



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL CASE NO.24 OF 2017

REPUBLIC.....PROSECUTOR

V E R S U S

DANIEL KANYWIRA MWANGI.....ACCUSED

J U D G M E N T

Daniel Kanywira Mwangi faces a charge of murder contrary to Section 203 ad read with Section 204 of the Penal Code.

The particulars of the charge are that on 17/6/2016 at Shauri Village, Kiriita Location, murdered MGG.

He denied committing the offence and the prosecution went on to call a total of ten witnesses in support of their case.

PW1, LW, a child aged 9 years, the daughter of the deceased, gave evidence on oath after the court conducted a voire dire and was satisfied that she was intelligent enough to understand the proceedings and the meaning of the oath.

PW1 identified the accused as a person they lived with and called him father; that he would come to their house at any time; that she was with her sister BW at night. The electric lights had been switched off because they were asleep. They heard their mother scream and accused warned them to be quiet. They woke up in the morning and found their mother bleeding and they went to call Mama Wachira, the mother's employer, PW3. PW1 said that the accused locked the door from outside but she opened another door and called PW3. PW1 explained that the mother worked in the bar which was next to a butchery where they slept while the mother slept in the next room. That there was no curtain in the mother's window and there was moonlight by which they were able to see what the accused did to the mother.

PW2, BW who was only 7 years gave unsworn testimony. PW2 identified the accused as the person who lived with them and they called him father; that she was asleep with PW1 in the butchery; that to enter her mother's room, one could pass through the butchery or another door; that when her mother came from the bar, she passed through the butchery; that by the time their mother came in, the accused had already entered in her mother's room as he had come earlier; that she saw the accused kill her mother.

PW3 Alice Wanjiku Mwangi testified that she had employed the deceased in Blueshade Bar; that on 17/6/2016, she passed by the bar and found the deceased peeling potatoes and went to her house and later slept; that early next day, she heard a knock on her door. She found that it was PW1 and 2, the deceased's children who called her to go see what their father had done to their mother. PW3 said that when she hired the deceased, the deceased told her that she had parted with her husband. She used to see accused visit the deceased whom she introduced as just a friend. PW3 went to the scene with Ngugi (PW5) and they found the deceased in a pool of blood. PW3 screamed and people came. She said that the accused and deceased lived as husband and wife and used to quarrel; that in March, 2016, the deceased went back to her home and told her that the accused had threatened to kill her using the knife she used at the butchery; that later, the deceased returned to work and told PW3 that she wanted to continue working as they would not be meeting with accused who was staying at Mairo-Inya; that PW3 sent a police officer Abdi to warn the accused that he should never go to her compound; that accused stayed away for a while but PW3 saw accused leaving the deceased's house in the morning and when she asked the deceased, she said that they had agreed to be visiting each other with accused. PW3 did not see accused on 17/6/2016.

PW4 Benard Gachogu Wachira, father to the deceased was called by somebody on 19/6/2016 and informed that Mercy was unwell and had to be taken to hospital. He was told to go on 20th. He went to Mairo Inya police station where he found PW1 and PW2 and was informed that the deceased's body was at the mortuary. He identified the body of the deceased before the postmortem was done. PW4 saw a stab wound to the deceased's neck. He denied having known the accused but he knew that the deceased had been married to the father of PW1 and PW2. He recalled that the deceased had come home and talked to her mother **Veronica Wangeci (PW6)** about disagreeing with Kanywira but that after two weeks, the deceased went back to her work place.

PW5 Peter Wachira Mwangi the son to PW3, recalled that on 17/6/2016, he reached his home at 9.30 p.m.; that he found the deceased and accused busking on a fire at the bar. He greeted them and went to sleep in his house which was about 20 – 25 metres from the bar. Next morning, the mother (PW3) screamed and he went to find out what had happened. He entered the butchery and found deceased in a pool of

blood. PW5 knew accused as the deceased's husband and they used to disagree.

PW6 is the mother of the deceased and wife to PW4. PW6 knew accused as husband to deceased; that the deceased confided in her that she had problems with accused in that the accused used to beat her; that in April of 2016, the deceased went to her parent's home and alleged that the deceased had threatened to kill her and she ran off at night; that later her employer called her and she went back only to be murdered in June. She identified the deceased's body. PW6 said that the deceased had been married to George Nderi, who was accused's friend, that the accused used to visit the deceased and her husband and an affair started between accused and deceased.

Dr. Karimi Joseph Kinyua (PW7) of Nyahururu County hospital produced a postmortem report prepared by Dr. Boniface Miringu on the body of Mary Gathoni Gachogu. The Doctor found a stab wound on the left supra-clavicular region. Lungs were perforated on the left side and had collapsed with haemothorax – 2.5 litres blood; that there were severed sub-clavian vessels. He formed the opinion that the cause of death was massive haemorrhage following a stab wound and asphyxia (lack of oxygen).

PW8 Sgt. Joel Koskei of scenes of crime went to document the scene on 18/1/2016 and produced the photographs in evidence.

PW9 Cpl. John Kingori attended to deceased's postmortem on 26/6/2016 and saw an injury on the left side of the shoulder. He drew a sketch map of the scene; that the building comprised of three rooms. It was a cable house and the body was in the middle room where the deceased lived; that the room had been split into two; that the body was in the 2nd room while the children slept in the first room. In the 2nd room, there was a mattress on the floor with a log used by butchers to cut meat, lay between the deceased's body and the mattress. The accused was arrested next day by Ngugi.

PW10 Ip. Peter Mwenda Mwiraria Deputy OCS of Mairo Inya received a report of murder from Alice (PW3). He went to the scene, found the body in the building which used to be the butchery which was not in operation; PW10 interrogated the deceased's children as a result of which he arrested the accused along the road on 18/6/2016.

After the close of the prosecution case, the court formed the view that the prosecution had established a prima facie case against accused and called on him to enter his defence. He testified on oath that the deceased was his friend (lover) for about 2 years, after he learnt that she had left her husband. He denied having known deceased's husband but knew the children PW1 and PW2; that in 2015, the deceased's husband and her parents took her back to Nyeri but she returned after 4 months and called to inform him that she now worked in a bar; that their affair ended when he learnt that she had a husband; that he continued to relate with deceased but not as before and each had their own house; that deceased would go to his house and he would pass by the bar where deceased worked to drink but he never entered her residence; that on 17/6/2016 he went to Ndaragwa to get charcoal, got it at 4.00 p.m. from Mairo Inya. He kept it in the store and went home to rest. Next day he took charcoal to his clients when he found a group of people him.

He enquired what was happening when he learned of the murder. He was told he had brought himself, was put on the motor cycle and taken to Mairo Inya Police Station and placed in cells. Soon thereafter, PW3 and her son PW5 were taken to the cells where they stayed with him for 7 days after which the OCS demanded money but since he had none, he was charged while those who gave money were released. He denied having been at the deceased's house on the night of 17th June, 2016. The accused requested that the Occurrence Book (O.B.) 12 for 17/6/2016 be produced and it was produced by PW10. O.B.5 of 18/6/2016 at 7.20 a.m. was a report made by Alice Wachira (PW3) in respect of the murder of deceased. The report also indicated that PW10 visited the scene of murder vide O.B.6 of 18/6/2016; O.B.8 was return to station. He arrested accused that day but later at 6.20 p.m., vide O.B.21, he arrested 3 more suspects, Benson Ngugi Mwagi, Alice Wanjiru and Peter Wachira Mwangi as suspects of murder but after investigations, they were released. He denied having received a bribe to release PW3 and PW5.

The accused faces a charge of murder under Section 203 of the Penal Code. To prove a charge of murder the prosecution must establish beyond any reasonable doubt, the following elements:

- (1) Proof of the fact and cause of the death of the deceased;***
- (2) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused;***
- (3) Proof that the said unlawful act or omission was committed with malice aforethought;***
- (4) Proof of the identity of the accused.***

The death of the deceased has been established by the evidence of PW1 and PW2 who told the court that they saw accused murder the deceased. PW3, 5, 8, 9 and 10 visited the scene of the murder and found the deceased in a pool of blood while PW4 and 6, the deceased's parents identified the body to the Doctor, before postmortem was done.

On examination of the deceased's body, the Doctor found that the deceased had sustained a stab wound on the left supra clavicular region – 5 x 2 cms and internally, the lungs were punctured and collapsed with blood in the chest cavity – 2½ litres. The doctor formed the opinion that the cause of death was massive haemorrhage due to the stab wound and asphyxia, that is, lack of oxygen.

The question is whether it is the accused person who inflicted the stab wound on the deceased. PW1 and 2 the deceased's children who were in the same house with the deceased on the fateful night told the court that although the lights were not on, they were woken up by their mother's screams and they were able to see what was going on in the house. PW1 said there was light from the window which had glass but had no curtain and there was moonlight on the outside. PW1 further stated that when they screamed, the accused warned them to remain silent. PW2 further added and which evidence was not shaken in cross examination, that the accused had entered their mother's room before their mother came from the bar ordinarily children will not be in a bar.

Although the accused denied having been at the deceased's house that day, I do not believe his testimony. He admitted in his defence that PW1 and 2 used to call him father. He denied ever going to the deceased's house but that he used to meet the children in the bar which I disbelieve.

The accused however contradicted himself in cross-examination and stated that the children called him father whenever he visited the deceased. Again he claimed to have been at the deceased's house a month earlier before her death. The inconsistencies are evidence that the accused was not truthful. I prefer the testimony of the children.

The accused also stated that he was no longer the deceased's lover but related casually. However, PW1 and 2 told the court that the accused used to come to their house daily at any time. In fact, they intimated that he lived with them and no wonder they called him father. PW1 and 2's evidence was further corroborated by PW3's evidence who knew that the deceased and accused had come back together as husband and wife or lovers after a brief separation when the deceased went back to her home fearing threats from accused.

PW5 also told the court that when he arrived home at about 9.30 p.m. he found the accused and the deceased at the bar busking at the fire. His evidence was not shaken and this evidence goes to corroborate PW1 & PW2's evidence that the accused was in their house on the fateful night.

PW1 knew accused well, the accused having stayed with them for over one year and I am satisfied that PW1 was able to identify his voice. PW1 said that the accused warned them not to scream.

In the case of Karani v Republic (1985) KLR 290 the Court of Appeal said as follows of voice identification.

"...there can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances, carry as much weight as visual identification since it would be identification by recognition rather than at first sight. In Rosemary Njeri v Republic (1977) CR.A.27 a Victim of the offence of grievous harm testified that she heard the appellant say 'break her legs'. The reception of this evidence was upheld in the High Court on the first appeal and also in the second appeal..."

See also Chege v Republic (1985) KLR 1.

In Anjononi and others v Republic (1976 – 80) 1 KLR 1566, (1568) the Court of Appeal held:

"...recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in form or other."

PW1 is a child who had lived with accused for sometime, she did not mention exactly what the accused said in warning them to remain quiet but her evidence goes to corroborate the evidence of PW2 that the accused was at the deceased's house on the fateful night and PW5's evidence that he had seen accused and deceased at the bar on the fateful night at about 9.30 p.m. That evidence placed accused at the scene.

The accused had raised an alibi defence, that on 17/6/2016, he went to get charcoal from Ndaragua, returned at night and just went to his house and slept till next day. Even when an accused raises an alibi defence that he was at a different place and not at the scene of crime, the burden always remains on the prosecution to prove their case beyond any doubt. An alibi defence does not shift the burden of proof onto the accused. In the Ugandan case of Ssentale v Uganda 1968 EA 365, the court said that the burden to disprove an alibi and prove the appellant's guilt lies throughout on the prosecution. In the case of Kiarie v Rep (1984) eKLR the Court of Appeal held:

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's findings on the alibi because the finding was not supported by any reasons."

In Republic v Chemulon Wero Olango (1937) 4 EACA 46, the court stated that the purpose of an alibi defence is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act. Although it is expected that an accused should raise the defence of alibi early enough to enable the prosecution investigate the alibi, yet the court must still go on to weigh the alibi as against the prosecution evidence. See Ganzi – 2 others v Republic (2005) 1 KLR 52.

In this case, the accused raised the defence of alibi in his defence for the first time. However, this court has weighed the alibi against the prosecution evidence and the court finds that it has not in any way dislodged the prosecution evidence.

There is overwhelming evidence from PW1, 2 and 5 that accused was at the scene of crime on the fateful night.

In his defence, the accused introduced himself as being a married man with 5 children. Later, he said he had 2 wives who included the deceased but later in the same defence, stated that he had parted with the deceased in 2015 once he learnt that she had been married. Although the accused has no duty to prove his innocence but the many inconsistencies in his defence go to point to the fact that his defence was not believable.

Whether accused had malice aforethought:

Section 206 of the Penal Code provides for instances when malice aforethought is established. It states:

“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 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 intention to commit a felony;

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

Malice aforethought can be either direct or indirect and can be inferred from the manner in which the killing took place. It will all depend on the circumstances of each case, for example, the nature of the weapon used, the part of the body that is targeted, the manner in which the killing is done and the conduct of accused before and after the attack.

The accused stabbed the deceased in a very delicate area of the body. The injury was so deep that it punctured the left lung, severed the left sub-clavia vessels that caused massive haemorrhage that in turn caused the deceased’s death. I find that malice aforethought flows from the injury inflicted. In addition, the deceased locked the door to the house from outside so that the deceased could not get help. PW1 and PW2 managed to get out through another door the next morning. These facts point to the accused’s intention, that is, to cause the death of the deceased.

The accused seemed to claim that he was framed because PW3 and 5 were arrested as suspects but that they were released after they paid the police a bribe. PW10 the Investigating Officer denied having received any bribe and indeed there was no evidence that any was paid. PW1 and PW2 told the court that the first person they reported to about the deceased’s murder was PW3, the deceased employer, who in turn called the son, PW5 and they went to the scene. It is PW3 who then reported to the police on the same morning.

PW10 claimed to have picked up PW3 and PW5 for interrogation and later released them. Picking up people for interrogation is not uncommon during investigations. It seems however that the picking up of PW3 and 5 was without any justification. As to the allegation of the bribe, I think that it is an afterthought. PW3 and PW5 testified before this court and no such question was put to them by the accused. I dismiss the said allegation as untrue.

After carefully considering all the evidence on record, I am satisfied that the accused with malice aforethought, killed the deceased. I am satisfied that the prosecution proved its case to the required standard of beyond reasonable doubt. I find accused guilty of the charge of murder contrary to section 203 of the Penal Code and convict him accordingly.

Dated, Signed and Delivered at NYAHURURU this 31st day of October, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State

Ms. Wangeci for the accused

Shihundu – court assistant

Accused - present