



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 51 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS OCHANGO.....ACCUSED

JUDGMENT

Thomas Ochango, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence are as follows:

THOMAS OCHANGO: On the 6th day of June 2016 at Kangemi Location in Dagoretti within Nairobi County murdered PHYLIS MINYOSO.

The accused pleaded not guilty to the charge necessitating a full trial in which nine (9) witnesses testified for the prosecution and one witness for the defence. The evidence by the prosecution shows that on 6th June 2016 at about 6.45-7.00am David Njiru Kahira (PW1) heard screams from one of the iron sheet houses in Bottomline Kangemi. The screams were coming from a house behind his. He rushed to the place and in his own words:

“I found a lot of blood on a house near the gate. That was the house where screaming was. There was a lot of blood. I pushed the door of the house open. We saw a woman lying down with bloodstained clothes. Her husband was present. He is the accused in the dock. I saw a cut on the neck. She was in bad shape....”

With help of the neighbours the injured woman, who is the deceased in this case, was taken to a nearby clinic where she died. The accused was taken to Kangemi AP Post by members of the public including PW1. According to PW1 members of public were becoming hostile towards the accused and it was feared that he might have been lynched. He was persuaded to accompany neighbours to the AP Post to avoid an attack. He was placed in police custody at the AP Post and was later transferred to Kabete Police Station.

Evidence further shows that the accused and the deceased lived with S.K (PW3) and P. M (PW4). The two were daughters of the deceased and step daughters of the accused. They lived in a single room at Bottomline in Kangemi. On the day before this incident, 5th June 2016, the deceased and her daughter PW3 went to a nearby salon at about 6.00pm to have the deceased's hair braided. PW4 was left at home preparing dinner. PW3 told the court that they thought that the deceased had left to go to work. While at the salon the accused called the deceased on the deceased's mobile phone. At the time the call went through PW3 was holding the phone. The accused wanted them to go home. The deceased and PW3 returned home and found the accused waiting for them at the gate. The accused seemed unhappy about something.

PW4 testified that she had noticed the accused with a knife that looked new. According to her the knife was hidden in accused's clothes. PW4 told her mother about the knife and the deceased sought to know from the accused why he was hiding a knife. The accused is said to have uttered words that seemed threatening to the effect that they, in reference to the accused and the two girls, would know why he was called 'Nyayo'. The family ate dinner and went to sleep. In the morning the two girls went to school leaving behind their mother and the accused. They were to learn later that their mother had sustained stab wounds and had died. The body of the deceased was later moved to the City Mortuary.

At Kangemi AP Post the accused was received by CPL Peter Wanjohi (PW2). After placing the accused in custody, he visited the clinic where the deceased had been taken. He noticed stab wounds on deceased's chest. CPL Wanjohi visited the scene and saw blood stains on the floor of the house. He also collected a knife that was stained with blood. After investigations were completed the accused was charged with this offence.

In his unsworn defence, the accused told the court that on the morning of 6th June 2016, PW3 and PW4 left for school. He testified that the deceased wanted money for fare to go to work. He said that he did not have change and he went out to look for change in order to give the deceased some money for her fare. The accused left the deceased in the house. He testified that on returning he found the deceased on the

ground near the door of their house. He called neighbours who assisted to take the deceased to hospital. He said that he was told to go to report the matter to the chief because he was the first person to see the deceased. He said that when he got to the chief's office he was not released. He was taken to the police station and placed in custody. He was later charged with this offence.

At the conclusion of defence case, the accused submitted through Ms Jepkorir that he is innocent; that the witnesses contradicted themselves in respect of the knife allegedly found with the accused with PW4 stating that the knife had been hidden in the accused's socks while PW3 stated that the knife had been hidden in the accused's waist; that PW5 testified that the accused and the deceased did not have a peaceful relationship while PW1 who was their neighbour did not say anything about this and that the stains of blood on accused's shirt and which were confirmed through DNA to belong to the blood of the deceased got on the shirt when the accused was taking the deceased to hospital. It was submitted that when the deceased was attacked the accused was not in the house. He had gone outside to look for change and that any other person may have entered the house and attacked the deceased. This court was urged to find that the prosecution has failed to prove beyond reasonable doubt the case against the accused. Ms Jepkorir urged that this court acquits the accused.

On the other hand, the prosecution submitted that it has proved the case against the accused beyond reasonable doubt; that the evidence places the accused at the scene of the crime; that the accused and the deceased were the only two people inside their house after PW3 and PW4 left to go to school; that the accused came home with a new knife which shows he had planned to commit this crime.

The onus of proving a criminal case rests with the prosecution that must prove that a murder was committed as provided under section 203 of the Penal Code. More specifically, the prosecution must prove beyond reasonable doubt that death of Phylis Minyoso occurred on 6th June 2016 as a result of an unlawful act or omission by the accused and that in causing that death the accused acted with malice aforethought as defined under section 206 of the Penal Code. The evidence that the prosecution relies on in attempting to prove this case to the required standard is, in my considered view, partly circumstantial. This is because there is no direct evidence that the accused stabbed the deceased. All the evidence pointing to him as the only person who could have done this to the exclusion of any other person is to be discerned from the circumstances surrounding this crime. It is clear to me from the available evidence that the accused and the deceased were the only people left inside their house that morning after their daughters had gone to school. I find no evidence pointing to any other person anywhere near or inside their house that morning at the time this crime was committed.

In regard to the issue as to whether death of the deceased occurred, I have carefully read and considered the evidence of CPL Peter Wanjohi (PW2) who testified that he went to Mary Magdalene Dispensary where the deceased had been rushed to for treatment and found that she had died. I have also read and considered the evidence of the Investigating Officer CPL Henry Njuguna (PW9) who testified that he went to Mary Magdalene Dispensary where he was informed that the deceased had been taken and found that she had died. He said that he saw visible stab wounds on her body. Further evidence by Dr. Oduor Johansen (PW7) on behalf Dr. Peter Muriuki Ndegwa confirms that the deceased died. Dr. Oduor told the court that the post mortem examination on the body of the deceased by Dr. Ndegwa showed the following injuries:

(i) Stab wound on right chest measuring 4cm by 2cm and located 3cm above the right nipple.

(ii) Stab wound on the back between 2 shoulder blades measuring 3cm by 1cm.

(iii) Stab wound on right cheek measuring 2cm by 1cm.

(iv) 2 slash wounds on right side of abdomen.

(v) Both lungs had been perforated.

(vi) 3rd right rib fractured.

(vii) 1st left rib fractured.

(viii) Heart stabbed.

(ix) 3 litres of blood in the chest cavity.

The opinion of the doctor is that the deceased died as a result of exsanguination due to severe chest injuries due to penetrating sharp force trauma. These findings are captured in the post mortem report (Ex. 3). It is my finding based on the evidence on record that the prosecutions has proved beyond reasonable doubt that indeed Phylis Minyoso died on 6th June 2016 and that the cause of that death was exsanguination or in simple terms the excessive loss of blood due to severe chest injuries due to penetrating sharp force trauma (stab wounds).

On the second issue as to who caused the death of the deceased, I have read and considered all the evidence surrounding this issue. Evidence shows that, a blood stained knife was recovered from the house where the deceased and the accused lived by CPL Wanjohi. Accused's shirt was also recovered from him. When CPL Henry Njuguna saw the accused at Kangemi AP Post, he did not have his shirt on. He learned that CPL Wanjohi had taken the shirt from the accused. The knife and accused's shirt were examined by Mr. H. K. Sang, a Government Analyst. Both were found to be moderately stained with human blood. DNA profiles generated from the stains of blood on the knife and the shirt matched DNA profiles generated from the blood sample from the deceased. This evidence confirms that the knife came into contact with deceased's blood. The accused has explained the presence of deceased's blood on his shirt by stating that the blood stained his shirt when he was taking the deceased to hospital. I have compared accused's evidence that he took his wife to hospital against that of PW1 David Njiru. David told the court that when he rushed towards the screams, he found the deceased and the accused inside the house. She was injured. David told the court that some women, neighbours of the deceased, carried her to the nearby clinic. He said that in company of other neighbours they persuaded the accused to accompany them to the Chief's office for fear that he might be attacked by members of the public.

This evidence casts some doubt in the evidence by the accused that his shirt got stained with blood because he took the deceased to hospital.

From my consideration of the recorded evidence, I am convinced that the deceased was inside their house alone with the deceased after their daughters left for school. It is not true, as testified by the accused, that he was away looking for change when the deceased was attacked. When David rushed towards the screams to find out who was screaming and the reasons for screaming, he saw a lot of blood outside and inside the house of the accused and the deceased. He found the deceased and the accused inside the house. The deceased was injured. I am convinced that the accused was the only person who could have attacked and stabbed the deceased. Evidence shows that they had not been in good terms from the evening after the accused called the deceased to come home from the salon. The evidence on record, from the photographs and from the account of CPL Henry Njuguna attests to a house in disarray. This is a sign of a vicious confrontation. The injuries suffered by the deceased attest to the viciousness of that attack. What I find strange however is that there were not defence injuries noted on the body of the deceased. This makes me wonder if the deceased was attacked suddenly without a chance to defend herself.

My conclusion on this issue is that there is sufficient evidence to prove beyond reasonable doubt that it is the accused and no other person who attacked and stabbed the deceased causing her fatal injuries from which she succumbed. On the last issue of malice aforethought, it is my finding that the accused had planned this attack. He was seen with a knife. I am aware that the evidence of the two girls, PW3 and PW4 did not agree as to where the accused hid the knife. I have noted that the contradictions are not so serious as to be fatal to the prosecution case or prejudicial to the accused. PW3 S. K told the court that the accused had bought a new knife and hidden it in his clothes and that when he went out and returned he had placed the knife in his socks. P. M (PW4) told the court that when she saw the knife on the accused, it was placed in the socks. I find this contradiction negligible. That there was a knife is an established fact. That the fatal wounds were caused by sharp force trauma is in no doubt. This evidence is strengthened by the evidence that a bloodstained knife was found inside the house at the scene of the crime, was examined and found to contain stains of deceased's blood.

It is my finding that the prosecution has proved beyond reasonable doubt a case of murder against Thomas Ochango, the accused. I reject his defence as untrue and find him guilty of murder as charged. Consequently, I enter conviction against him. Orders shall issue accordingly.

Delivered, dated and signed this 28th March 2019.

S. N. Mutuku

Judge