



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 48 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JACOB MWAMANZI MBITI.....ACCUSED

J U D G M E N T

1. **Jacob Mwamanzi Mbiti** the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the night of **7th** and **8th** **May, 2014** at **Mbitini Suc-Location, Mbitini Location** in **Kisasi District** within **Kitui County** murdered **Phylis Kitonga**(Deceased).

2. Facts of the case are that the Accused herein was the owner of **Mbitini Medical Clinic**. On the **7th** day of **May, 2014**, PW1 **Emmaculate Mukuu** escorted the Deceased to the clinic to seek medical attention. The Deceased entered one of the rooms and the Accused was the attending physician. They were inside the room for a duration the witness estimated as two (2) hours and when the Accused left the room, the Deceased was crying an act that prompted PW1 to enter the room where she found the Deceased bleeding from her private parts. The Accused returned to the room and PW1 went out. Three (3) hours later he came out and informed her that the Deceased had passed on. The Accused managed to get a motor-vehicle that was to remove the body but prior to doing so the police arrived and arrested them. Subsequently a post-mortem was conducted on the body by PW4, **Doctor Mutisya Cosmas** who concluded that the cause of death was haemorrhagic shock caused by incomplete abortion hence the case.

3. Upon being put on his defence the Accused stated that he was a private medical practitioner as a Community Nurse. He worked with Government facilities for ten (10) years prior to resigning and opening his private clinic. Regarding the fateful date he stated that he found the Deceased who had been escorted to the clinic by PW1. The Deceased had a blood stained skirt. She was already bleeding from her genital organs. He instructed her to remove the sanitary pad but she was using cotton wool that was soaked in blood. The Deceased denied being pregnant but since she looked anaemic, he referred them to **Motomo Hospital**. PW1 asked him to assist them in finding means of transport. He called a taxi driver, negotiated and agreed at **Kshs. 1,500/=** and he even paid him **Kshs. 1,000/=** as they did not have money. The driver asked for time to prepare before returning to take her. He returned 45 minutes later with the police after the patient had collapsed. The police declined to listen to him, collected various items from the clinic and arrested him. He denied having initiated the abortion. His argument was that if it was done then it was before the Deceased went to the hospital.

4. It was submitted by the defence that the Accused tendered a cogent defence corroborating evidence of PW1 that the incomplete abortion that caused the death of the Deceased was initiated outside the clinic therefore the Accused was not responsible. That the Accused was arrested on suspicion that was discredited by PW1 and samples that were collected at the clinic were abandoned by the Prosecution for lack of evidence linking the Accused to the death of the Deceased.

5. It was urged by the Prosecution (State) that the act and circumstances that surrounded the death of the Deceased involved acts of causing or inflicting bodily harm that would have been avoided had the Accused taken precautionary measures. That the Deceased failed to get proper medical attention and the acts of the Accused hastened her death. In this regard he cited the case of **Republic vs. Guzambizi s/o Wesonga (1948) 15 EA CA 65** where it was held that:

“All homicide are presumed unlawful unless excusable by law, or in reasonable defence of property or person.”

That the Deceased died due to the unlawful act and liability of the Accused. Therefore, the action taken by him amounted to murder.

6. I have considered evidence adduced and rival submissions of both the Prosecution and defence.

7. In the case of **Anthony Ndegwa Ngari vs. Republic (2014) eKLR** the Court of Appeal stated that:

“For the offence of murder, there are three (3) elements which the prosecution must prove beyond reasonable doubt in order to

secure a conviction. They are (a) the death of the deceased and the cause of death (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought (See Nyambura & Others vs. Republic (2001) KLR 355).”

8. The fact of death of the Deceased is not denied. A post-mortem was conducted by PW4, **Doctor Mutisya Cosmas** who found a gravid uterus at 18 weeks. He noted the presence of placenta tissues but there was no foetus. As a result, he concluded that the cause of death was haemorrhagic shock caused by incomplete abortion.

9. The kind of abortion herein was an induced one. The Deceased was stated to have been a student, therefore the removal of the embryo or foetus was deliberate. Deprivation of the life of foetus that was growing in the womb as a right having been deliberate was an unlawful act **(see Article 26 of the Constitution 2010)**.

10. It is urged that the unlawful act was committed by the Accused. It is not in doubt that the Deceased was found at the clinic operated by the Accused. It is however the Accused person's defence that the Deceased died while undergoing treatment having initiated an abortion prior to seeking medical attention.

11. The person who took the Deceased to the clinic was PW1. It was her testimony that while at home on the fateful date, the Deceased asked her to take her to hospital and she took her to Mbitini Hospital. On reaching the clinic they did not find anyone. They waited for 30 minutes prior to the Accused going to their aid. And when the Deceased entered the room she remained outside. She waited and when she heard the Deceased cry and entered the room, she was bleeding from her genitalia. On cross examination, she stated that the Deceased was bleeding from her private parts and when she entered the clinic the clinician started attending to her.

12. PW9 **No. 231742 C I Gabriel Okello** the Investigation Officer found an outpatient register at the clinic where the Deceased was registered as **Serial Number 111**. He also saw some other records maintained by the Accused. These records were not adduced in evidence to enable the Court tell what exactly the Deceased was being treated for. But on cross examination, the officer stated that he found PW1 at the clinic and in her statement she stated that she took the Deceased to hospital while she was bleeding from her private parts.

13. PW8 **Mungwe Mutia** claimed to have been pregnant and having been at the clinic on the material date for purposes of procuring an abortion. It was her evidence that the Accused inserted some drugs into her vagina so that the foetus would come out. And that when the police arrived the Accused switched off lights and instructed her and others to run out and hide at a nearby construction site. The following morning, she passed by the clinic and found the girl who sat waiting for the one who was ill. Thereafter she was arrested by the police as she had left her books and bag at the clinic.

14. The Investigation Officer alluded to a register of patients. Had it been produced in evidence it would have been established if indeed PW8 was a patient at the hospital and the nature of her ailment would have been disclosed. It was not enough to allege that she had gone to procure an abortion and had to pay **Kshs. 1,800/=** having negotiated downward from **Kshs. 3,000/=** without proof of having been pregnant in the first instance.

15. **Section 107** of the **Evidence Act** provides thus:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

16. In the celebrated case of **Woolmington vs. DPP (1935) ALL 462** Lord Sankey had this to state:

“Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to..... The defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner.....the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

17. The position was also summed up in the case of **Pius Arap Maina vs. Republic (2013) eKLR** where the Court stated that:

“It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be interpreted in favour of the accused. ...”

18. The Prosecution's witness having tendered evidence to the effect that at the point of going to seek medical evidence the Deceased was already bleeding, it was duty bound to prove that the subsequent haemorrhage as a result of the incomplete abortion was not induced by the Deceased herself but the Accused who made relentless effort to intervene for a duration of estimated five (5) hours estimated by PW1.

19. This is a Criminal Case where the Prosecution had to prove that the Accused committed the act that caused the death of the Deceased. Had it been a Civil Case the Complainant would have endeavoured to prove that the Accused, as a clinician by conduct acted by causing harm to his patient by failing to use the standard of care while performing the procedure he was expected to perform.

20. Looking at the nature of investigations carried out, the report PW9 received was that there was an incident of murder at the plot and the

motor-vehicle that had been spotted was to transport the body of the Deceased. All the officer did was to take an inventory of items that he found at the clinic that were never treated as exhibits. He did not seek to establish circumstances under which the Accused was operating the clinic. Following shoddy investigations carried out it was suspected that the Accused caused the death of the Deceased. In the case of **Joan Chebichii Sawe vs. Republic Criminal Appeal No. 2 of 2002** the Court stated that:

“Suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

21. It was suspected that the incomplete abortion was induced by the Accused but the Prosecution failed to prove that fact beyond any reasonable doubt. In the premises the case against the Accused fails. Accordingly, he is acquitted of the charge of murder.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 30th day of April, 2019.

L. N. MUTENDE

JUDGE