



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 17 OF 2017

LESIT, J

REPUBLIC.....PROSECUTION

VERSUS

MARY NJERI WANJIKU.....ACCUSED

JUDGMENT

1. The accused **MARY NJERI WANJIKU** is charged with murder contrary to **section 203** as read with section 204 of the **Penal Code**. The particulars of the offence are:

“On the night of 22nd/23rd March, 2017 at Mradi Area at Embakasi within Nairobi County jointly with others not before court murdered JOEL OMONDI ODUOR.”

2. The prosecution called 9 (nine) witnesses. In brief the prosecution case is that the accused lived in a plot where she was neighbours with PW1, PW2 and the deceased. On the material night, the accused accompanied with one Gakii went back to the plot drunk at around 2 a.m. She started banging PW2’s door demanding for her wash basin.

3. It is said that the deceased who shared a house with PW1 went outside and talked to the accused to be quiet to allow residents to have quality sleep as most were students and workers and needed to leave for work or school in the morning. The accused is said to have announced that she would call one Lum on phone to help her. Then she said she would call her brother.

4. As deceased tried to calm her down a group of 10 men came. They first asked who was making noise at the plot and in response PW2 pointed at the accused as the culprit. The group entered PW2’s house after asking him to open for them failure to which h they threatened to break in. PW2 was assaulted with flat sides of pangas which the thieves had. One attempted to stab him with a knife but held the knife and repulsed the attack.

5. PW1 was inside his bed at the time. He testified that after hearing noises outside he saw deceased who had been outside talking to the accused enter their house. He said that the deceased fell down near the door with upper torso inside the house. PW1 heard him breathing abnormally before all was quiet. When he woke up to check on him shortly later, he saw blood oozing from the deceased chest. PW1 started screaming.

6. PW2 went to check why PW1 was screaming. That is when they realized that the accused had left. Eventually the deceased body was carried away from the scene. The postmortem report on the deceased revealed that the deceased had one stab wound on the left anterior chest wall and that the cause of death was chest injuries due to penetrating sharp force trauma.

7. The accused was placed on her defence and she gave an unsworn defence. She called no witness. In her statement she admitted that she went to the plot with one Gakii and that she had an altercation with PW2 over a wash basin she had given him which he claimed was lost. The accused stated that PW1 and the deceased went out to both of them and asked them to stop making so much noise as the issue was petty and residents needed to sleep.

8. The accused stated that her Gakii friend went away. She said that the matter between PW2 and herself was settled when PW1 and the deceased gave her a basin and after it was agreed that PW2 would replace her basin the next day. She stated that she went back to her work where she was until morning. At 6 a.m. she went back to the plot and lay down to rest a little.

9. The accused said that as she rested in her house, Police Officers went and arrested her saying she had committed murder against the

deceased. She denied it. The accused also denied calling anyone to the scene on the material night and also denied using her phone to call anyone.

10. The accused faces a charge of murder contrary to **section 203** of the **Penal Code**. **Section 203** of the **Penal Code** prescribes as follows:

“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder”

11. In order to prove the charge against the accused, the prosecution must establish:

- (i) That the deceased died.
- (ii) That the death was caused by an unlawful act or omission of the accused
- (iii) That the unlawful act or omission was activated by malice aforethought.

12. Malice aforethought is not defined under the Penal Code. However the circumstances which constitute it are set out under **section 206** of the **Penal Code** in the following terms:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(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) ...”

13. If any one of the circumstances set out under **section 206** of the **Penal Code** are proved, then malice aforethought would have been proved against the accused.

14. The burden of proof lies with the prosecution to prove the case against the accused person beyond any reasonable doubt.

15. Mr. Okerosi Ochako was the counsel for the accused. He filed written submissions at the close of the case. They are dated 28th February 2019. Learned counsel relied on those submissions entirely.

16. Mr. Amos Otieno Learned Prosecution Counsel also filed final submissions in this case. He too he relied wholly on them.

17. I have considered the submissions by both counsels, together with the cases cited in support of their case. Out of those submissions and from the evidence adduced before the court, I find that there are issues which are uncontested. These are:

(a) That the deceased died after a single stab wound to the chest.

(b) That the accused, the deceased and PW1 and PW2 the key witnesses in this case lived in the same plot. It is not in dispute that PW1 and the deceased shared a room.

(c) That the accused and the deceased had no differences or grudge between them and that they had lived peacefully and amicably for the two months they were both there.

(d) That a group of about 10 people went into the plot after which the deceased was injured and died.

18. The contested, and therefore issues for determination are:

(a) Whether the prosecution has established who fatally stabbed the deceased.

(b) Whether the prosecution has proved that the accused summoned the group of 10 people and whether there was a common purpose between the accused and these people to cause death or grievous harm to the deceased.

(c) Whether the prosecution’s case had material contradictions and inconsistencies.

(d) Whether the prosecution proved malice aforethought.

(e) Whether the prosecution failed to adduce material evidence in the case and whether the investigations in this case were

complete.

(f) Whether the accused defence can stand.

19. The issue whether the prosecution established who fatally wounded the deceased. The evidence concerning the events leading to the deceased fatal injuries are not really disputed. The prosecution and defence are in agreement that the issue arose when the accused went back to the plot, rowdy and demanding her basin from PW2. It was as she demanded the basins that PW1 and deceased went outside their house and talked to her trying to calm her down.

20. According to the prosecution the accused was with her friend one Jackie Gakii. By the time PW1 came out of their house with the deceased, Gakii did not feature. The evidence was that the accused started to say she would call for assistance against PW2 by calling first one Lum and then her brother.

21. The issue is whether the accused actually called Lum and or her brother to the scene and if so, whether either of them came to the scene. PW1 in his evidence-in-chief said that he heard the accused saying that her call to Lum did not go through. He then testified that he heard the accused say that she would call her brother. However, PW1 was clear that he did not hear any telephone conversation by the accused through her phone that night.

22. PW2 on the other hand testified that he heard the accused say that she would call Lum to assist her. But that he heard her make the call but did not talk to anyone. PW2 testified that the accused then stated that she would call her brother. He said that he heard her make the call and then converse with someone to whom she said "KUJENI" meaning "Come" in plural.

23. The evidence of PW1 and 2 was inconsistent as to whether the accused placed a call and spoke to someone summoning them to the scene on the material night. The only way of resolving that apparent contradiction is through other material evidence.

24. It was important for the prosecution to adduce evidence to establish that the accused actually placed a call on her phone at the time in question. Indeed, the investigating officer PW9, testified that he took the accused phone and called for her phone data. He testified that he received and confirmed from the phone data that the accused did not place any calls on her phone at the time in question. PW9 did not however produce either the phone data or accused phone as evidence in this case to demonstrate his findings. In fact, the issue of the investigation into the accused phone came up during cross-examination by the defence. That bit of evidence was more of an afterthought, yet it was such an integral part of the whole case.

25. Assuming PW9's did call for Phone Data from the accused phone from the phone service provider, his findings from the data corroborates PW1's evidence that even though the accused threatened to make calls to summon people to assist her, she in fact did not talk to anyone from her phone at the material time.

26. The evidence of PW1 and findings by PW9 from accused phone data is contradicted by PW2's evidence who said that he heard the accused call someone and summon them to come in plural. There is contradiction whether the accused called anyone to the scene before the attack on the deceased. Furthermore, the accused's phone Data which could have helped resolve this was not produced in evidence.

27. The Court of Appeal decision in **Thomas Kitsao alias Katiba v Republic MLD CA Criminal Appeal No. 123 of 2014[2015] eKLR** the Court observed that:

'We shall promptly dispose of the question of contradictions and inconsistencies in the prosecution evidence. It is true that as regards the confessions there are slight variations from the account of one witness to the other. But we must ask ourselves whether these are normal variations that would be expected when different human beings recollect an event or incident or whether they are of such a nature as to betray a cooked up or contrived case? This Court has stated severally that the mere fact that there are some variations in evidence does not ipso facto prove that the evidence is false or unreliable (See Willis Ochieng Odero v Republic, KSM CR. APP. NO. 80 OF 2004). Indeed variations must be expected in evidence that is true. It is said that sometimes evidence without the slightest variation may be a good indicator of coached witnesses.'

28. In Uganda the Court of Appeal dealing with the same issue in **TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA, 6** held that it is not every contradiction that warrants rejection of evidence. The court put it thus:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

29. The law is clear that variations in the prosecution case is expected and are normal. In this case we did not just have variations but contradictions regarding whether or not the accused summoned people to the scene of incident. The two witnesses gave conflicting evidence one saying the accused summoned people to the scene another saying she did not. They two witnesses were at the scene of crime at the same time, and they both witnessed the events of the material night. That they heard different things that night goes to the very substance of the prosecution case. I find that they are not mere variations of evidence but contradictions. As stated earlier the phone data would have helped resolve the issue who was telling the truth, but it is not before the court. The prosecution case on the point whether the accused summoned to the scene remained in shambles. The legal position is that where a doubt occurs in the case benefit of that doubt should be resolved to the benefit of the accused person.

30. That leads to the second question whether the accused was acting with a common purpose with the 10 people who went to the scene of

incident just before the attack.

31. The evidence of the two eye witnesses should help resolve this issue. PW1 said he was inside the room he shared with the deceased because the accused told him off saying she could not listen to him as he was a stranger. He was clear that he left the deceased outside with the accused and did not witness the people arrive nor did he see what they did or what happened.

32. PW2 on his part said that he was the subject of the shouting by the accused and so he did not leave his room until after the incident. PW2 in his testimony stated that as the accused shouted while the deceased tried to calm her, a group of ten men came to the plot. PW2 stated that he saw them from the comfort of his house through the window whose window pane the accused had broken the same night.

33. PW2 said that the moment the men entered they asked him who was making noises at the plot. PW2 said that he pointed out the accused to them. The men then demanded that he opens the house for them or they let themselves in. He chose to open for them. PW1 on his part said that he did not see the people but only heard them. He said that the first thing he heard was the people ask who were making noise there and that they sounded irritated by the noise.

34. The evidence of PW1 and 2 is clear that the people who came to the plot that night were irritated by noises coming from that plot. Both these witnesses in their testimony did not see any cordial relationship between the accused and those men. Neither did they talk to her or ask her anything. I find that from their conduct, the group of ten who went to the plot did not appear to have been summoned to assist anyone at the plot. Further I also find their conduct negates any possibility that there was a common purpose between them and the accused. They appeared to have come to the scene because of irritation by the noise, not to render any help to anyone there, leave alone the accused. Otherwise why would they ask about noises instead of consulting the accused to say what help she required from them. The issue of the group having been summoned to the scene does not tie up with the evidence adduced by the prosecution beyond any reasonable doubt. I doubt the group were summoned to the scene. It appears they took advantage of the noises to reign terror on the residents at the plot.

35. Regarding how the accused left the scene and whether she left together with the group, PW1 could not see anything as he was in his house. PW2 was also inside his house trying to fight for his life. When the group left him PW2 was clear he did not leave his house until he heard PW1 screaming and saying that the group had killed the deceased.

36. I noted the contradiction in evidence of PW1 and 2 regarding security lights at the scene at the time of incident. PW1 said the high mast street lights, also known as flood lights, were on that night and were placed not far from the plot. PW1 testified that these lights enabled him to see the accused and the area outside his house.

37. PW2 contradicted PW1 and testified that the high mast streetlights were not on that night. He was categorical that the only lights on that day, and which enabled him to see what happened at the scene, was the electric light inside his house. PW2 said that there was no security or street lights on outside the plot that night. Not to mention that being inside the house, the light in PW2's house had a limited coverage and could not have sufficed to light up the area outside PW1 and 2's houses.

38. The Investigating Officer PW9 corroborated PW2's evidence that indeed the only lighting at the scene that night was fluorescent light (tubes) which he found on inside the houses of PW2 and PW1 shared with the deceased.

39. This evidence is critical as it establishes that the conditions of lighting at the scene at the time PW1 and 2 allege they saw the accused leaving the scene was not safe for positive identification. Their evidence cannot be reliable and the possibility they may not have seen the actual time and with whom, if at all, the accused left the scene is high. Their evidence that accused left with the group was therefore conjecture and unreliable. That piece of evidence was inadmissible for being insecure to rely upon and I therefor reject it.

40. The conclusion is that the accused left the scene because by the time PW4 and 9 went there, she was not at the scene. The actual time she left, and the circumstances under which she left was not covered in the testimony of the prosecution witnesses.

41. This brings me to the issue of the accused arrest. PW9 testified that PW4 was the one who arrested the accused. PW4 on her part did not anywhere in her evidence refer to accused arrest. If PW4 did not talk of arresting the accused, that means that the officer who arrested the accused did not testify. The place and time of accused arrest is not therefore not before the court.

42. The accused in her defence stated that she left the scene alone and returned to work. She then returned home from work at 6 am and straight went to sleep. She was woken up from sleep by police officers who arrested her.

43. The prosecution did not show who or where or when the accused was arrested. Her defence that she was arrested in her house at 6am on same morning following the incident has not been controverted. Which also leads to the conclusion that accused conduct of returning to the scene few hours after the incident was not consistent with the conduct of a person with a guilty mind.

44. As to whether the prosecution proved malice aforethought as against the deceased. The evidence by PW1 and 2 was clearly that the accused and deceased had good relationship. PW1 testified that the accused oldest child spent a lot of time with the deceased and him in their house. PW1 said that many a night the child ate at their house, and that the accused picked him up from their house many a times.

45. There was no known grudge between the accused and the deceased. The prosecution has not shown that the accused could have had any reason to cause deceased death.

46. The accused seemed to have had a bone to pick with PW2 over a basin and a girlfriend. Indeed the group who came to the plot attacked PW2 after forcing him to open. However there is nothing to show that the group attacked PW2 on behalf of the accused or any other person. They roughed up PW2 and left him alive, even though they were 10 and could easily overpower him if they had any intentions of hurting

him.

47. As to who stabbed the deceased. Mr. Otieno for the prosecution submitted that the accused was the one who caused the deceased death and for that proposition relied on the REP VS STEPHEN SILA MATHEKA Kajiado HCCCR 10 OF 2015 where the learned judge observed:

“The accused person in this case armed with a panga and at a very close range he targeted the complainant. What can be deduced from his action is the intent to kill or merely to cause grievous bodily harm. This was not an accidental attack but one the accused conceptualized and designed on how to execute it.”

48. Given the conditions of lighting at the scene of attack, and given the clear evidence of PW1 and 2, the key witnesses in this case, that none of them witnessed the stabbing of the deceased, there is no evidence to prove that the accused stabbed the deceased.

49. It is clear that the accused was unarmed at the time of this incident, and no one has implicated her of having stabbed the deceased. The circumstances are clear that the deceased was stabbed following the entry of the group of 10 men to the scene. They all entered PW2's house first. The deceased was outside. By the time the deceased returned to his house shared with PW1 he had already been stabbed. The accused did not say anything. There is no dying declaration of who could have committed this heinous act against him. For this reason with all due respect, the case cited by the prosecution does not apply to the facts of this case.

50. The evidence is clear that the deceased was stabbed after the group of ten men came to the scene. PW2 who had an encounter with them said they were ten and that they had pangas and a knife.

51. For all intents and purposes, that same group is the one that stabbed the deceased. They had the time and sole opportunity to do so. The deceased was outside when they arrived at the scene. They first went to PW2's house before turning on the deceased. The motive for the fatal assault on the deceased remained a mystery by the close of the case. It is however clear that the accused had no reason whatsoever to attack the deceased or to cause him harm. Neither was any evidence adduced to show that the group and the accused were acting with a common purpose and sole intention to cause death or grievous harm to the deceased. In the circumstances, it cannot be argued that the acts of the group were the acts of the accused. It also cannot be said that because the accused had a quarrel with PW2 the attack on the deceased was transferred malice.

52. Regarding whether the investigations into this case were completed and the matter of whether all the material witnesses were called to testify. Mr. Ochako for the defence submitted that the accused was charged with the offence as a result of poor investigations and suspicion. In support of this proposition counsel cited SAWE –V- REP [2003] KLR 354 , where the Court of Appeal held as follows:

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ...

5. ...

6. ..

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

53. PW9 did not pursue Gakii who was with the accused on the material night. Her evidence was crucial as it may have shed light as to the circumstances under which the accused left the scene. PW9 did not try to track and apprehend the group of 10 who raided the plot in question that night. Further, the phone data of accused phone was not produced as evidence as earlier stated. Furthermore, no attempts were made to recover the murder weapon. I find that the investigation into this incident leaves a lot to be desired and with that I agree with the defence.

54. Having considered entire evidence I find that the prosecution did not prove the charge of **murder** contrary to **section 203** of the **Penal Code** as against the accused as required by law. There was a lot to be desired in the manner in which this case was investigated. It is unfortunate a young lad promising life was lost. However, the evidence adduced could not sustain the charge against the accused beyond any reasonable doubt. In the circumstances I give the accused the benefit of doubt and acquit her under **section 322** of the **Criminal Procedure Code**.

DATED AT NAIROBI THIS 28TH DAY OF MARCH, 2019.

LESIT, J

JUDGE