



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 7 OF 2014

JACKSON NGARA NDERITU.....ACCUSED

-VERSUS-

REPUBLIC.....PROSECUTION

JUDGMENT

On 15th February 2014, the events leading to this case began to take their ominous shape when Purity Wambui Irungu the wife to Jackson Ngara Nderitu the accused herein ran off to her parent's home in Charity area in Endarasha.

The two had been married were living at Gakanja village where the accused husband had rented a house from the family of PW4 Esther Wanjiku. They had been blessed with a baby girl who was about 18 months old.

Upon arrival at her parent's home, Purity told her mother Anne Wangui Irungu Muturi PW2 that she and her husband had differences. That he was mistreating her, had beaten her, and even threatened to kill her. That he had told her that he now had another wife.

Her mother, PW2 rang her husband Philip Irungu Muturi (the deceased herein), Purity' and told him about their daughter's plight. He directed that she stays at home for 2 weeks as he would sort out the issue. So, she stayed put.

On or about the 27th or 28th February 2014, PW2 Anne left her daughter and grandchild at home and went to work. Upon return she found her daughter crying. Her granddaughter was missing. Purity told her that her husband the accused had stolen the baby.

Anne rang her husband and reported the new development. He was not amused. He and travelled home from wherever he had been arriving at 11:00pm. He must have been very angry with the conduct of his son in law because Anne testified that she talked to him, telling him how he should report the matter to the Government (chief/assistant chief) and get the help of elders to go and collect his granddaughter. He would not hear of that. He told her that they would go by themselves.

On 1st March 2014, the three of them left for Gakanja village. By 7:00am they were at the accused's home. They found him washing clothes and the baby was crying from inside the house. What transpired in terms of conversation is scanty because one, Purity could not testify as she was prohibited to do so by s.127(3) of the evidence Act cap 80 Laws of Kenya, as confirmed by Justice Mativo's ruling to that effect.

Two, during her testimony Anne was clearly very much still traumatized by that event even four years later. She was still broken, crying a lot, and it appeared to me that her memory had blocked out some things.

Evidently, she had not received any psychological support since the death of her husband, was not taken through her statement before her testimony, and was surely shocked by the gruesome photos shown to her by the prosecution during her testimony.

Nevertheless, she testified that her husband told their daughter to get into the house and pick her child, while the 2 remained outside with the accused. Purity went in, picked the child and they all left. Purity was in front- she followed, and the deceased was at the back.

There was no one else around and the home was kind of isolated. They went out of the gate. As they walked, Anne just heard her husband utter the words, "*woooi, run so that you will not be hit like me*". She did not run, she looked back to see her husband with a cut on the right side of his head, bleeding profusely. She rushed to get hold of him but he fell. She saw the accused running away. She began to scream running towards the road calling for help. Her screams were heard by PW4 Esther Wanjiku who was in her house within the same compound. She came out and found Purity with her father lying on the ground bleeding profusely .S he had a lessa which she tied the deceased's head with. Some people came to help but they said he was already dead. The village elder was called, and so were the police.

Esther learnt from Purity that it was her husband Jack who had cut her father.

PW3 No.59311 CPL Gideon Kamwiti and PW6 No.235403 IP Judy Magiri arrived at the scene after receiving information about the murder. They found Anne and Purity and the deceased at the scene. Upon inquiry they learnt that deceased had been cut by his son in law- who was being looked for by members of the public. They learnt he had been arrested and was at Ebaringo AP Camp where they later collected him and escorted him to Mweiga Police station. The body of the deceased was escorted to Nyeri PGH where Dr.Obiero Okoth, Pathologist performed the postmortem on 5th March 2014.

He testified that it was the body of a male African about 60 years old – with a compound fracture on the right side of the head with injuries to the bone, behind the ear and the middle ear. He formed the opinion that cause of death was head injury due to sharp trauma. He produced the post mortem report.

Upon arrest the accused was escorted to PGH Nyeri for psychiatric examination which was conducted on 11th March 2014 by PW1 Dr. Richu Mwenda and was found capable of facing trial.

It was on the basis of this evidence that by the information dated 12th March 2014 he was charged with murder contrary to s. 203 as read with s. 204 of the Penal Code. That on the 1st March 2014 at Gakanja Village, Endarasha Location, within Nyeri County, he murdered Philip Irungu Muturi which he denied.

The prosecution closed its case. The court was of the view that the accused had a case to answer under s. 306(2) of the CPC.

He was put on his defence. He made a sworn testimony in which he simply stated that on 1st March 2014 he was in his shamba at Watuka in Endarasha alone when “serikali” (police) found him and arrested him for unknown reasons. He said he did not have any weapon. He said he heard what the witnesses said in court but it was all not true.

On cross-examination however he conceded that he was the husband to Purity Wangui and father to their child- that they had disagreed, that she had gone home to her parents and that he had followed her there and taken the child. He said that on 1st March 2014 she had gone to his home with her mother to get the baby, they had found him and the baby at home that they had collected the baby from his home. That later he had heard that the Purity’s father had died in Gakanja.

He also said that the only other person in that homestead where he was living was one Muthoni, sister to his landlord, but that those who had come to collect the baby had found him alone. He said he left the deceased, his mother in law, his wife and their child in the home and went to the shamba.

On re-examination by his counsel he said when he collected his baby from his wife they had not quarreled. He denied that the deceased had accompanied his wife and daughter to his home.

At the close of the case for the defence, both counsel made oral submissions.

Counsel for the accused Mr. Njuguna Kimani adopted the submissions made on no case to answer where he argued that the case for the prosecution was full of contradictions, inconsistencies and glaring gaps.

He raised several questions: -

Question- where was the deceased attacked by the accused?

He pointed out at the inconsistency between the evidence of PW2, the PW6 and PW3 with regard to the actual place- whether outside the accused’s house or 100m from the accused’s house. He also pointed out the fact that no blood stains were found on the accused’s clothes.

Question- whether the house of the accused was searched?

That the police did not visit the house of the accused to conduct search for evidence. Whether any investigations were conducted and if so, that they were so casually conducted that they did not support the case for the prosecution.

That the prosecution had failed to prove its case to the required standard and the option left to the court was to acquit him. accused should not be put to the task of filling gaps.

Mr. Magoma for the prosecution urged the court to find that the evidence as presented by PW2 was sufficiently corroborated by other evidence to sustain a conviction and that the ingredients of murder were established. That the incident happened at daytime, the accused was the only one present and who had reason to attack the deceased. He did so without uttering a single word- giving him no opportunity to defend himself.

In rebuttal counsel for accused submitted that the evidence as presented fell short of the standard of beyond a reasonable doubt.

-That accused had no reason to attack the deceased.

-That his wife had voluntarily left the matrimonial home.

-That he had collected the child from his parents in law peacefully.

-That it was not clear where the attack took place – should the court take the evidence of Anne PW2 or IP Judy the Investigating Officer PW6 who claimed to have seen blood stains outside the accused's house.

-That Anne PW2 never saw accused cut the deceased.

Having considered the evidence and submissions the issues for determination are:-

1. Whether the deceased was murdered?
2. Whether the murder was committed by the accused person.

Murder is defined by section 203 of the Penal code as where *Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

The prosecution must prove: the fact of death

There is no dispute that the deceased died. It is also not in dispute that he died on 1st March 2014 that was confirmed by the witnesses who were at the scene on the material date. This was established by the evidence of PW 5 the pathologist, PW2, the deceased's wife, PW3 and PW6 the police officer, PW4 the accused's neighbour. The accused also confirmed that he had learnt that deceased had died within Gakanja area.

Hence the fact of the death of Philip Irungu Muturi is not in dispute.

The unlawful Act or omission...

Was the death by the unlawful act/omission of the accused person with malice aforethought? Death was the result of head injury caused by sharp trauma.

According to PW2, it is the deceased's cry that made her turn and see him falling with a cut on the right side of the head bleeding profusely. She did not actually see the accused cut him but she saw him running away. So it is her evidence against the accused person's denial.

In his defence, the accused person had denied every fact of the case until he was cross-examined where he conceded that he took the child from the home of the deceased, and that the deceased's wife and his own wife came to his home to collect the baby.

The fact of malice aforethought...

The deceased was found dead outside the deceased's gate and by the evidence of PW2, they had just come from there- the only person who had any issues with the deceased and his family was the accused. There was nobody else in the vicinity who had any issue with the deceased except the accused. Accused went to his wife's home and took away a child who was breast feeding from the mother. It would appear to me that his intention was that that act by itself would make his wife go back to him.

However on 1st March 2014, those prospects were nipped in the bud, because instead of her going back to him, she was escorted by her father to take away the baby. That to him must have signaled the end to the relationship. That must have made him furious and given him the impetusto attack the deceased. The attack was vicious. He armed himself with a sharp panga. Stealthily followed the deceased and his family out of the gate, attacked the deceased and took off.

What more evidence of malice aforethought as defined under s.206 of the Penal Code could this court ask for? It is established where there is evidence proving any or more of the following circumstances: -

a) An intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not.

In this case, the injury cause on the deceased demonstrated that the person who caused it intended to do grievous harm by its nature and the nature of the weapon used.

a. Knowledge that the act or omission causing death will probably cause death if or grievous harm to some person whether that person is actually killed or not, although such knowledge is accompanied by indifference whether death/grievous bodily harm is caused or not, or a wish that it may be caused.

The taking of a sharp object, and applying force to it sufficient to cause the kind of injury inflicted on the deceased- stealthily, from behind and the running away of the accused is evidence that he knew what he was doing.

b) An intention to commit a felony.

c) An intention by the act/omission to facilitate the flight or escape from custody of any person who has committed/attempted to commit a

felony.

The kind of injury inflicted on the deceased shows the intention was to cause grievous harm or even kill.

The circumstances of the case point one finger only- and that finger's direction is the accused person. While it is evident that PW6 conducted nearly no investigations except to send the body for postmortem and have other officers record statement on the behalf and the fact that the murder weapon was not recovered, the circumstantial evidence is that which fact within the description given in **Joan Chebii Sawe vs. Republic (2003)eKLR**

“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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving the facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains on the prosecution. It is a burden which never shifts to the party accused”.

In this case, I found no other co-existing circumstances weakening this chain of circumstances relied on by the prosecution. The accused picking the baby, the visit by the accused in laws and his wife, the picking of the baby by his wife and her leaving with the baby and the almost immediate attack on the deceased- there is no intervening fact to break that chain of events.

The accused's defence that he was arrested for no reason at all is displaced by the fact that he was at the scene at that all material times and even if none saw him actually cut the deceased he was the only one at that time or that place with the reason and motive to hurt the deceased.

It may also be argued that the evidence of PW2 was inconsistent/full of contradictions. Not all contradictions/inconsistences can amount to evidence to be unreliable. The inconsistency/contradiction must go to the root of the charge.

As I have observed elsewhere victims of crime find no closure within the criminal justice system. Such trauma should be addressed as a matter of course in the course of investigation, prosecution, and post -trial. That is the purport of section 14 of the Victims Protection Act no 17 of 2014: on the *Purpose of support and welfare services viz:*

(1) In addition to the enforcement of rights provided under section 8, the Board shall provide support services as may be appropriate

(2) The services to be accorded to the victims under this Act shall be accorded so as to assist victims —

(a) deal with physical injury and emotional trauma;

(b) access and participate in the criminal justice process;

(c) participate in restorative justice to obtain reparations; or

(d) cope with problems associated with victimization.

In this case it was evident that the PW2 was still traumatized by what happened on the day her husband was killed- since that day of 1st March 2014 to 2018 the criminal justice system had just kept her as “evidence stock” to be produced on the hearing date and she had not been taken through her statement.

Despite all that I found her testimony credible, being able to pool her emotional strength together to recall the events of that day. The fact that the photos that were taken of the deceased were rejected by the court because the maker was not called, does not water down the evidence against the accused as the PW2's evidence on the injury was corroborated by the pathologist and the other witnesses.

The Investigating Officer was not serious in her testimony as it was clear that she had not prepared for that trial.

Despite all that I was satisfied that the prosecution had proved its case against the accused person and I make a finding of guilt of the accused for the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code. He is convicted accordingly and will be sentenced under Section 322(2) of the Criminal Procedure Code.

Dated, Delivered and signed in open court this 30th Day of April 2019 at Nyeri.

Mumbua T Matheka

Judge

Court Assistant: Juliet

Mr. Njuguna Kimani for Accused

Accused

Mr.Gitonga for Mr. Magoma for Prosecution

Records:

Mr. Gitonga: I do not have previous Records of the accused. He be treated as a first offender.

Mitigation

Mr Njuguna Kimani: The accused is a first offender.

He is 27 years separated from his wife. He is remorseful. He was arrested on 1st March 2014 and has been in custody for 5 years and 29 days. He has learnt that crime does not pay.

His case is fit for the application of the Muruatetu Case and we urge the court to– impose any other sentence and not death sentence. We ask that the period he spent in custody be considered.

Court:

I order that a pre-sentence report be filed by the Probation Officer on or before the 14th May 2019. This order be served on the County Probation Officer Nyeri for compliance.

Mention on 14th May 2019.

Accused Remanded in Custody.

Judge