



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE NO. 5 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PETER MAINA KARIUKI.....ACCUSED

JUDGMENT

1. **PETER MAINA KARIUKI (Maina)** is charged with the offence of murder of **PAUL NGUNJIRI KIBIRI** (the deceased).

2. The circumstances which led to the death of the deceased were highlighted by the evidence of prosecution's witness Tabitha Wanjiku Kinuthia (PW 3). On the fateful day when the deceased died PW 3 said she was at home. At about 6 p.m. the deceased and her husband arrived into her home. They had been at a funeral. The deceased sent PW 3 to take meat to his wife, Grace Wangari Ndungu (deceased's wife) at the deceased's home. PW 3 went as requested leaving her husband and the deceased injecting a cow that was sick.

3. PW 3 arrived at the deceased's home and found the deceased's wife in the company of a female relative. When that female visitor went away the deceased's wife informed PW 3 that she (the deceased's wife) had a plan to have sexual affair with the accused, Maina. Deceased's wife said that they had not started the affair but that they intended to start. Deceased's wife told PW 3 that Maina had promised to give her kshs.2000.

4. Further the deceased's wife said that she had informed the deceased that Maina was seducing her and they had agreed if Maina arrived at their home she was to telephone (popularly known as flashing) the deceased to alert him.

5. As PW 3 left the deceased's homestead she saw Maina entering into the compound of that homestead.

6. Elizabeth Wanjiru Kibiri (PW 6) was sister to the deceased. She stated that her mother, who had died nine months previously, had informed her that the deceased had confided in their mother that he wanted to separate with his wife because his wife was having an affair with Maina. Further PW 6 stated in evidence that on 24th January 2016 she saw Maina standing with the deceased wife and their mannerism, they were smiling, left her with questions about their relationship.

7. Monica Muthoni Kariuki (PW 2) the mother of Maina stated that on 25th January 2016 she was at home cooking. It was slightly before 6 p.m. She was in the company of her mother and the daughter of Maina called Muthoni. Muthoni informed PW 2 that she (Muthoni) heard someone say in the maize plantation they would kill her father, Maina. PW 2 stepped out of her house and heard a voice. Someone

who was in the maize plantation who she could not immediately identify:-

“Maina today I will kill you.”

8. PW 2 ran towards where she heard screaming was coming from. On arriving at the scene PW 2 saw the deceased and Maina struggling with a knife. She said:-

“Maina was holding the knife with two hands and Ngunjiri (the deceased) with one hand.”

9. PW 2 was able to persuade the two to drop the knife.

10. The deceased held on to PW 2's hand and requested that they go to look for his wife. On their way the deceased said that he was very thirsty and went into his house, drunk water, then came out. It was then that PW 2 excused herself saying that she needed to return to her house to check on the food she left cooking.

11. From the prosecution's evidence it seem that the deceased thereafter went to the house of his brother in law. His brother in law, James Kariuki Murage (PW 1), was married to deceased's wife's sister.

12. PW 1 stated in evidence that at 7.30 p.m. on 25th January 2016 the deceased arrived at his home. The deceased requested PW 1 to get his wife and they all go to his house. PW 1 said that his wife was busy cooking for the children. It was then that the deceased and PW 1 went together. As they went to the deceased informed PW 1 that he wanted to send him to Maina. The deceased further said that he wanted PW 1 to go call Maina, Maina's wife and Maina's mother.

13. PW 1 noted that the deceased was irritated. On PW 1 questioning the deceased on why he wanted these people summoned, the deceased said:-

“Get them and bring them to my house.”

PW 1 said that the deceased told him that he, the deceased wanted them to 'have a case'. The deceased did not give PW 1 any further details of the propose 'case'.

14. As PW 1 and the deceased continued conversing the deceased seemed to bend then he fell. PW 1 noted that the deceased was losing consciousness. PW 1 called out to his wife who came to the scene in the company of deceased's wife. Both women began to scream on seeing deceased fallen down.

15. The screams alerted other villagers who organized for the deceased to be taken to hospital. The deceased was pronounced dead on arrival at the hospital.

16. At this juncture it is important for this court to remind itself of who bears the burden of proof in criminal cases. Where the burden of proof lies was discussed in the case **WAFULA JUMA & 2 OTHERS –v- REPUBLIC [2014]eKLR** viz:-

“Of instant benefit to this appeal is that, after a long raging debate, dating back to late part of 1700, on whether or not legal burden of proof could shift under any circumstances, it is now a well settled principle of law that, the legal burden of proof in criminal matters never leaves the prosecution's backyard. Viscount Sankey L. C. in the case of H. L. (E)*WOOLMINGTON -v- DPP [1935]A. C. 462 PP 481 in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that:-

‘Throughout the web of the English Criminal Law one golden thread is always to be see, that it is the duty of the prosecution to prove the prisoner's guilty subject to what I have already said as to the defence of insanity and subject also to any statutory exception. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’

17. The prosecution is required to prove beyond reasonable doubt:-

a) **The deceased died;**

b) **The accused did an unlawful act that caused the death of the deceased; and**

c) **That the accused acted with malice aforethought.**

DEATH OF DECEASED

18. The death of the deceased was confirmed by the doctor who performed the postmortem and by PW 6 who identified the deceased's body before the postmortem.

19. The postmortem report revealed that the deceased had no haemorrhage in the eye or tongue. There were no lacerations noted on the deceased body. There was, however, haemorrhage on the deceased's head which the doctor found when the deceased's skull was opened. The doctor said that there was a collection of blood in the brain of the deceased. The doctor concluded that the probable cause of the deceased's death was a blunt force trauma.

20. On being cross-examined the doctor stated that the deceased's body had a collection of blood below the scalp.

21. It follows that from the above evidence the prosecution proved the deceased died.

DID ACCUSED'S UNLAWFUL ACT CAUSE DEATH OF THE DECEASED?

22. Police constable (P. C.) Robert Chuma (PW 8) after visiting the scene on 26th January 2016 stated that there was clear evidence of a fight having taken place in the maize plantation. Then on a further examination of the scene he and his co-officer Corp Julius Thirinja (PW 9) found at that scene a used condom. On further investigation the officers learnt that Maina was found by the deceased while engaging in sexual intercourse with the deceased's wife and a fight ensued between the deceased and Maina.

23. Maina in his defence stated that the deceased's wife called him into the maize plantation. That as he reached the maize plantation and he greeted the deceased's wife the deceased came holding a knife and said he would kill Maina and then go to jail. That the deceased's wife on seeing the deceased she ran away.

24. That Maina held the knife with both his hands while on the ground and the deceased was on top of him. That they continued holding the knife until they were separated by PW 3 mother of Maina.

25. In this court's view the defence offered by Maina was contrary to the evidence of PW 8 and PW 9, the police officer who went on the scene. They both described the maize plant being disturbed suggesting that a fight had taken place.

26. It was only the deceased and Maina who were present when the fight occurred. Following that fight the deceased suffered fatal injuries to his head which resulted in internal haemorrhage and consequently his death.

27. Maina by his own evidence placed himself at the scene where the deceased received his injuries. PW 2 testified that it was her persuasion that ended the fight between the deceased and Maina. Maina having fought with the deceased, who subsequently succumbed to his injuries, had a responsibility or a duty to give an explanation of exactly what occurred to the deceased. This duty is in accordance with **section III(1) of the Evidence Act Cap 80** which is in the following terms:-

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bring the case within an exception of exemption from, or qualification to, the

operation of the law creating the offence with which he is charged and he burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall –

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charge; or

28. The prosecution evidence, in my view, has met the standard proof proving that Maina was found by the deceased having sexual intercourse with the deceased wife in the maize plantation. A fight ensued and Maina fatally injured the deceased. Maina as required under section 111(1) of Cap 80 had a burden to explain what happened when the deceased found him in the maize plantation having sexual intercourse with the deceased's wife; and what caused injury to the deceased leading to his death.

29. This court therefore finds that it was the unlawful act of Maina that caused the death of the deceased. The evidence tendered by Maina that he did not know what caused the death of the deceased is an obvious lie and is rejected. The deceased was in the company of Maina and within a short while thereafter he collapsed and later died of internal injury to his head. Maina must have known what caused that injury and since Maina does not deny that he fought with the deceased it is the consequence of that fight that resulted in the death of the deceased.

MALICE AFORETHOUGHT

30. The prosecution was required to prove that Maina had formed the necessary intention either to cause death or grievous harm as provided under section 206 of the Penal Code.

31. The prosecution failed to prove such intention. The evidence of the prosecution is that Maina and the deceased wife were having sexual intercourse in the maize plantation when they were confronted by the deceased. The deceased's wife on seeing her husband ran away. Maina and the deceased engaged in a fight. They were separated by Maina's mother (PW 2). It seems that in that fight Maina injured the deceased by causing internal bleeding in his brain. The effect of that internal injury were not immediately noticeable but within a short while the deceased collapsed and died before arriving at the hospital.

32. In those circumstances Maina did not have intention either to cause death or grievous harm of the deceased. Accordingly one of the ingredients of murder was missing. That being so Maina is guilty of Manslaughter.

33. Having reached the above conclusion I hereby substitute the charge against the accused from murder contrary to section 203 to **Manslaughter contrary to section 202 of the Penal Code** in accordance with the power of substitution provided under **section 179** of the Criminal Procedure Act.

34. I hereby convict **PETER MAINA KARIUKI** of the offence of manslaughter of **PAUL NGUNJIRI KIBIRI (Deceased)**.

DATED and DELIVERED at NANYUKI this 31st day of JANUARY 2018.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Accused: Peter Maina Kariuki

For Accused

For state:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE