



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 28 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MARY KHABETSA MATEKWA alias BEATRICE....ACCUSED**

**JUDGMENT**

1. **MARY KHABESTA MATEKWA** alias **BEATRICE** stands charged with the offence of murder contrary to Section 203 as read with Section 204 of Penal Code. The particulars are that the accused between 29<sup>th</sup> and 30<sup>th</sup> day of March 2014 within Kiambu County murdered **J W N**.

2. She pleaded not guilty to the charge and the matter proceeded to full hearing with the prosecution calling six (6) witnesses. The accused gave an unsworn statement of defence and called no witnesses.

3. The prosecution case is as follows;

**PW4 J M G M** is an advocate of the High Court of Kenya and husband to the deceased. He testified that 29<sup>th</sup> March 2014 was a Saturday and he woke up at around 10 am. Present at his home were the deceased, Houseboy (PW5), house help (accused) and their children. He left for work at his office as the deceased took their daughter to the salon. He worked upto 5 pm when he went to meet his friend at Season restaurant, Agakhan walk, where he stayed upto 7 pm. He then left for a meeting with John Mugo at Heru Square Eastern bypass, and he stayed there upto 1.00 am. He left for home and arrived at 2.00 am.

4. He found the perimeter wall security lights off yet there was no black out in the area. This was unusual as the security lights were usually switched on by either the deceased or PW5. He hooted thrice at the gate but there was no response. He then got out of his vehicle and opened the gate since he had spare keys.

5. Inside the compound, he noticed that the curtains in the main house were open and the lights were on. This was also unusual. He proceeded and pressed the doorbell at the door of the house and there was no response. He used the door keys in his possession to open the external door and the door to the main house. He realized that the door had been bolted from the inside on the lower part and so he could not gain entry. He used the kitchen door which was not locked to get into the house.

6. On opening, he found blood flowing from the kitchen. There were utensils all over the kitchen floor and they were blood stained. He noticed the deceased's body lying on the corridor of the sitting room and bedrooms. The body had a stab wound on the left side of the neck. The deceased was still in her clothes and shoes which were blood stained. She appeared to have been dragged from the kitchen to the corridor.

7. He raised an alarm and called the watchman outside the gate. He came and they entered the house and went to the 1<sup>st</sup> bedroom where the accused used to sleep but she was not there. They saw footmarks of bare feet of an adult and a child on the corridor to the bedroom.

8. He went to his son's bedroom and found him sleeping, in a vest and shorts. This boy was aged 2 years then. The shorts he wore had a few blood stains, while his other clothes which were blood stained were on the floor. His daughter was not in her room and the master bedroom was locked.

9. He called Njengu Police post and **Mr. Tuweu** arrived with his officers, who preserved the scene. The scenes of crime officers arrived at 4 am and after investigations, the body was removed at 6 am to the mortuary.

10. On 31<sup>st</sup> March, 2014 PW4 was called by officers from Kiambu police station who went with him to Kenyatta University Mortuary

where he identified the deceased's body for postmortem. She was buried on 5<sup>th</sup> April, 2014, which was the same day he learnt of the arrest of a suspect who was at Kiambu police station. He went there on 6<sup>th</sup> April, 2014 and was shown his wife's phone "Nokia Lumia 830". It was black in colour and he identified it through the photos on the screen shot as the phone was still on. This phone was marked as MF11.

11. He identified the accused who he said had worked for them for 11 days and she had been recruited through a house help bureau. She hailed from Buruburu. He knew her as Beatrice as told by the deceased. He had not interacted much with her and he had not noticed any strained relationship between her and his people. He added that the accused had been directly under the direction of the deceased.

12. **PW1 Kenneth Akhina Sumba** is a security officer with Searite Security firm and was attached to the residence of PW4 at Turitu area in Kiambu. He reported on duty on 29<sup>th</sup> March, 2014 6.30 pm and found no one in the home and there was a blackout. He was stationed outside the gate where there is a gatehouse.

13. He stated that around 2.30 am PW4 came home driving and hooted but no one opened the gate for him. He opened himself and got into the compound and switched on the security lights. PW1 then heard a scream from PW4's house and was called by PW4. He went and found blood on the floor. The deceased was lying in the blood on the corridor to the kitchen, and had injuries on her head and neck. He stated that after he reported on duty he did not see anyone enter or leave PW4's compound, and he did not have a key to the gate of the said compound.

14. **PW2 Duncan Mungai** is a neighbor to PW4 and she knew the accused as a house help to PW4's family. He testified that on 29<sup>th</sup> March, 2014 around midday he saw the accused walking towards the main road with PW4's child called C. The accused had a handbag but C had nothing. The latter asked for PW2's son, but the accused did not talk to him. This witness stated that he was generally at home that day. He did not see the accused return home but he saw C return with a hair dresser who used to braid her hair.

15. He had however, seen the deceased going to her compound that day but he did not know if there were other people on that compound. He went to PW4's compound that night when he heard screams, and found the deceased's body lying on the floor. He next saw the accused in a police land rover on PW4's compound while she was under arrest. The accused was asked where the knife which was the murder weapon was and she pointed to the roof. The knife was retrieved from the said roof.

In cross examination, he said he had seen the deceased return around midday without the child.

16. **PW3 Monica Wanjiku Maina** is a shop attendant doing retail business. The deceased was her customer and she knew her daughter C. On 29<sup>th</sup> March, 2014 she was in her shop selling when C was brought to the shop by the house help who is the accused. The accused asked her to sell the child soda which she left her taking as she went to braid her hair at a salon. She stated that the accused had a bleeding hand and she had bought elastoplast from her. The injury was across the fingers and she explained that she had been injured as she was washing dishes. The accused also bought rubber shoes from her.

17. After the child was through with the soda, the witness sent her to check on the accused at the salon but she returned after ten (10) minutes saying the accused was not there. The accused never came back and the witness called the child's mother on her cell phone but the call went to voice mail. It was getting late and she decided to take the child home. On reaching the gate, the watchman informed her that the child's parents were not there. She went with the child to her home and informed the watchman as much.

18. The next day she was questioned by the police and was asked to record a statement. In cross examination, she said it was 2 pm when the accused and C came to her shop. She could not remember if C hair was plaited or not. She also said it was the accused's right hand which was bleeding.

19. **PW5 David Maina Mwangi** testified that he used to work for PW4 at his compound and he lived in the servants' quarter. March 2014 was the first month he was working for PW4. He knew the accused who was a house help to PW4 and the deceased. The 29<sup>th</sup> March, 2014 was his off duty day and PW4 had paid him his salary. He was at home with the deceased, 2 kids and the accused on this day. He did all his work and by the time he left at noon, the deceased and accused were at home together with deceased's son. The accused locked the gate.

20. He stated that his home is in Muranga and that's where he went. Upon arrival he called the deceased but she could not be reached on phone. He delivered a parcel to PW4's mother in Muranga. On 30<sup>th</sup> March, 2014 at 3am, he was called by PW4 who asked him how he had left his home. He had called him while outside his gate when no one was responding. He called a second time and explained how he had found the deceased's body on the corridor. He travelled back and arrived at PW4's home between 8 am – 9 am and he found a crowd plus police officers. It was his evidence that the accused stayed and related well with this family and himself.

21. **PW6 Peris Wanjiru Mwangi** is a hair dresser who used to plait C hair. On 29<sup>th</sup> March, 2014 11 am, the deceased took C to her for the plaiting of her hair. She finished the assignment at 12.30 pm and she called the deceased using the contact she had left but no one was picking the call. She decided to take the child to her home since she knew it.

22. She waited as the child knocked the gate but there was no response. She went upto the gate and heard a lady's voice saying, "C, C wait for me we go together to the shops". She then left as she was sure the child was safe. As she turned at the last corner, she looked back and saw someone she did not identify peeping at the gate. She learnt of the deceased's death the next morning.

23. The accused gave an unsworn statement for her defence and did not call any witnesses. She told the court that she had worked as a house help for the deceased and PW4 for 11 days only. On 29<sup>th</sup> March, 2014 she did her work and the deceased assisted her make tea. PW4 then left for work, leaving her with the deceased, 2 children and PW5. It was her "off duty day". She was to have an off on Saturday and Sunday. The deceased requested her to prepare lunch for her which she did. The deceased took her daughter to the salon and returned alone after half an hour and found her feeding the younger child.

24. The deceased told her she wanted to go for a church meeting and so could not wait for C whom she had told to go to PW3's place. After she was through with feeding the small child, the deceased took him and left for church with him. C came and she served her food after which they left together.

25. They went to PW3's and after explaining to her their mission, she left C there and went to her place in Buruburu. On 30<sup>th</sup> March, 2014 a police woman from Kiambu Police station invited her to the police station. She went and was led to the office of the OCS where she found five (5) officers. After introductions she was asked to tell them who had killed the deceased. She was so shocked and started crying out of pain. She was placed in cells as investigations went on. She was later charged with murder on 17<sup>th</sup> April, 2014. She denied killing the deceased and stated that there was no reason that could have made her kill her. She referred to the evidence of PW4 and PW5 about her relationship with the deceased.

26. **Mr. Omondi Tunya** for the accused filed written submissions which he highlighted. It was his submission that though the prosecution called six (6) witnesses, none of them was an eye witness. The prosecution therefore relied on circumstantial evidence. For such evidence to lead to a conviction, two things must be proved. They are;

- i. All the inculpatory facts as proved must point to none other than the accused as the culprit.
- ii. The chain of events leading to that hypothesis must not have been broken. On this he referred to the court to the cases of

a. ***Teper –vs- Republic (1952) ALL ER 480***

b. ***Mwangi & Another –vs- Republic (2004) eKLR 32***

c. ***Republic –vs- Abdi Sheikh Mohamed Garissa High Court Criminal Appeal No. 20 of 2012***

d. ***Criminal Appeal No. 84 of 2014 Eric Odhiambo Okumu –vs- Republic (Mombasa Court of Appeal)*** among others.

27. Mr. Tunya outlined what the inculpatory facts are and submitted that the accused was indeed at the deceased's home, but she was not the only one there at the time. He mentions PW5 and two others who were at the gate digging a well. Further that there was no evidence that indeed PW5 went to his rural home as alleged. Further it was not clear what time he left PW4's home, as apparently, PW2 never saw him leave.

28. He submitted that the accused explained that she had to take C to PW3's shop and proceed to her home while the deceased was to go for a function in church. She was summoned from Buruburu and she responded to the summons. It was therefore his submission that she never fled from the scene as alleged.

29. As to whether the accused pointed out to the murder weapon, Mr. Tunya submitted that PW2 who stated so is not a police officer and there was no other evidence to support him on this. Secondly, no confession had been recorded from the accused on this. It was his submission that the inculpatory facts and the chain of events taken together do not point to the accused alone as the culprit in this case. He argued that the evidence shows there were other existing factors which displaces the hypothesis of guilt.

30. In response, **Mr. Okeyo** counsel for the State submitted that the prosecution had proved its case beyond reasonable doubt. Firstly, that the fact of death had been proved and the accused had been placed at the scene by the evidence of PW1, PW2, PW4 and the accused herself. Further, that the accused had pointed out the murder weapon and this was not shaken. He wondered why the accused had to leave C with PW3 when her mother was at home. It was his submission that the accused had an unexplained injury which she must have received during her scuffle with the deceased.

31. He argued that the accused's movement on 29<sup>th</sup> March 2014 was suspicious as there was no evidence that she had an off that day. He submitted that her conduct after the incident confirmed malice aforethought. He said she hid the murder weapon and ran away from the scene. He asked the court to find that the accused committed the offence.

32. In a rejoinder, Mr. Tunya reiterated that the pointing out of the knife was unlawfully done. Secondly, that PW3 had confirmed from C that the deceased had to go to church that afternoon. She was unable to identify the accused's hand which had an injury. Further, that PW2 who had been with the accused and C did not notice any bleeding. That the accused only learnt of the deceased's death when she went to the police station.

33. This is now the case before court for determination. I have duly considered all the evidence, submissions and authorities cited.

34. The accused is facing a charge of murder which is defined under Section 203 of the Penal Code as follows;

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

35. The three ingredients which must be proved in a case of murder are:

- (i) The fact of death,
- (ii) The act of killing (actus reus)

(iii) The intention to kill (malice aforethought or mens rea)

**(i) The fact of death**

36. PW1, PW2 and PW4 confirmed that they found the deceased's body lying on the corridor of their house in blood. It was bleeding from a stab wound on the neck. The body was taken to the mortuary by the police who visited the scene. PW4 identified the body before the post mortem was conducted. It is also not in dispute that the doctor who carried out the post mortem did not testify and the post mortem report was also not produced. In spite of these omissions, I find that the fact of death has been established.

**(ii) The act of killing (actus reus)**

37. The prosecution called six (6) witnesses. From their evidence, there is no mention of an eye witness to this unfortunate incident. The prosecution therefore relied purely on circumstantial evidence to establish its case.

What then is circumstantial evidence? It is evidence that relies on an inference to connect it to a conclusion of fact. It is evidence that is not drawn from direct observation of a fact in issue. In other words, circumstantial evidence is the opposite of direct evidence.

38. The test on circumstantial evidence was set out in the case of Republic –vs- Kipkering arap Koske (1949) 16 EACA 136. It was restated in the case of Simoni Musoke –vs- Republic [1958] EA 715 where it was held;

***“In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt and also before drawing the inference of guilt the court must be sure that there are no co-existing circumstances which would weaken or destroy the inference of guilt.”***

39. The Court of Appeal in the case of Erick Odhiambo Okumu –vs- Republic, Criminal Appeal No. 84 of 2014 stated thus;

***“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence namely, evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establish the guilt of an accused person as direct evidence. Indeed, as this court stated in Musili Tulo –vs- Republic (Criminal Application No. 30 of 2013)***

***“Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”***

40. The test set out in the above cases has been followed in numerous cases in our superior courts (see Abanga alias Onyango –vs- Republic Criminal Appeal No. 32 of 1990; Sawe –vs- Republic [2003] KLR 364; Mkendeshow –vs- Republic [2002] 1KLR 461).

41. In Sawe –vs- Republic (supra) the Court of Appeal affirmed this position. At page 375 it stated;

***“There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.”***

42. The above is the law which I now wish to apply to the facts before this court. There is no dispute that the accused was employed by PW4 and the deceased as a house help and had worked for them for only 11 days. It is also not disputed that on 29<sup>th</sup> March, 2014 PW4 left home for the office leaving at his home the deceased, the accused, their 2 children and PW5.

PW5 says he left the deceased's home for his rural home in Murang'a at around 12 noon since it was his "off day". Besides his word of testimony, there is no single evidence to back him on this. PW2 is the neighbor who appeared to see every person moving in and out of PW4's compound did not see PW5 leave, PW4's compound.

PW5 also stated that PW4 had sent him to his mother to deliver some parcel. PW4 never testified on this and neither did PW4's mother testify to confirm that indeed PW5 was at her home with a message from PW4.

43. PW2 testified that the accused while under arrest had led to the recovery of the murder weapon which was a knife. First of all, there is no knife that was brought before this court as the murder weapon. For that reason, PW2 was not in a position to identify to this court what he referred to as the murder weapon. If indeed a knife was recovered, it ought to have been brought before this court for identification and final production. This was never done, and the discussion ends there.

44. Police officers in whose custody the accused was were aware of the steps to be taken when a suspect was going out to do any recoveries. No such steps were taken and no confession was tabled before this court to corroborate PW2's evidence. The prosecution can therefore not rely on the pointing to a non-existent knife as a basis of the accused's guilt.

45. There is mention by PW3 that she saw some injury on the accused's right hand fingers, which were bleeding. The accused was arrested on 30<sup>th</sup> March, 2014 and if indeed she had any injuries, those who arrested her, could have taken note and ensured that there was medical evidence to that effect. There is no such evidence before this court.

PW2 testified that when the accused and Claire left the compound he saw them and even spoke to C. He did not mention anything about injuries or bleeding on the accused's fingers. I have found no medical evidence to support the claim that the accused suffered injuries as a result of a scuffle with the deceased, as submitted by the State.

46. According to the particulars in the charge sheet, this incident occurred between 29<sup>th</sup> March, 2014 and 30<sup>th</sup> March, 2014. Is this the position from the evidence?

PW1 is the security officer who was guarding PW4's house that night. He was categorical that he reported on duty on 29<sup>th</sup> March, 2014 at 6.30 pm. From the time, he reported upto around 2.30 am when PW4 returned home, he did not see anyone get into or get out of PW4's compound. When PW4 entered the house, he found the body of his wife lying on the corridor of their house. Could the murder have occurred on 30<sup>th</sup> March, 2014 as is stated in the charge sheet? The evidence is not clear on this.

47. C was left at the salon of PW6 by the deceased. She was brought back home by PW6 who did not enter the compound. This was around 12.30 pm after her calls to the deceased went unanswered. PW2 saw the deceased take C to the salon. He saw her return around midday but minus C. He does not seem to have seen C return or who was shouting "C C wait for me, we go together to the shops".

48. He however, said that when he saw the accused leaving with Claire, it was about half an hour after her return from the salon. It is therefore not clear whether C ever entered their compound and/or house upon her return from the salon. If she did not, then where was she for the roughly 30 minutes after her return from the salon, as stated by PW2? The accused in her defence stated that Claire returned home and even had lunch!

49. The final question would then be whether the deceased was killed before or after the accused left with C? PW2 or anyone did not hear any screams/shouts from PW4's compound in the course of the day and night of 29<sup>th</sup> March, 2014. There were two men digging a well outside the gate of PW4's compound. None of them testified as to whether they heard any screams or saw any person get into or get out of PW4's compound during that time.

50. PW4 told this court that when this incident occurred, the child C was aged seven (7) years. Though a child of tender years, I am convinced that she may have explained something that is not adding up in the evidence before this court. She was however not called as a witness.

51. No police officer including the Investigation Officer testified in this case. The Investigation Officer could have explained why he did not deem it fit to have a confession from the accused taken if indeed she led to the recovery of the murder weapon. He could have also produced the knife that was allegedly recovered together with the phone, MFI 1. There is no evidence to show how the phone was recovered.

52. The accused has in her unsworn defence explained what she knows about the 29<sup>th</sup> and 30<sup>th</sup> March, 2014. The issue is not only whether she was at the scene but whether she was at the scene and also killed the deceased.

53. The circumstances forming the inculpatory facts in this case do not form a continuous chain, I find several gaping holes in the prosecution case for the following reasons;

- (i) It is not clear when the deceased was killed.
- (ii) It is not clear when PW5 left the compound of PW4.
- (iii) Is there anything that the child, C witnessed that could have assisted the court? Why was she not called as a witness?
- (iv) Was there any instance when the accused and deceased were left in that house alone?
- (v) The two men who were digging the well at PW4's gate appear nowhere in this case. Where did they disappear to?
- (vi) What was the murder weapon? Was it ever recovered and if so, why was it never availed to the court? If the accused led to its recovery why was no confession recorded to that effect?
- (vii) The origin or recovery of the phone (MFI 1) is not explained. Who recovered it and from where?

54. I am raising all these issues because there are no answers to them in the evidence before this court. The accused gave her defence explaining what happened on 29<sup>th</sup> and 30<sup>th</sup> March, 2014. The prosecution evidence does not challenge that defence.

I have also noted from the record that though **PW1 Kenneth Akhina Sumba** and **PW2 Duncan Mungai Shuki** were cross examined and even re-examined, the record does not show whether they were ever sworn. Their own evidence shows they were adults.

55. At the conclusion of my analysis, I find that the circumstantial evidence herein does not meet the test set out in the cases of **Republic – vs- Kipkering arap Koske (supra)**; **simon Musoke –vs- Republic (supra)**, **Abanga alias Onyango –vs- Republic (supra)** and others.

The accused will benefit from that doubt. I find her not guilty and acquit her under Section 322 (1) Criminal Procedure Code.

Orders accordingly.

**Delivered, signed and dated** this *24<sup>th</sup>* day of *January* 2018 at **NAIROBI**

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**HEDWIG I. ONG'UDI**

**HIGH COURT JUDGE**