



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO.32 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ANNASTACIA NTHAMBI ATANUS.....ACCUSED**

**JUDGEMENT**

1. The accused, was charged with the offence of Murder contrary to sections 203 as read with section 204 of the Penal Code Act. The particulars of the offence are that on the 14<sup>th</sup> day of September 2012 at Mukumuku Village, Matetani Sub-location, Kangundo District in Machakos County murdered **Catherine Kavuu Wambua** alias **Serah Kavuu Wambua**.

2. **James Kamanza Mutua (PW.1)** testified and stated that on the 14/09/2012 he and several family members were on their way home after attending a wedding preparation for another relative when the accused herein and her sister one Munyiva engaged them in a verbal confrontation which degenerated into an ugly scene whereby the accused rushed to her home and armed herself with a knife and sought to stab him but the deceased stepped in and in the process the accused stabbed her from the back fatally wounding her. **Miriam Muloko Mbuvi (PW.2)** **Mbeneka Mutua (PW.3)**, **Stephen Mutinda Kamanza (PW.4)** all stated that they witnessed the incident.

3. **PC. Geoffrey Chweya (PW.8)** who was the investigating officer stated that he visited the scene and recovered a blood stained knife from under a bed in one of the bedrooms inside accused's home. He produced the said kitchen knife as exhibit one. He finally confirmed that the accused intended to stab James Kamanza Mutua but when the deceased rushed to his help she stabbed her instead.

4. **Dr. James Muoki (PW.7)** testified that he conducted a post mortem on the body of the deceased and established that the stab wound had penetrated through the right lung. He formed the opinion that the cause of death was massive haemothorax and lung injury due to a penetrating stab wound. He also established the weapon to have been a sharp and pointed object. He produced the post mortem examination report as exhibit 2.

5. The court found that the accused had case to answer and she was placed on her defence. Dw1 testified that on 14.9.2012, James Kamanza came and started hurling insults against her and his wife came and joined him in hurling the insults then they entered the compound and threatened her then her sisters children were taken away and intruders entered the compound and descended on her sister. She then took her vegetable knife and used it to scare the intruders and she secured her sister's release then they locked themselves in the house. It was her testimony that while inside she heard the intruders claim that one of them had been stabbed and they wanted to torch the house. She and her sister fearing for their lives fled to a bush and in the morning went to report the matter to the police station where she was locked up. She told the court that she learnt that the victim was Catherine Kavuu Wambua and that she had never seen her at the compound that day and that the knife that was produced in court was not the one she used to cut vegetables. She told the court that James Kamanza was out to evict her mother from the family land after her father died and further that the family members who gave evidence were the same ones who had attempted to evict her and her sister from their compound. She stated that she had no motive of killing anyone as she only waved the knife to scare away the crowd and that the knife had no blood; she added that James Kamanza was drunk and he and his group had a bad motive towards her. On cross examination, she testified that she did not see the deceased in the compound on the material day but that the deceased died from a stab wound. She told the court that she had no dispute with the deceased.

6. Dw2 was Agnes Munyiva who testified that on the material day she found the accused who is her sister being harassed by James Kamanza who was then drunk. It was her testimony that the said James called the accused a prostitute and he was joined by his family members who assaulted her and she fell down then the accused pulled her and they locked themselves in the house. She told the court that she heard Mama Purity shouting that they would torch the house and she did not see the accused injure anybody and in any event the deceased was not at the scene. On cross-examination, she testified that when she was assaulted by the intruders, she fell down and was unable to see what was happening and she was charged with assault occasioning actual bodily harm but was acquitted because there were no witnesses. She also stated that she was unable to see the accused rushing back to the house to get a knife.

7. Prosecution urged the court to convict the accused on the evidence of PW1 as corroborated by Pw2, Pw3 and Pw5 who saw the accused rushing into the house and pick a knife that was used to stab the deceased. It was also argued that the injury on a sensitive part of the body was indicative of malice aforethought as well as attacking a person who was unarmed.

8. Counsel for the accused on the other hand pointed out that the murder weapon was not identified by Pw1, Pw3, Pw4 and Pw5 and that none of the persons who identified the body of the deceased were called as witnesses. Counsel submitted that there was no evidence adduced to show that the accused had ever touched the knife that was presented in court. It was further argued that Pw1 was drunk and urging for war whereas the accused had no intention to harm anybody. Court was invited to believe the version of evidence by the accused that was concise as she did not exhibit malicious intent. Reliance was placed on the case of **R v Joseph Chege Njora (2007) eKLR**. The learned counsel submitted that the court should proceed and acquit the accused since the Prosecution failed to prove the case beyond reasonable doubt.

9. The burden to prove all ingredients of the offence beyond reasonable doubt falls on the Prosecution in all cases save a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R 372**. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, a court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

10. The four ingredients that the prosecution is required to prove in a charge of murder are that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person.

11. The postmortem report on the examination of the body of the deceased has not been objected to nor controverted. This ingredient of the offence was duly proved by the prosecution. The cause of death is not disputed.

12. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by Law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held :

*“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”*

13. The deceased in this case was found with a stab wound that had penetrated through the right lung. The doctor who performed the autopsy was of the opinion that the cause of death was massive haemothorax and lung injury due to a penetrating stab wound. He also established the weapon to have been a sharp and pointed object. There was a suggestion by Counsel for the accused that there was no evidence adduced to show that the accused had ever touched the knife that was presented in court. It was upon the prosecution to ensure that the allegation that this was the murder weapon was backed by supporting evidence hence I find it safe to presume that the death was unlawful, however I find that the evidential lapse will have a bearing on the identification of the perpetrator.

14. Malice aforethought is the intention to cause death. It is an element of the mind which can only be inferred from the circumstances in which the death occurred. Courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is used on the victim and the conduct of the assailant before, during and after the attack.

15. Four of the prosecution witnesses did testify to witnessing the attack on the deceased. However there is no certainty as to what was used as the murder weapon. What however is clear from the postmortem report is that there was a deep stab wound on the right side, back of the chest which implies a lot of force was used using whatever object was employed. Given the presumed force used on such a sensitive part of the body, it can safely be inferred that death was the desired outcome of whoever the assailant was. The evidence of Pw1 was that the knife was driven from the back and so was the evidence of Pw2 that the deceased was stabbed from the back. With all due respect to the learned Dr Muoki, I find the post mortem report of no use to assist in confirming that the deceased was stabbed from the back as was testified by Pw1 to Pw3. In **Mutonyi v Republic (1982) KLR 204**, the court observed that

*“a court is not bound by expert opinion if in its view, the criteria employed to test the accuracy of his conclusions is inapplicable to the facts before it or inconsistent, in some way, with those facts.”*

16. By the time a knife enters the back through to the front, there are vessels that ought to have been indicated as injured and the same is not indicated in the post mortem report. According to the article **“Prediction of Injury Caused by Penetrating Wounds to the Abdomen, Flank, and Back From the Indiana University Regional Trauma Center and Wishard Memorial Hospital, Indianapolis, Ind... “If a knife entered your back the only bones there is your spine and shoulder blades”**. According to the **Journal of Biomedical Informatics Volume 42, Issue 2, April 2009, Pages 308-316**, diagnosis requires a pairing of entry and exit wounds as well as the surrounding organs associated with the wound. A comparison of the evidence of the eye witnesses and the evidence of Pw7 means that there is doubt as to whether or not the deceased was stabbed from the back and in essence I am unable to find the evidence of Pw1, Pw2 and Pw3 credible. From the evidence deceased is Pw3’s mother in law, the accused is a cousin to Pw2’s husband and there was an allegation that the accused insulted Pw2’s mother. The accused is married to Pw1’s cousin and there was an altercation between Pw1 and the accused, the accused is Pw3’s sister in law and the accused’s brother is Pw4’s husband; unlike what the prosecution submitted, Pw5 did not witness the incident. Pw1 to Pw4 are relatives of the deceased and as such there is likelihood of bias and hence the need for independent evidence to corroborate the story of the said witnesses. It is noted that none of the villagers were called to testify as independent witnesses.

17. There was no direct evidence linking the accused to the crime. It is the position of the law that for the court to base a conviction on circumstantial evidence it must irresistibly point to the guilt of the accused with no co-existing circumstances which would weaken or destroy that inference. For evidence to be capable of being corroborated it must:

(a) be relevant and admissible, **R v Scarrot, [1978]QB 1016**;

(b) be credible, **DPP v Kilbourne [1973]AC 729**;

(c) be independent, that is, emanating from a source other than the witness requiring to be corroborated, **R v Whitehead [1929] 1 KB 99**,

(d) Implicate the accused. **Abanga alias Onyango v Republic Cr. Appeal 32 of 1990(UR)**.

18. In another case of **Republic v Kipkering Arap Koske and Another (1949)16 EACA 135**, regarding circumstantial evidence the court held that:-

*“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt.”*

19. The prosecution case suggests that the accused had an opportunity to kill the deceased because she had a knife in her hands. The evidence also shows that she was distressed, terrified and scampered for safety after being under siege from family members who wanted her out of the land she was staying on. The accused testified that she had no reason to kill the deceased and the knife that was presented in court was not the one that she had. The accused’s evidence is that the deceased was not at the scene on the material day. On the other hand, the accused established that the eye-witnesses of the prosecution showed that they had every reason to frame her because Pw1 to Pw5 were family members who had an interest in the land she was staying. Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge.

20. I am unable to find whether or not, other than the accused person, there are other persons who equally had the opportunity to kill the deceased, who were not exonerated from suspicion of having committed the offence by the prosecution, so as to leave the evidence pointing unerringly towards the guilt of the accused. However I cannot rule out the possibility that there were other persons who would have an interest in the death of the deceased and the accused found herself as the sacrificial lamb. As such the evidence against the accused only raises grave suspicion against her of which as was rightly pointed out in the case of **Neema Mwandoro Ndurya versus Republic [2008] eKLR**, suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.

21. I accordingly, therefore, find that the availed circumstantial evidence falls short of establishing the offence against the accused beyond reasonable doubt. I find there is doubt created in the prosecution’s case. The defence evidence has shaken and cast doubt upon that of the prosecution. The accused is entitled to be given the benefit of such doubt. I find the accused not guilty and is accordingly acquitted of the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. She is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at **Machakos** this **30<sup>th</sup>** day of **September, 2019**.

**D. K. Kemei**

**Judge**