODOYO JABUYA**. This apparently did not go down well with the accused who reported the matter to the AP Camp and the Area Chief. **PW9** the investigating officer confirmed that on 16/4/2015 the accused reported to Kenyatta Police Post that he suspected **PW5** to be having an affair with his wife the deceased and was issued with OB NO. 13/16/5/2015. He went back to the said Post on 22/4/2015 and reported a case of threats from **PW5** who allegedly told him that he was a police officer. It was **PW9's** evidence that when he arrested the accused, he noticed that he had injuries which he explained had been sustained on 13/5/2015 when he went to the house of **PW5** looking for the deceased and the second injury when he fought with the deceased on 17/5/2015 leading to her death. The said injuries were confirmed by **PW 10 DR. JOSEPH MAUNDU**.

26. The other circumstantial evidence is how the accused was arrested. **PW3's** evidence was that members of the public went to the High-rise Police Post with a report that the deceased had been stabbed by her husband. He went to the scene and recovered the murder weapon as confirmed by the evidence of **PW6**. The reportees gave the name of the accused and he could not arrest him since he had disappeared from the scene. **PW7** on 17<sup>th</sup> May, 2015 received three people at Kenyatta Police Post the accused, his father and brother **DW2** who reported that the same had killed his wife and wanted him locked in. He proceeded to re-arrest the accused. **PW8** the Area Chief confirmed having received intelligence that the accused was armed with a knife on the material day looking for the deceased. He further confirmed that the accused and his father later on presented themselves to the police. **DW2** confirmed that he took the accused to the police post. It is thereafter clear from evidence that the accused was the only one suspected and considered as the one who caused the death and reported as such.

27. The other circumstantial evidence linking the accused with the offence is the motive for the crime:- There is evidence on record that the deceased had left the accused and moved in with **PW5** which did not go well with him. He therefore set out to get the deceased back at all costs leading to her death. There is further the trouser of the accused which was examined and had the blood stains whose DNA profile matched that of the deceased blood thereby putting the accused squarely at the scene of the murder.

28. Whereas the accused in his defence put the blame on **PW5** and stated that it was **PW5** who was armed with a knife aimed at him and in the process the deceased came in between them so as to stop the accused from stabbing him, I find this account unbelievable since it was his evidence that the deceased was on the side of **PW5** supporting the mocking of the accused. I have also weighed this against the evidence of the Chief to the effect that it is the accused who had been seen armed with a knife looking for either the deceased or **PW5**. Having moved out of home into the arms of **PW5** the most logical thing one would have expected of the deceased was to let **PW5** deal with the accused.

29. The other circumstantial evidence linking the accused to the offence is his conduct thereafter. If the same was innocent as he wanted the court to believe, he would have sought medical assistance to the deceased rather than leave her at the scene which role was later on taken by his father **PW11**. The only logical conclusion is that the accused ran away from the scene having stabbed the deceased as confirmed by the evidence of **PW11** and **PW2**. **DW2's** evidence that he found the accused in his house confused together with his children was contradicted by the accused's account that he went to his house and proceeded to Kenyatta National Hospital where he met a crowd on the way who informed him that his wife and sister had died and when they blamed him he decided to go to the police.

30. The other positive circumstantial evidence pointing to the guilt of the accused is that all initial reports made to the police and information to the chief and the brother of the deceased all pointed and named the accused as the person who had committed the offence and whereas there were no eye witnesses present, I find that the involvement of the accused was not mistaken. He was well known in the area as was **PW5**.

31. In totality of the circumstances set out herein I am satisfied and I hold that the death of the deceased herein was caused by unlawful act of commission on the part of the accused person who was not happy by her action of leaving him for **PW5**. This action created the motive for the accused to kill the deceased. His evidence on record is that **PW5** having taken his wife was openly walking with her at High-rise Estate despite the fact that she was the mother of six and the police to whom he reported was slow to take action.

32. The evidence on record shows that the accused had armed himself with a knife, having earlier reported the matter to the police and seeing that no action was being taken the same took the law into his hands and therefore formed the necessary mental element to cause the death or grievous harm to the deceased and indeed succeeded to kill the deceased. It therefore follows that the prosecution proved prima malice aforethought as defined in **Section 206** of the **Penal Code**.

33. Having taken into account the totality of the evidence tendered on behalf of the prosecution and defence, I am satisfied and find that the prosecution has proved all the ingredients of the offence of murder and therefore find the accused guilty of the murder of his wife **EUNICE OMENDA MATANGA** on the 17<sup>th</sup> day of May, 2015 contrary to **Section 203** of the **Penal code** and convict the same accordingly.

34. I have said before and will restate the same for all men and women to understand that any woman and man has a right to fall in and out of love at any stage in their life and in as much as marriage is holy and sanctified no one has a right to take the life of another if and when they

decide to fall out of love and move on.

**Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of March, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Naulikha for the State*

*Mr. Masara for the accused*

*Accused present*

*Court assistant- Karwitha*