



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.1 OF 2013**

**REPUBLIC .....PROSECUTION**

**V E R S U S**

**AGNES KARWIRWA IKUNYUA.....ACCUSED**

**J U D G M E N T**

**Agnes Karwirwa Ikunyua**, the accused herein, faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 30/9/2012 at Maua Township, jointly with another not before court, murdered Timothy Muroki.

The prosecution was led by learned counsel **Mr. Mulochi** who called a total of six witnesses in support of their case.

The accused testified on oath in her defence and called one other witness. The defence was led by learned counsel **Mr. Mutuma**.

**Dr. Charles Njeru Muchangi** of Meru Level 5 hospital produced the postmortem report that had been prepared by Dr. Njuguna who performed the post mortem on the deceased, Timothy Muroki Mugambi. The Doctor found multiple bruises on the upper and lower limbs of the deceased; a large bruise on the right side of the neck. Internally he found right sided haemothorax (blood in the chest) and in the abdomen. He formed the opinion that the cause of death was massive haemorrhage due to blunt trauma.

**PW2 Abdifalar Abdirahiman** a motor cycle rider (Boda Boda) recalled that on 30/9/2012 about 10.30 p.m. he parked his motor cycle, entered his house but found no candle and went out to buy one, he heard somebody saying that he should be left alone. He saw Muroki (deceased) whom he knew had one lame hand and Agnes, the accused, who was with another lady, whom PW2 did not know; that the three were outside a bank which had security lights which enabled him to see the three; that Muroki was drunk and making noise; that accused took a stone and hit Muroki on the chest and the other women with accused also threw stones at Muroki while on the ground. PW2 retreated to avoid being hit. PW2 went away and next day, his friend Christopher Mureithi informed him that one of the people who had fought the previous night had died. He went to the scene which was about 30 metres away from his house and found Muroki lying dead but there were no stones at the scene, PW2 knew the accused as his customer as he used to carry her on his motor cycle and she was a tailor at Antubuchiu.

**PW3 Stephen Stanley Mwenda** also a motor cycle rider (boda boda) recalled that on 30/9/2012, about 10.30 p.m. he reached Friends Corner at the stage and Agnes called him asked him to carry her; that they were 3 persons, two ladies and one man who lay on the ground; PW3 said that there was a bank under construction at the scene and there were electricity lights. He said that Agnes and the lady with her were throwing stones at the man who lay on the ground. They then boarded his motor cycle and he took them to Antubuciu where Agnes used to work as a tailor. Next day, he found the man he had seen lying down still at the scene and people asked him to show where the ladies who threw stones at the man. He noticed a swelling on the deceased's chest. He was stopped by some people who took him to the police station to record statements which he did. He was left at police station as the police went to look for the accused and they brought her to station. PW3 said the accused was her regular customer for about 5 months.

**PW4 Christopher Mureithi** recalled that on 30/9/2012, he was near Friends Corner in Maua, eating *miraa* with about 5 others; that Friends Corner is a bar but he was at Gitonga's which is opposite Friends Corner. He heard noises about 10.30 p.m. went outside to see what was happening. He found 2 ladies pelting somebody with stones. He knew one as Agnes, the accused. He did not know the second lady. PW4 said that he was able to see the people because of security lights from a nearby bank. PW4 said that the place is a stage and the 2 ladies boarded a motor cycle and left while the man who was beaten with stones was left lying there. He left and went to sleep and next day, he was informed that the man had died. He knew the man used to wash cars nearby; that the deceased's family came enquiring about who had witnessed the incident and he went to record his statement at the police station. PW4 said he knew accused because she loved clubbing and they used to meet in the clubs but denied knowing the lady who was with accused on that night.

**PW5 Deborah Gakii Kobia**, told the court that she owned Deborah bar as of 30/9/2012; that on the said day, about 5.00 p.m. to 5.00 p.m., she saw Agnes (accused) in the bar; she closed the bar at 11.00 p.m. and next day she heard that the accused had killed somebody and she was summoned to the police station where she went and was questioned by police. She denied knowing when Agnes left the bar on that night. PW5 further said that she saw accused taking alcohol with a man and lady and she knew accused as a tailor.

**PW6 P.C. Joshua Kiambati** was the investigating officer in this case. He received a report on the morning of 1/10/2013 that a body had been found at Friends Corner. He went to the scene which was by the roadside, at Friends Corner; he took the body to the Meru Hospital Mortuary. He found when members of public had brought accused to the station. He recorded the witness statements.

In her sworn defence, accused stated that on 30/9/2012, she went to the bar with her husband Gilbert Kinyua (DW2) at 8.00 p.m. till 11.00 p.m. when the owner, PW4 Deborah Gakii, closed down. She went home and next day on 1/10/2012, she went to her work place till 2.00 p.m. when she heard a mob of people singing from Meru direction and on reaching Antubucio, they went to her place of business and one person asked if she was Agnes and if she knew Ken and she accepted. She was informed that Ken had said she killed somebody at Friends Corner and the person said he was Mwenda a brother to the deceased; that the person said he was going to get Ken to confirm if she was the one but returned to say Kennedy Mwiti Muthengya had ran away. The person told the mob which was armed not to harm her, she was taken to the police station and at the entrance to the office, she found a motor cycle which belonged to Kennedy Mwiti and that the rider Stephen Mwenda (PW3) was in cells; that she informed police that on 28/9/2012 she had made a report that Kennedy had threatened to kill her and make her shift because she did not hail from Igembe, and would teach her a lesson; that the police started investigations, took her to Meru but released her on 30/10/2012 for lack of evidence. That she was told to be reporting to police station every Friday but after 3 weeks, she was told not to report. On 31/12/2012, she was arrested and taken to court. She denied having hit anybody with stones. She said the witness told lies because she was with her husband (PW2) that day. She denied knowing the deceased or having a reason to kill him.

**DW2 Gilbert Kinyua Anampiu** testified that he is accused's husband and that on 30/9/2012, he went to Deborah with accused at 7.00 p.m. where they remained till 11.00 p.m. when it closed and they went home to sleep. Next day, he left for work and was later informed that accused had been arrested. He knew that Ken had a dispute with accused and they had reported it on 28/9/2012.

The accused faces a murder charge and it is the duty of the prosecution to prove beyond any reasonable doubt:

- (1) **The death and cause of death of the deceased;**
- (2) **That the death was caused by accused's unlawful act or omission;**
- (3) **That the accused had malice aforethought.**

PW2, 3, 4, saw the deceased's body at the scene where he was pelted with stones on 1/10/2012 morning. PW6 collected the body from the scene and PW1 produced the postmortem authored by Dr. Njuguna who performed the postmortem and found the cause of death to be massive haemorrhage due to blunt trauma. In fact PW2, 3 & 4's testimonies do corroborate the findings of the doctor as to how the deceased met his death through stoning which inflicted blunt injuries.

The next question is whether it is the accused who caused the death. The accused totally denied any involvement in the murder of the deceased and raised an alibi defence, that she was at Deborah Bar from 8.00 to 11.00 p.m. when it closed down and she went home with her husband DW2 who also testified to that fact.

In her statement to the police which was recorded on 4/10/2012, PW5 had stated that accused went to her bar at 8.00 p.m. and left at 11.00 p.m. when she closed but in court, she denied telling the police that but that she did not know when accused left the bar.

The defence of alibi was considered. In *the Ugandan case of Sekitoleki v Uganda (1967) E.A. 531*, where the court held: "**As a general rule of law, the burden of proving the guilt of a prisoner beyond any reasonable doubt never shifts when the defence set up as an alibi or something else.**"

## **2. the burden of proving an alibi does not lie with the prisoner....."**

An accused who raises an alibi defence has no duty to prove the truth of the alibi but the burden of proving its falsity or otherwise squarely lies on the prosecution.

It is the duty of the court to carefully examine the alibi and it is enough if the alibi raises a doubt in the prosecution case, see *Kiarie v Republic (1984) KLR*.

In the instant case, PW2, 3 and 4 were categorical in their testimonies that they knew the accused person before the 30/9/2012; that there were electric lights outside Friends Corner Bar from a bank that was under construction and that they saw accused and another lady pelt the deceased with stones.

PW2 heard a quarrel between accused and the deceased before accused started to throw stones at the deceased. PW2, 3 & 4 said the incident occurred about 10.30 p.m. When cross examined, the accused could not tell why PW2 and 4 could frame her with such an offence. As regards PW2, she said he may have been supporting one Kennedy with whom she had disagreed with. However having considered the testimony of PW2 and 4 and the fact that all of them saw PW3 carry away accused from the scene, I have no doubt that the three of them told the court the truth.

The court appreciates that when an offence occurs, nobody looks at their watch to ascertain exactly what time it has occurred. The witnesses were never asked whether they checked their watches or mobile phones for the time. I am convinced that the three witnesses were truthful that they saw accused pelt the deceased with stones about 10.30 p.m. on 30/9/2012 and accused was ferried away from the scene by PW3 who led to her arrest the next day. The prosecution evidence was consistent and unshaken on cross examination and I find that the alibi raised by accused and DW2 did not dislodge the prosecution evidence.

PW2, 3 & 4's evidence is overwhelming that they saw the accused, a person they knew very well, throw stones at the deceased. No reason has been alluded to as to why the three witnesses would frame accused. The accused alleged that she had had an altercation with one Kennedy on 28/9/2012. She really never told the court the nature of the disagreement and why Kennedy would have threatened to kill her. Accused was represented and if indeed she made a report of that incident to the police on 28/9/2012, this court has no idea why it was not mentioned during the trial to enable the prosecution make a rebuttal.

PW6 said that upon arrest, the accused made such allegations about Kennedy, but on interrogating Kennedy and recording his statement, found that he was not connected to this case. As noted above, apart from DW2 saying that the dispute between accused and the said Kennedy was over business, accused herself never alluded to the source of the disagreement between her and Kennedy if at all. Besides, the said disagreement had happened on 28/9/2012 and had no connection to the murder which occurred on 30/9/2012.

I have considered the evidence of PW5, Gakii, who owned the bar where the accused drunk on the night of 30/9/2012. She told the court that the accused had been in her bar from 5.00 p.m. till about 8.00 p.m. but could not tell when she left. However, upon cross examination, it turned out that what she recorded in her statement to police on 4/10/2012 sharply contrasts her statement because she had denied that accused left the bar at 11.00 p.m. PW5 then claimed to have been drunk when she recorded the statement. She was an unreliable witness. Considering the evidence of PW5 together with PW2, 3 & 4's evidence, I found the evidence of the three witnesses to be cogent and unshaken even on cross examination and hence believable.

The defence counsel submitted that the prosecution had failed to prove the motive for the attack. However, in a murder charge, motive is not relevant. What the court has to consider is whether there was malice aforethought as defined under Section 206 of the Penal Code. Generally, malice aforethought is defined as an intention to kill or cause grievous harm to a person.

According to PW2, he heard some noises of people quarrelling. It seems there was some quarrel between the deceased on one hand and the deceased on another. PW2 and 3 also mentioned that the deceased looked drunk. PW2, 3 and 4 saw accused and her lady companion throw stones at the deceased till he fell and they continued to throw more stones. Indeed the postmortem revealed that the deceased had multiple bruises on the trunk the limbs, large bruise on the right side of the neck, bleeding in the chest and stomach which resulted in massive internal haemorrhage.

It means that stones were indiscriminately thrown at the deceased causing injury all over the body and the internal organs. The injuries inflicted on the deceased clearly point to the intention of the accused; to cause grievous harm to the deceased or kill him, which is evidence of malice aforethought.

In the end, I am satisfied that the prosecution has proved beyond any doubt that accused, together with another assaulted the deceased with stones which resulted in serious injuries to him ending in his death. Malice aforethought flows from the injuries that were sustained by the deceased.

The offence of murder was proved to the required standard beyond reasonable doubt. I find the accused guilty as charged and convict her accordingly.

**Signed and Dated** at NYAHURURU this 19<sup>th</sup> day of April, 2018.

**R.P.V. Wendoh**

**JUDGE**

**Delivered by** A. MABEYA (J) at MERU this 20<sup>th</sup> day of April, 2018.