



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 7 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH KARIUKI NYAGA NGIRI.....ACCUSED

J U D G M E N T

A. Introduction

1. The accused herein is charged with the offence of murder to contrary **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence are that on the 2nd day of May 2016 at Kavondori village Kianjiru sub-location, Nyangwa location of Mbeere South Sub-county within Embu County, he murdered Phelis Kalimi Mwangangi to which offence he pleaded not-guilty.
2. The prosecution called six (6) witnesses in support of their case which will be briefly summarised herein.

B. Prosecution Case

3. PW1 Dr. Thuo certified the accused mentally fit to stand trial. PW2 testified that on the 1/05/2016 the accused approached their home shouting loudly prompting him and his siblings to run away. PW2 further testified that the accused entered the house and after a short while came out and hit the mango tree where PW2 and his siblings had hidden. PW2 and his siblings then climbed down and went to their room to sleep. PW2 further testified that the following day, he came to discover the deceased's body lying outside her house.
4. PW3 the mother of the appellant testified that that on the 1/05/2016 the accused had earlier in the day visited the deceased's home shortly then left. She further testified that later in the day the accused and his wife came and visited her. She testified that the following morning she discovered the body of the deceased lying down on a footpath near her shamba. PW3 further testified that the deceased and the accused had a few disagreements and currently the deceased had an arson case pending in Siakago against the accused.
5. PW4 identified the deceased's body prior to post mortem. PW5 testified that on the 2/05/2016 the accused made a report that the deceased had been murdered. PW5 further testified that after carrying out investigations, all evidence pointed to the accused as perpetrator of the deceased's demise.
6. PW6, Dr. Phyllis Muhonja testified on the post mortem report prepared by Dr. Faith Mbithia which determined that the deceased had died as a result of a severe head injury due to blunt force trauma.

C. The Accused's Case

7. The accused testified as DW1 and his testimony was that he did not go to the deceased's home on the material day but rather went to work at Hali motors and later in the evening he went home in the company of his wife. He further testified that he came to hear of the deceased's death in the morning when his mother led him to the scene where the deceased's body was found. DW1 further stated that the main suspect of the deceased's murder, one Njiru Ithika, was released by the police. DW2 the accused's wife corroborated the accused testimony on the alibi.

D. The Accused's Submissions

8. It was submitted on behalf of the accused that none of the prosecution witnesses was present during the incident. It was submitted further that their evidence was contradictory and uncorroborated and as such the same cannot be relied on.

9. The appellant further contended that none of the elements required to prove the charge of murder had been established by the prosecution and that the evidence against him was not only fabricated but inconsistent.

E. Analysis of the Law & Evidence

10. Having considered the prosecution's evidence as against the defence. In my view, the main issue for consideration is whether the prosecution have discharged the burden of proving the guilt of the accused person beyond reasonable doubt to sustain the charge of murder.

11. To prove a charge of murder, the prosecution has a duty to *establish the following elements*:

i) the death and cause of death of the deceased;

ii) That the accused caused the death through an unlawful act or omission; and

iii) The accused possessed the intention to cause harm or kill or malice aforethought.

12. According to the information filed, the accused person Joseph Kariuki Nyaga Ngiri faced a charge of murder contrary to **Section 203 as read with Section 204 of the Penal Code** which sections provides:

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

13. **Section 204** is the Penal Section upon conviction for the offence of murder.

14. The malice aforethought is a very important ingredient for the offence of murder. The prosecution has to establish malice aforethought. **Section 206 of the Penal Code** sets down the facts which constitute malice aforethought as follows: -

“206. 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 is 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 nor, although such knowledge is accompanied by indifference whether death of grievous bodily harm is accused 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”

15. The postmortem on the body of the deceased was carried out by Dr. Faith Mbithe and her report was tendered in court by PW6, Dr. Phyllis Muhonja, who said she had worked with Dr. Mbithe and was conversant with her handwriting and signature.

16. PW5, No. 73414, P.C. Eric Gitonga testified that he proceeded to the scene of the crime on 2/05/2015 and found the body of the deceased outside her house and removed it to Embu Level 5 Hospital mortuary. The cause of death as per the postmortem report was due to severe head injury due to blunt force trauma. The evidence of PW5 and the postmortem report was that the deceased had bruises on the head. The death of the deceased was therefore established through PW5's report and through PW4 who identified the body.

17. There was no eye witness in this case who saw the accused inflict the injury on the deceased. However, there is both direct evidence on matters preceding the death of the deceased an indirect evidence on what transpired at the scene at the time the deceased met her death.

18. The evidence of PW2, the son of the deceased was that the accused who was his uncle came to their home which was about 150 metres from his own. PW2 and his mother lived in separate rooms which were detached from each other as gathered from the evidence.

19. As the accused approached the home of the deceased, he was shouting loudly that the did not want to find children in that home. PW2, his sibling and cousin decided to escape as their mother pleaded with the accused not to chase away the children. The young boys climbed on a mango tree in a shamba next to their home and remained there for about four (4) hours before they went to their room to sleep without checking on the deceased in her hoouse. It was on the following day that PW2 found the body of the deceased about 30 metres from her house. PW2 said that their grandmother had already reported the death to the police.

20. In the case of **Kiarie v Republic [1984] KLR** the Court of Appeal held that: -

“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 proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that

is not unreasonable”.

21. The defence of the accused was an alibi that he was not at the scene at the material time. Further that he saw the body of the deceased lying outside her home after his own mother PW3 alerted him. He called his wife DW2 to support his defence that he was in his house at the material time.

22. PW2 was aged 18 years old at the time he testified. I found him a credible and reliable witness. I did not find any contradictions in his evidence as alleged by the defence. The defence said that PW2's evidence was not consistent with that of PW3 yet they were together. This allegation was not correct in that PW2 was accompanied by his younger sibling and a cousin when he escaped from the deceased's house following the terror meted out by the accused. PW3 said she was in her house at the material time and did not witness the incident. She only saw the deceased's body outside the house the following morning.

23. In the case of **Erick Onyango Odeng' v. Republic [2014] eKLR** citing with approval the Uganda Court of Appeal case of **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** in which it was held as follows:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”

24. The court did not believe the defence of the accused that he was not at the scene at the material time. His house was about 30 meters from that of the deceased. He may have been at his home at the material evening but he had the opportunity to go the house of the deceased and commit to crime. Given the proximity of the two homes, DW2 may not even have noticed the absence of the accused from their house.

25. PW2 saw the accused enter the deceased's house around 7.00 p.m. before he escaped. There is no evidence that any other person went to that home that evening. From the evidence of PW2, the children of the deceased were so scared of the accused that they hid on the mango tree and remained there for several hours before sneaking to their house to sleep. It must have been dark at the time around 11.00 p.m. that they could not possibly see the body of their mother outside the house as they walked to their house.

26. There is evidence that the accused was armed with a stick when he went to the house of the deceased. The injuries that caused her death according to PW6 was blunt force trauma that was consistent with the stick which is a blunt object. PW2 and PW3 told the court that the stick was recovered the following day next to a mango tree and taken by police.

27. PW5 produced the exhibit in evidence. Although he said he did not dust it for finger prints, it was identified by PW2 as the stick that the accused was armed with when he went to the house of the deceased.

28. After the deceased was killed, her youngest child aged 1½ years was left outside the house unattended until PW2 found her there at 11.00 p.m. and took her to sleep in his house. This is a confirmation that no other adult person went to the home of the deceased after the accused. If anyone had done so, they would have taken the child with them or inquired the whereabouts of her mother and siblings had gone.

29. PW3 in her evidence testified that the accused and the deceased had very pronounced differences. There was a pending criminal case at Siakago where the accused faced charges of arson as a result of a complaint by the deceased. PW5 testified that investigations revealed that the motive of killing was a land dispute between the accused and the deceased. The husband of the deceased had died some years back and the deceased and her family continued to reside in their home on the family land. The arson incident may have been an attempt by the accused to evict the deceased and her children from the land to give him a bigger share of the parent's land.

30. It is my considered opinion that the defence of the accused is not plausible as compared with the credible and reliable evidence of PW2 and other witnesses. I find that the prosecution have established beyond any reasonable doubt that the accused caused the act that led to the death of the deceased.

31. As for malice aforethought, the evidence of PW6 on the injuries is crucial. He found that the deceased had bruises on several parts of the body: on the right and left superior orbital region, on the right cheek, on the right side of the chest below the breast; an epidural haematoma on the right parietal region and separation of the frontal skull bone from the left parietal. The death was caused by severe head injuries.

32. What does the foregoing injuries demonstrate? I will be in order to conclude that the accused was in such a rage as he attacked the deceased that he inflicted very severe injuries mostly on the head with no other intention but to end her life. Section 206(a) of the Penal Code describes malice aforethought as such.

33. In the case of **Nzuki v Republic [1993] KLR 191** where the court stated as follows: -

“Malice aforethought is a term of art and emphasized that:

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

i. The intention to cause death.

ii. The intention to cause grievous bodily harm.

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of those acts, it does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert homicide into a crime of murder. (See also Hyman v DPP [1975] EA 55).”

34. It is my finding that malice aforethought has been established by the prosecution against the accused.

35. It is my finding that the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code has been proved beyond any reasonable doubt against the accused. I find him guilty of the offence and convict him accordingly.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Ms. Migwi for Accused

Accused present