



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 49 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MIRIAM MURINGE.....ACCUSED**

**JUDGMENT**

**Introduction**

Miriam Muringe, who I will call the accused in this judgment, is charged with the murder of Brian Munyui Gakumo, referred to in this judgment as the deceased. The information is framed as follows:

**MIRIAM MURINGE: On the night of 27<sup>th</sup> November 2016, in Ogopa Village, Mowlem within Dandora, Nairobi County murdered BRIAN MUNYUI GAKUMO.**

The accused pleaded not guilty to the charge. She is represented by Mrs Omungála, Learned Counsel. Various Prosecution Counsel prosecuted the case on behalf of the Director of Public Prosecutions for the Republic.

**The Prosecution Case**

Ten witnesses testified in support of the case for the prosecution. These are Jackline Njeri Nyambura (PW1), the mother of the deceased; Jackline Omondi Ochieng (PW2) the psychiatrist who examined the accused and certified her as fit to plead to the charges; Kennedy Ndichu Gakumo (PW3) brother to the deceased; Peter Gakumo Munyui (PW4) father to the deceased; Emily Anyango (PW5) a neighbour of the accused and the deceased at Mowlem; Yvonne Kangéndo Mbeketho (PW6) a neighbour of the accused and the deceased at Mowlem; Dr Charles K. Muturi (PW7) the pathologist who examined the body of the deceased; Police Constable (PC) Julius Kirui (PW8) the investigating officer; Eunice Moraa Nyakoe (PW9) a neighbour of the accused and the deceased and Dr Julius Muia (PW10) the doctor who attended to the deceased when he was admitted at Kenyatta National Hospital (KNH).

The evidence by these witnesses show that the accused and the deceased lived together as husband and wife. On the morning of 27<sup>th</sup> November 2016 a Sunday, it was the duty of Miriam to clean the compound where they lived according to the duty roster. By 9.00am Emily Anyango was wondering where she was since Emily had not seen her that morning. At 2.00pm Miriam went to the house of Emily. On being asked where she had been she told Eunice that she had been at her parents home after disagreeing with the deceased the previous day. Emily called Eunice Moraa another neighbour of theirs. She intended that both her and Eunice talk to Miriam about her domestic issues. According to Emily, Miriam had told them that the deceased had assaulted her the previous day hence the reason why she had gone to stay with her parents.

According to Eunice, both her and Emily counselled Miriam to give the deceased some time to cool down. Eunice explained that they told Miriam to leave the home she shared with the deceased to allow the deceased to think things over. Instead of leaving Miriam entered her house, picked her clothes and started washing them. The deceased also picked his shoes and started cleaning them. At 7.00pm that evening Miriam went to Emily's house and asked for a bag. Eunice did not have a bag. According to Emily, Miriam did not explain why she needed a bag. Miriam returned to her house but returned to Emily's house shortly thereafter to call her. Emily went outside and found the deceased throwing Miriam's clothes outside their house. The deceased claimed that Miriam had become a problem to him. Emily tried to calm him down but he continued throwing clothes outside. Emily called Eunice to come and help in talking to the deceased.

According to Eunice, Miriam sent her to buy food for her at around 6.00pm. When Eunice returned she found Miriam washing utensils. Eunice confirmed the evidence of Emily that Emily called her. She put the time when Emily called her at 9.00pm. Eunice told the court that Emily told her that there was a problem at Miriam's house. When Eunice went outside she found the door to Miriam's house open and her clothes thrown outside. She returned to her house. At that time Emily had walked out with a guest. Emily said she heard screams from their plot and went back. She met Mama Aisha a neighbour of theirs screaming. Emily learnt that Miriam had stabbed the deceased. When she got to their compound she found the deceased lying on the ground bleeding.

Eunice told the court that she returned to her house after finding Miriam's clothes thrown outside. Shortly thereafter she heard some noise from Miriam's house. She went to the place. She found the deceased standing holding the knife in his hand. He told Eunice that he had been stabbed and showed her the stab wound. Eunice called her husband to assist in taking the deceased to hospital. The deceased followed Eunice to her house and dropped the knife inside the house. He fell down. Neighbours tried to tie a cloth on the wound to stop the bleeding. The deceased was taken to Prudent Hospital by the husband to Eunice.

Another neighbour Yvonne told the court that she heard screams from Miriam's house at around 8.00pm on 27<sup>th</sup> November 2016. When she went outside to find out what was happening she found it was Miriam screaming saying in Kiswahili that "*Kujeni mnisaidie kumpeleka hospitali*" translated loosely as "come and help me take him to hospital". This is obviously in reference to the deceased. Yvonne said that at that time the deceased was lying on the ground bleeding with a piece of cloth tied to the wound.

The deceased was taken to Prudent Hospital. It seems that he did not get proper medical care at Prudent. He was referred to Mama Lucy Hospital where he was x-rayed and returned to Prudent for dressing of the wound. After this he went home. His mother Jackline was informed and travelled to Nairobi the following day on 28<sup>th</sup> November 2016. When she arrived in Nairobi she found the deceased at home. According to her, the deceased was in pain and could not walk. Jackline saw a dressed wound on the left side at the ribs. According to Jackline the deceased told her that he and Miriam had a domestic issue that they had failed to resolve and that Miriam had stabbed him. She said that she did not find Miriam at home but she found Miriam's mother there. She said that she took deceased to Mama Lucy Hospital on 30<sup>th</sup> November 2016 after noticing that his urine was black. He was x-rayed again but he was not strong enough to be taken to the theatre. He was placed on a drip and admitted. On 5<sup>th</sup> December 2016 the doctors went on strike and they were advised to take the deceased home. They took him home on 6<sup>th</sup> December 2016,

Jackline testified further that on 7<sup>th</sup> December 2016 she reported the matter at Mowlem Police Post. The deceased was not able to record a statement because of the condition he was in. Jackline returned to work and left Kennedy taking care of his brother. Kennedy told the court that he was unable to take care of his brother the deceased because of financial constraints and advised him to go to their rural home. He was taken home on 12<sup>th</sup> December 2016. His condition became worse while at home and his mother Jackline took him to Thika Memorial Hospital on the same day 12<sup>th</sup> December 2016. He was not admitted because the hospital lacked ICU facilities. They were referred to Kenyatta National Hospital where they arrived on the same day at 1.00pm. He was x-rayed and taken to the theatre. He died at Kenyatta National Hospital on 15<sup>th</sup> December 2016 and was buried on 23<sup>rd</sup> December 2016.

Dr Julius Muia who attended to the deceased at Kenyatta National Hospital told the court that the deceased had difficulties in breathing with reduced expansion of left chest when breathing. He said that deceased's abdomen was swollen and was painful on touch. The x-ray of the chest showed blood and air in the left chest with blood showing signs of infection. A tube was inserted to drain the air and the blood. The deceased was put on pain killers and antibiotics.

Dr. Muturi who examined the body of the deceased painted a very grim picture of the state of that body. He performed a post mortem on the body of the deceased on 19<sup>th</sup> December 2016 at the City Mortuary. He noted a stab wound on the left mid chest with signs of medical intervention with tube inserted for drainage. He noted fluid with a lot of pus on the left side chest cavity. Both lungs were congested. The left lung had collection of pus on the lung tissue. One lung and the heart were stuck on the chest wall. There was pus in the abdominal cavity and the abdominal organs were stuck on the wall. The doctor formed the opinion that the deceased died as a result of overwhelming septic shock due to overwhelming infection throughout the blood system and organs secondary to stab wound. The post mortem was produced as Ex. 2.

### **Defence Case**

The accused opted to give a sworn defence. She is the only witness for the defence. She confirmed the evidence of Emily and Eunice, especially in respect to the events leading to the stabbing of the deceased. She told the court that they lived with the deceased as husband and wife and that they experienced domestic issues which they were unable to resolve. She testified that on 26<sup>th</sup> November 2016 the deceased had assaulted her following a disagreement. She had left the deceased and gone to her parents. She testified that her father called the deceased on 27<sup>th</sup> November 2016 to discuss the issue but they did not agree. The accused said that she was present when her father called the deceased. The deceased wanted the accused to go and pick her clothes and other personal items. The accused testified that after the telephone conversation between her father and the deceased she went to Mowlem where she lived with the deceased to do house chores then leave. She testified that she arrived at their home and found her neighbours Emily and Eunice who wanted to know where she had been and she explained to them what had happened and where she had been. She said she then entered her house and found the deceased inside, she greeted him and picked clothes to wash them. She said that the deceased picked his shoes and started cleaning them. They were not talking as they cleaned besides each other. After washing the clothes she cleaned the house and washed utensils. In the evening she sent Eunice to buy her food to cook supper. She cooked and both the deceased and her had supper together. She said that at this time they were talking.

She testified that after supper, she started packing her clothes. This attracted the attention of the deceased who asked her whether she was packing or just folding the clothes. She told him that she was packing to leave. The deceased asked her not to leave but she was determined to go because the deceased did not respect her parents and did not value her. This made the deceased angry. He started throwing her clothes outside their house telling her to go and pack her clothes outside. She said that her neighbours could see what was happening. She said that the deceased stood at the door of their house and starting hauling insults towards her. She told the court that she went to Emily's house to ask Emily to talk to the deceased. Emily who was at that with a guest told the accused that she would go to talk to the deceased. The accused went outside and continued packing her clothes. Emily attempted to talk to the deceased without success. The accused said that she entered her house to pick her bag containing personal items. She said that the deceased closed the door of their house and started beating her telling her that she could not leave him without means because he had no job at the time. He also claimed that she was having an affair with another man. She said that the deceased hit her with force; that he picked a knife an used it to tear her clothes threatening to kill both of them; that she held his hand and could not let go; that the deceased pushed her out of their house; that she let go of his hand; that he closed the door still holding the knife; that the accused ran to Emily's house where she found Achieng, Emily's sister an explained to her what was happening; that Achieng told her to hide behind the curtains; that the deceased followed her and demanded to know where she was hiding; that at the time the deceased was bleeding; that he went to Eunice's house and asked to be taken to hospital; that when the accused went outside she

found the deceased lying on the ground. She said that she screamed telling her neighbours to help her to take the deceased to hospital. She said that her neighbours refused her from joining them in taking the deceased to hospital. She said that she was confused. Her mother came and took her away with her.

On cross-examination the accused told the court that she did not stab the deceased. She said that they were struggling and she thought the deceased was injured during that struggle. She said the deceased had the knife all the time. She said that the witnesses who said she had stabbed the deceased were not at the scene where the deceased and her were struggling.

### **Determination**

At the conclusion of the case, defence counsel, Mrs Omungála prepared written submissions which she fully relied on. Learned counsel submitted that the accused was provoked leading to the fight that resulted in the stabbing of the deceased. She submitted that it was one stab which points to the unpreparedness and further that it is not quite clear who stabbed the deceased. She submitted that the charge of murder cannot stand under the circumstances. Learned counsel relied on *V M K vs Republic [2015] eKLR* on the issue of provocation and urged that this court finds that the offence of murder has not been proved and acquit the accused forthwith.

On the other hand the learned prosecution counsel submitted that the prosecution has proved the offence of murder against the accused person. He submitted that the evidence by prosecution witness is direct, reliable and overwhelming against the accused; that the evidence places her at the scene of the offence and that the ingredients of murder have been proved. Learned prosecution counsel urged that this court finds the accused guilty of murder and convict her accordingly.

I have considered all the evidence and submissions. The evidence is clear to me, both from the prosecution and the defence, that there were serious problems between the accused and the deceased. This was attested to by the neighbours. The evidence of Emily and Eunice, who took part in trying to reconcile the accused and the deceased, agree with that of the accused on what happened before the stabbing occurred.

The offence of murder is committed when any person who of malice aforethought causes the death of another person by an unlawful act or omission. To prove the offence of murder, the prosecution that bears the onus, must prove that the death of a person has occurred; the unlawful act or omission causing the death must be proved and the intention to cause that death. The proof must be beyond reasonable doubt. I have carefully read, analysed and considered all the evidence from the prosecution and the defence of the accused. The circumstances leading to the injuries sustained by the deceased are laid bare and clear in this evidence. The evidence is clear that Brian Munyui Gakumo died at Kenyatta National Hospital on 15<sup>th</sup> December 2016 at 7.20pm. Before he died, the deceased went through a very difficult period of pain and lack of proper care both medically and physically. The evidence by his mother Jackline and brother Kennedy show a situation that was so dire that the court cannot help but think that had the deceased received proper care both in hospital and at home he would probably not have died. Jackline and Kennedy seems to have resigned themselves to fate that would befall the deceased. The two were challenged both financially and timewise. They did not have money to ensure that the deceased received the medical attention he required and they did not have the time to give him proper care. The deceased was moved from hospital to another when he seriously needed proper medical care. He was discharged from hospital when he was not supposed to and was taken home where proper care was lacking. This situation was compounded by doctors/nurses strike at a time when the deceased was not able to afford specialized care in a private hospital. The evidence of the doctor captures the situation better. In his evidence Dr Charles Muturi told the court as follows:

***There was a stab wound on the left mid chest with signs of medical intervention with tube inserted for drainage. There was fluid with a lot of pus on the left side of the chest cavity. Both lungs were congested. The left lung had collection of pus on the lung tissue. One lung and the heart were stuck on the chest wall. There was pus in the abdominal cavity and the abdominal organs were stuck on the wall. The doctor formed the opinion that the deceased died as a result of overwhelming septic shock due to overwhelming infection throughout the blood system and organs secondary to stab wound.***

This evidence proves without reasonable doubt that death of the deceased occurred. The death was not a natural death. Initially there was a stab wound that led to the infection of the blood system and organs leading to the death.

Does the evidence prove beyond reasonable doubt that the accused stabbed the deceased causing the injuries that led to the death of the deceased? The prosecution seems to think so. This is why learned prosecution counsel submitted that there is direct evidence showing that the accused was at the scene and that she stabbed the deceased. I have examined the evidence. While I have no doubt that the deceased was at the scene, she admits this, the evidence does not show that any one witnessed the actual stabbing. Emily stated as follows regarding this issue:

***“After a short while she (accused) returned to call me. I had a visitor and I went out with the visitor. I found deceased throwing Miriam’s clothes outside. I told him not to be angry but to resolve issues amicably. He told me that Miriam had become a problem to him. I tried to calm him but he did not stop throwing clothes out. I called Eunice Moraa a neighbour to come and help in talking to Brian. Eunice came. I went to escort the guest..... I heard screaming from our plot. I went back. I met mama Aisha, a neighbour screaming. She told me Miriam had stabbed Brian. I returned to the plot. I found Brian lying down bleeding.”***

It is obvious that Emily was not present when the stabbing occurred and her evidence is based on what she was told by a neighbour. Evidence shows that mama Aisha is Yvonne. But according to her evidence it is screams from the accused that made her to come out of her house. When she did, she found Miriam screaming saying “*Kujeni mnisaidie kumpleka hospitali*” this was in reference to the deceased who Yvonne found lying on the ground near Emily’s door bleeding. Yvonne, just like Emily, did not witness the stabbing.

On her part, Eunice, the only other neighbour who testified, told the court as follows:

***“Mama Walter (Emily) called me at 9.00pm and told me there was a problem at Miriam’s. She told me to go to accused’s and find***

***out what was happening. I went out and found door of their house open. Miriam's clothes had been thrown on the corridor. I returned to my house since no one told me what was happening. Shortly mama Walter came. I heard noise at Miriam's. I went to the place and found deceased standing holding a knife in his hand. He told me he had been stabbed and showed me a wound on the side. I called my husband to take deceased to hospital."***

It is the deceased who told Eunice that he had been stabbed. He did not name the accused as the person who had stabbed him. It is worth noting that when he talked to his mother the very first time after he got injured the deceased did not tell his mother that Miriam had stabbed him. Jackline the mother told the court as follows:

***"Brian told me that he had been stabbed with a knife and that he was in hospital. He did not tell me who had stabbed him or the place where he had been stabbed."***

It is Kennedy who told Jackline their mother that the accused had stabbed the deceased. Kennedy told the court that the deceased told him that it is Miriam who had stabbed him. Without clear evidence from the prosecution pointing to the accused as the culprit, this leaves this court with circumstantial evidence and what the deceased told some witnesses which in my view amounts to a dying declaration by the accused.

The evidence of the accused is not clear as to what exactly happened. She seems to be saying that while struggling over the knife that the deceased was holding the deceased was accidentally stabbed. In cross examination, the accused denied stabling the deceased. Her demeanour during her evidence in chief suggested someone who knew exactly what had happened during her struggle with the deceased. She is however not under a legal duty to prove her innocence. In her submissions through her legal counsel the accused raised the issue of provocation. But she did not rely on this defence in her testimony. She did not tell the court that she stabbed the deceased but was provoked into doing so. It would seem as an afterthought therefore to raise the defence of provocation at the time of submissions. Provocation is provided for under sections 207 and 208 of the Penal Code. Section 207 provides as follows:

***207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is for his passion to cool, is guilty of manslaughter only.***

Provocation is defined under section 208 (1) of the Penal Code as follows:

***208(1) The term 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.***

As I have stated the accused did not raise provocation as a defence in her testimony. However this court is aware of the circumstances that led to the stabbing. The accused and the deceased had a disagreement on 26<sup>th</sup> November 2016 when the accused claimed to have been assaulted and left to her parents. This disagreement continued on 27<sup>th</sup> November 2016 when the accused returned to their home to pick her clothes. She stayed even when she knew their relationship was not good. She was advised by her neighbours, Emily and Eunice, to leave her husband to give him time to think things over. She did not. She stayed on, washed clothes, cleaned the house, did other household chores, cooked dinner and later in the evening started packing her clothes to leave. She said she was persuaded by the deceased to stay but she insisted on going. This escalated the on-going disagreement and led to events that culminated in the stabbing. Her actions were not wisely chosen. She even ignored the advice to leave.

They were the only two inside their house when the stabbing took place. This court can only consider the circumstances surrounding the situation and come to a conclusion as to what really happened. Evidence by the accused shows that the deceased picked the knife and used it to tear her clothes. He did not attack her with the knife. In her evidence the accused does not say exactly when the stabbing took place. She told the court that they struggled and she held the hand of the deceased with the knife. I think it is prudent to consider the law on dying declarations alongside circumstantial evidence before concluding this matter.

Section 33 of the Evidence Act provides as follows:

***Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an unreasonable delay or expense which in the circumstance of the case appears to the court unreasonable, are themselves admissible in the following case:***

***(a) "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."***

Evidence shows that the deceased told Eunice that he had been stabbed without naming the person who had stabbed her. When he talked to his mother Jackline, the deceased also told her that he had been stabbed without mention the accused as the person who had stabbed her. To his brother Kennedy, the deceased told him that his wife Miriam Muringe had stabbed him. In the words of Kennedy:

***"He used to tell me that his wife Miriam Muringe had stabbed him. He did not explain why Miriam had stabbed him."***

In *Philip Nzaka Watu vs Republic [2016] eKLR*, the Court of Appeal has this to say in respect of admission and reliance on a dying declaration:

***“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. .... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”***

I have given the evidence before me and the circumstances of this case much thought and consideration. All the evidence by the accused herself and her neighbours Eunice, Emily and Yvonne show that the accused and the deceased were the only people inside their house. Indeed their relationship was not good at the time in question. They fought or struggled before the stabbing. It is my view that the intention of the deceased in picking a knife was not to stab the accused but to use it to tear accused's clothes as testified by the accused. The evidence that they were the only two people inside their house lends credence to dying declaration that indeed it is the accused who stabbed the deceased. Circumstantial evidence also points to the accused to the exclusion of any other person as the person who stabbed the deceased. I am therefore convinced beyond doubt that it is the accused that stabbed the deceased occasioning him a stab wound to the chest that caused a chain of events exacerbated by lack of proper medical care that led to the death of the deceased. Consequently, I arrive at a conclusion that the accused stabbed the deceased in these very unfortunate circumstances. However after considering all the circumstances of this case it is my considered view that this stabbing was not planned nor was it intended. It was done in the cause of the struggle described by the accused and may have perhaps been done in self-defence. It is therefore my finding and I so hold that the evidence presented to court does not prove the offence of murder. I find that the offence that I find having been committed is manslaughter contrary to section 202 as read with section 205 of the Penal Code. I therefore find the accused not guilty of murder and acquit her forthwith. Instead, I find her guilty of manslaughter under section 202 as read with section 205 of the Penal Code. I convict her of manslaughter. It is so ordered.

**Dated, signed and delivered this 28<sup>th</sup> day of November 2019.**

**S. N. Mutuku**

**Judge**