



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 5 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

OMAR WAITHAKA KEVAL.....ACCUSED

JUDGMENT

The charge

1. Omar Waithaka Keval, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of this charge are as follows:

OMAR WAITHAKA KEVAL: On the 2nd day of January 2012 at Happylands Flats in Harambee Estate Buruburu in Starehe District within Nairobi County murdered YVONNE NJOKI MAINA.

2. The accused pleaded not guilty to the charge.

3. From the outset it is important to explain the reasons for the delay in concluding this matter. The circumstances leading to the delay in expeditious disposal of this case were explained in detail in my ruling following the conclusion of the case by the prosecution. These circumstances included this case being handled by various judges before it was assigned to me in October 2014 and non-attendance of defence counsel for reasons explained on the record as well as lack of witnesses. These are the problems I inherited until this matter came to a conclusion after the defence closed its case on 14th February 2019 after attempts to secure attendance of two witnesses (minors) failed.

4. The matter was placed for submissions. This court directed that the parties file written submissions on or before 12th April 2019 and the judgment was reserved for 16th May 2019. As at the time of writing this judgment in May 2019 there are no submissions in the file. The judgment was postponed to 30th May 2019 because on 16th May 2019 this court was not sitting due to my being away from Nairobi while attending to a three-bench matter (High Court Petition No. 442 of 2015).

The evidence

5. In total thirteen (13) witnesses have testified for the prosecution. The accused was the only defence witness. From the evidence adduced in court both from the prosecution and the defence, Omar Waithaka Keval, the accused, and Yvonne Njoki Maina, the deceased, were friends for a long time. Romauld Waweru Maina, PW2, brother to the deceased told the court that the accused and the deceased had been friends for over seven (7) years while Joseph Peter Maina, the father of the deceased, told the court that the two had been friends for 10 years. The two had a child together. However, their relationship was not a happy one according to the evidence of the family of the deceased. It was described as having been toxic and abusive.

6. It is obvious to this court going by the evidence of the brothers and father of the deceased that the family of the deceased was not in favour with the relationship between the accused and the deceased and did not want it to continue. The deceased had another friend, Geoffrey Wambugu Ngugi, PW1. It seemed that the family of the deceased favoured this relationship.

7. At the time this case arose, the deceased was living with her parents in Ongata Rongai from where she was picked by the accused in company of his friend Wellington Mabua Ombuni (PW5) on 1st January 2012 at about 8.00pm. Evidence shows that after picking the deceased, they left for Nairobi West where Wellington was running an electronics business. After a short while, they left for Majengo Nairobi to pick some *miraa* (khat) and returned to Nairobi West at about 11.00pm. They left Nairobi West again to go to South B, Nairobi, where they continued chewing *miraa* inside the accused's vehicle.

8. That same night the accused and the deceased in company with Wellington left for Westlands Nairobi to a club called Lazoras where they took alcoholic drinks and continued chewing *miraa* although the accused told the court that he did not drink beer but that it was the deceased

who was drinking. Wellington told the court that he did not accompany the accused and the deceased to Westlands. The accused however said that the three of them went to Westlands.

9. After a long night of *miraa* chewing and perhaps drinking the accused and the deceased left to go to deceased's home at Happylands Flats. What happened after they arrived at accused's home is not known because there is no independent evidence on this.

10. The following day on 2nd January 2012 in the morning, time is not specified, Geoffrey Wambugu Ngugi called the deceased on her mobile telephone but the call was not received. Later that morning at about 11.00am according to Wambugu, he received a call from the deceased's number. A male voice was on the other end. The person identified himself as Omari. He wanted to know who he (Wambugu) was. Wambugu told the caller that he was deceased's boyfriend. Wambugu testified that shortly after this exchange he heard screams but was not able to identify whether it was a man or woman screaming. His evidence is captured as follows:

“I heard, ‘come and talk on this phone’. I heard screams then heard, ‘come and help me take this one to hospital.’”

11. It is after hearing the screaming that he called the parents of the deceased and told them that deceased may not be well and that they should check on her. PW3, father of the deceased, confirmed to the court that he received a call from Geoffrey about the deceased. PW3 told the court that he tried calling deceased's number without success and that the accused called PW3 using the deceased's number but PW3 who was annoyed at the accused disconnected the call. The accused called deceased's mother and told her about the deceased. The brothers of the deceased, Romuald, PW2, and Eugene Stephen Gatheru, PW4, were also informed about the deceased.

12. The information given to the family of the deceased by the accused is that the deceased had jumped from accused's flat on the 5th floor and had been taken to Metropolitan Hospital in Buruburu. The parents and the brothers of the deceased went to Metropolitan Hospital and found the body of the deceased inside a Matatu belonging to the accused. She had been pronounced dead on arrival at the hospital.

13. The body of the deceased was taken to Umash Funeral Home after the scene of crime officer PC Joseph Kipsaimo (PW9) took photographs of the same. It was examined by Dr. Oduor Johansen (PW7) on 3rd January 2012. The findings of the doctor are documented in the Post Mortem Report produced in court as Ex. 1

14. According to the evidence of Dr. Oduor and the information contained in the Post Mortem Form the following external injuries were documented:

(i) Multiple bruises on the forehead below the hairline covering an area of 10cm by 4cm.

(ii) Multiple bruises to the arm and hands.

(iii) Stab wound on the back of the ring finger on the right hand.

(iv) Stab wound on the middle finger of the left hand.

(v) Extensive bruises on the left side of trunk from pelvis area and bruises on the left leg below the skin and left buttocks.

15. Internally the doctor found the following injuries:

(i) Bleedings on the muscles of the neck.

(ii) Multiple fractures in the back, fractures on the 2nd to 5th ribs on the left side.

(iii) Fractures on the 2nd and 3rd ribs on the right side.

(iv) Fractured sternum bone.

(v) Fractured pelvis.

(vi) Multiple skull fractures.

(vii) Extensive scalp haematoma.

(viii) Excessive bleedings on layers covering the brain.

(ix) Fractured spine at the level of the thorax.

16. After the examination of the body, the doctor concluded as follows:

“The injuries are consistent with a fall from height. However, the absence of fractures of the limbs raises a possibility of a person who may have been unconscious and was thrown from height. There is also possibility of strangulation from neck

injuries.”

17. Specimens of deceased's liver, kidney, blood and stomach were extracted for analysis. The toxicology analysis was conducted by Joyce Wairimu Njoya (PW8), a Government Analyst. She did not find any chemically toxic substance that could have contributed to the death of the deceased.

18. Blood samples extracted from the deceased and the accused were examined by Elizabeth Waitthera, PW10, a Government Analyst and compared with the blood stains found on various cloth items collected from the accused and the deceased. These clothing items included deceased's purple brassiere, under pant, orange blouse, blue jeans, grey socks and accused's white shirt and sky blue trousers.

19. The orange blouse was found to be heavily stained with human blood. The brassiere, jeans, socks, accused's shirt, and trousers were all found to have moderate blood stains. DNA profiles generated from the brassiere, orange blouse, blue jeans, grey socks, all belonging to the deceased, and white shirt and sky blue trousers belonging to the accused and compared with DNA profiles from the deceased's blood sample showed that the bloodstains on those clothing items were from the deceased's blood.

20. PC Pharis Thoya (PW11) investigated this case with IP Lucy Mbithi, now deceased. The evidence of PC Pharis Thoya is that the two officers were on the way to the Metropolitan Hospital upon receiving the report that the deceased had been taken there when CIP Matoke, the OCS Buruburu Police Station, called them and instructed them to go to Happylands Flats in Harambee Estate. They went to the place and entered House No. C16. Inside that house they found the accused, CIP Matoke and other police officers. From his own observation, the house was not disturbed. A note (Ex. 15) was recovered from a table in that house. It has writings suspected to belong to the deceased. At the time they went to the scene the deceased had been taken to hospital.

21. PC Pharis Thoya called scenes of crime officer PC Joseph Kipsaima, PW9 to the scene to take photographs. PC Kipsaimo went to the Metropolitan Hospital where he took more photographs of the body of the deceased. He produced these photographs as Ex. 3(a) to 3(f) and his certificate as Ex. 4.

22. The note recovered from the house (Ex. 15) and sample handwritings of the deceased (Ex. 16 (a), (b) and (c) were examined and compared by Jacob Mugeni Oduor, PW12, a document examiner. He recorded his findings in a report produced as Ex. 18. His findings are that Ex. 15 was written by the same author of the sample writings – the deceased.

23. PC Pharis Thoya testified further that at first the matter was reported as a suicide but after the post mortem report came out it showed attempted strangulation and stab wounds on the hands of the deceased. This made the investigators to change their mind and prefer a charge of murder against the accused because the accused and deceased were they only two people inside the house at the time of the incident giving rise to this offence.

24. The accused confirms picking the deceased from her parents' home in Ongata Rongai and spending the night with her chewing *miraa* and drinking (though he denied that he took any alcoholic drinks). He confirmed going to his home in Happylands Flats in the early hours of 2nd January 2012 with the deceased. He confirmed they were the only two people inside that house that night. His evidence is captured as follows:

“We went to the bedroom. We did not argue all this time. We were both happy. We were discussing business and did not argue at all. We went to sleep. In the morning at about 10.00am on 2nd January 2012 Yvonne told me that she wanted to go home to prepare clothes for the son to go to school. She received a call. I saw her running towards the balcony. I do not know who called her. She ran to the balcony and I wondered what she had heard. I went to check on her. She opened the kitchen door and climbed on the balcony rails. I shouted at her not to jump but before I finished the warning she let go and fell from the 5th floor to the ground. After the call we did not talk. I did not have time to talk to her. Events happened very fast.”

25. It is clear from the evidence of the accused that his defence is that the deceased committed suicide. This informed the initial report that was given to the police.

Analysis and determination

26. The offence of murder is created by Section 203 of the Penal Code. This section is worded as follows:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

27. This section defines the ingredients of murder. There must be a death of a human being. That death must be caused by an unlawful act or omission by another person, in this case the accused person under trial. In so acting or omitting to act, the accused must have malice aforethought, or the intention to cause that death. Malice aforethought is defined under Section 206 of the Penal Code.

28. Section 206 of the Penal Code reads as follows:

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) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

29. In criminal trials like this one, the burden of proving a case lies with the prosecution. It does not shift to the accused. The threshold is proof beyond reasonable doubt.

30. In view of the above provisions of the Penal Code, this court will be determining whether death of a human being has occurred; whether that death was caused by an unlawful act or omission perpetrated by the accused person under trial and whether there is the element of malice aforethought.

31. The accused and the deceased were alone that early morning of 2nd January 2012. They had spent most of that night chewing *miraa* and drinking although the accused denied that he took alcohol. From the time they returned to accused's home in house No. C16 Happylands Flats in the early hours of that day to the time PW1 received a call from the accused using deceased's phone, no other person knows what transpired. In other words there is no evidence from the prosecution on what happened after the accused and the deceased arrived home.

Death of the deceased

32. There is evidence from the family members of the deceased, specifically from Romuald Waweru, that when he arrived at Metropolitan Hospital in Buruburu he found a *matatu* parked at the Hospital grounds. He went to where the *matatu* was and saw the body of the deceased lying inside the *matatu*. Romuald testified as follows:

“She was laid across the front seat with head hanging out of the door. Her face was bloodstained. I tried to look for her pulse but I could not..... I ran into the hospital to get a doctor. I saw the doctor on duty. He told me that he had examined my sister and had confirmed that she was dead on arrival.”

33. Joseph Peter Maina, the father of the deceased testified that when he arrived at Metropolitan Hospital he saw the body of the deceased lying in a *matatu* belonging to the accused. He said that he saw that her face was covered with blood. Likewise Eugene Stephen Maina another brother of the deceased confirmed that he saw the body of the deceased at Metropolitan Hospital.

34. The body of the deceased was examined at Umash Funeral Home by Dr. Oduor Johansen who confirmed the death of the deceased. His findings on the injuries the deceased suffered and his opinion as to the cause of death are captured elsewhere in this judgment.

35. It is clear from the evidence that death of the deceased occurred. The issue that remains to be resolved is whether that death of the deceased was an unlawful death caused by the accused or was a suicide as testified by the accused in his defence.

36. Dr. Oduor Johansen stated as follows in the post mortem report (Ex. 1):

“The injuries are consistent with a fall from height. However, the absence of fracture of the limbs raises a possibility of a person who may have been unconscious and was thrown from height. There is also possibility of strangulation from the neck injuries.”

37. In his evidence in chief and in the cross examination, Dr. Oduor was categorical that the cause of death was fall from height. He said in cross examination that he had no doubt that this was the cause of death and that if death was caused by strangulation he would have stated so.

38. I have considered the evidence of the Wambugu (PW1) and the brothers and father of the deceased. Wambugu does not give the specific time when he called the deceased. He just said he called the deceased in the morning but the call was not received. He then testified that at about 11.00am he received a call from the telephone number of the deceased and the accused, who was using the phone, asked him who he was. The accused said the deceased received a call at 10.00am and after receiving this call she jumped from the balcony. Is this the call from Wambugu? I do not have evidence to show it was the call from Wambugu.

39. However, given that the accused called Wambugu to demand from his who he was then the only logical conclusion is that he either saw the deceased answering to that call or he saw a missed call from the deceased's phone. Whichever the case, the time does not agree. The timing becomes more confusing when the evidence of the brothers and father of the deceased is considered.

40. If Wambugu received the call from the deceased's phone at about 11.00am and heard someone screaming at about the same time, it would mean that his call to the parents of the deceased should have been made after 11.00am. This is not so. It would also mean that the deceased was alive as at that time.

41. Romuald Waweru said that his mother Margaret Maina (not a witness) called him at 9.45am and told him that the deceased had died. Joseph Peter Maina the father of the deceased testified that his wife received a call from Wambugu at about 10.30am and that Wambugu informed him about the call from the accused and the deceased screaming. Eugene Gatheru, another brother of the deceased, told the court that his father called him at 9.15am and informed him about the death of the deceased. It is obvious that these timings do not agree.

42. With such varied timings it is not easy for this court to determine the exact time. However, it is clear to me that the parents of the

deceased received the call from Wambugu before they received a call from the accused. Whatever the sequence of events, evidence shows that PW3, father of deceased, was alerted by Wambugu that something was amiss with the deceased. He tried to call the deceased without success. This made him unhappy. When the accused called him he disconnected the call. This prompted the accused to call deceased's mother to break the news that the deceased was dead.

43. It would seem that after this information was received by the parents, whatever time that was, they informed the sons Romuald and Eugene who then went to Metropolitan Hospital.

44. It is very easy to conclude that the deceased jumped from the balcony to her death if the evidence of the accused is to be believed. This fall caused her death as testified by the doctor. The injuries sustained from that fall were not the only injuries the deceased suffered. She had signs of strangulation. The doctor found bleeding on the muscles of her neck explained as signs of attempted strangulation. She also had stab wounds on the fingers of both hands explained by the doctor as defence wounds. The doctor also told the court on cross examination that the deceased had bruises on the knuckles of the left hand and this may be an indication that she had hit another person.

45. The above evidence from the doctor coupled with that of Wambugu who told the court that after accused asked him to state who he was he heard screams point to a confrontation between the accused and the deceased. Although he did not identify who was screaming, given the events of that morning, there is a possibility that it was the deceased screaming.

46. The evidence on injuries on the hands of the deceased and signs of strangulation lends credence to the fact that the deceased was involved in a scuffle with the accused. They were the only two people inside the house. Could this disagreement have occurred after Wambugu called the deceased and this came to the attention of the accused? After all there is evidence from Wambugu that the accused called him using deceased's telephone to ask him who he was. Wambugu told him that he was a boyfriend to the deceased. This is not good news to a man who was also interested in the deceased. Could this have annoyed the accused to an extent that he attacked the deceased, injured her and pushed her over the balcony? This is where circumstantial evidence becomes relevant.

47. Circumstantial evidence is defined by Black's Law Dictionary (Tenth Edition) as evidence based on inference and not on personal knowledge or observation. It is all evidence that is not given by eyewitness testimony. In *Sawe v. Republic [2003] eKLR* the Court of Appeal while citing with approval the case of *R. v. Kipkering Arap Koske & Another (1949) 16 EACA 135*, held, *inter alia*, that:

(i) 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.

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

(iii) 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.

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

48. See also *Simoni Musoke v. R. [1958] EA 715* on the applicable legal principles on circumstantial evidence.

49. Applying these principles in this case, it would appear that the deceased did not jump over the balcony. The evidence of injuries on her hands and neck point to an attack on her before she fell over the balcony. Given that the accused was the only other person in that house, it can be concluded, basing on circumstantial evidence, that it is the accused to the exclusion of any other person who must have pushed the deceased over the balcony. It is not possible to determine the state the deceased was in when she fell over the balcony. She must have been in a state that did not enable her to use her limbs in reflex in protecting herself from the fall, hence the lack of fractures to her limbs as opined by the doctor.

50. There is also the note (Ex. 15) recovered from the table inside accused's house. The note was confirmed by a document examiner Jacob M. Oduor, PW12, to have been authored by the deceased. It contains narrative of complaints by the deceased on how the accused had mistreated her. The contents of this document confirm the evidence by the family of the deceased that the accused was abusive towards the deceased and that their relationship was not a peaceful one.

51. Although motive is not an ingredient of murder, the accused had every reason to attack the deceased. The call by Wambugu may have led to a fit of jealousy on the part of the accused after he discovered that the deceased had another man friend or if he knew this already, that call may have ignited a fit of anger on the accused to cause him to attack the deceased.

52. After careful consideration of all the evidence and the defence of the accused, I am convinced beyond reasonable doubt that the death of the deceased was an unlawful death and that it was caused by an unlawful act of the accused. I so find. This finding satisfies me to the required legal standard that the death of the deceased was by an unlawful act of the accused. I now turn to the element of malice aforethought.

53. Given the injuries on her hands and neck and the deceased's pushing over the balcony, it is clear to me that the accused cannot escape blame that he had knowledge that his actions would lead to the death of or grievous harm to the deceased. It is therefore my finding that the evidence satisfies the legal requirement of proof beyond reasonable doubt that malice aforethought existed on the part of the accused. I so find and hold.

54. In conclusion, this court finds and holds that the prosecution has proved all the ingredients of murder beyond reasonable doubt. Consequently, I find the accused guilty of murder as charged and convict him. Orders shall issue accordingly.

Dated, signed and delivered in Nairobi this 30th day of May 2019.

S. N. Mutuku

Judge