



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL (MURDER) CASE NO. 4 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

DOROTHY AWUOR JUMA alias MERCY.....ACCUSED

JUDGMENT

1. **Dorothy Awuor Juma alias Mercy**, the Accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

On 10th January, 2016 at Awasi Township, Nyando Sub-County, within Kisumu County, Accused murdered one Irene Awuor.

2. The prosecution summoned a total of 5 (five) witnesses in support of its case while the defence called only the Accused.

Prosecution Case

3. **PW 1 Edward Aino Rabai**, stated that his shop was in the neighborhood where deceased and Accused lived. He recalled that on 10.1.16 at about 2.30 pm, he heard screams outside his shop and when he went out and found a crowd that had gathered where deceased and Accused fighting outside his shop. That as the fight continued, the deceased fell and it was then that he saw Accused holding a knife. The Accused went away bragging that she had accomplished her mission. It was his evidence that Accused and deceased were neighbors and he had never heard them quarrel.

4. **PW 2 Peter Manyika**, the landlord to Accused and deceased recalled that on 10.1.16, he returned home at about 8.00 pm and saw bloodstains outside his posho mill and on the wall of deceased's house. That upon inquiry, he was informed that Accused had stabbed the deceased. That on 12.1.16, one of tenants namely William Ouko showed him where the murder weapon had been hidden on the house of Accused's roof and he called police who took it away. It was his evidence that Accused and deceased were neighbors and he had never heard them quarrel.

5. **PW 3 Isdora Anyango Oyugi**, deceased's mother identified the body of the deceased to the doctor who conducted a postmortem on 18th January, 2016.

6. **PW4 CPL Caroline Mutai**, the Investigating Officer received Accused on 10 th January, 2016 from members of public who reported that she had committed murder. She stated that she visited Accused's house on 12 th January, 2016 and recovered the murder weapon, a knife, and that after she completed investigations, she caused Accused to be charged.

7. **PW 5 Dr. Rukia Aksam** of Jaramogi Oginga Odinga Teaching and Referral Hospital stated that she performed a postmortem on deceased's body on 18 th January, 2016 and found that the body had fracture of the 2nd and 3rd right ribs. She made a finding that deceased died of severe chest injury and bleeding in the right lung secondary to a stab on the chest. She produced the deceased's postmortem **PEXH.1**.

The Defence Case

8. At the close of the Prosecution case this Court ruled that the Accused person had a case to answer and put her on her Defence. In her sworn Defence, Accused told Court that deceased was her neighbor and friend. She recalled that was at her place of work frying and selling chips, one Lilian told her that deceased was sick and had asked her to tell Accused to buy her medicine. That she returned home and found deceased stitted outside her house and for no apparent reason started insulting Accused calling her a prostitute. That she went into her house and when she returned, deceased held her by the collar and fight ensued as a result of which she was injured on the head and right hand. That

deceased who was armed with a knife attempted to stab her and as they were struggling, deceased fell on the knife and was seriously injured. She produced an investigation diary as **DEXH. 1** which confirmed that she had injuries at the time of arrest.

ANALYSIS AND FINDINGS

9. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. Those ingredients are as follows:-

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the ‘actus reus’ of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the ‘mens rea’ of the offence.

(a) Proof of the fact and cause of death of the deceased

10. The death of the deceased has been proved by the **PW3 Isdora Anyango Oyugi**, deceased’s mother and **PW4 CPL Caroline Mutai**, the investigating officer who witnessed the autopsy and by **PW 5 Dr. Rukia Aksam** who conducted the autopsy confirming the cause of death of the deceased. The Court therefore finds as a fact that indeed the deceased herein died.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused person

11. As stated hereinabove, PW1 did not see Accused armed with a knife until after the deceased had been stabbed. Except the Accused person, no one else could narrate how the deceased sustained the fatal injury. Accused stated that deceased fell on the knife deceased intended to stab her with, and sustained the fatal injuries.

12. That leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence taking into consideration the fact that the Accused being an interested party may have lied to save herself.

13. As we know from **Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20**

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

14. I have considered the severity of the injuries suffered by the deceased and I do not agree with the Accused that deceased fell on the knife while Accused was struggling to wrestle from the deceased.

15. From the foregoing; I am satisfied that the Prosecution has proved beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which involved stabbing her with a knife which constitutes the ‘actus reus’ of the offence.

(c) Proof that the said unlawful act or omission was committed with malice afterthought

16. Accused pleads provocation and self defence. The defence of provocation is provided for under Section 207 and 208 of the Penal Code.

17. Section 207 states as follows:

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 time for his passion to cool, is guilty of manslaughter only.

18. Section 208 on the other hand states as follows:

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 or in the presence of 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.

2.

3.

19. In the case of **Okwany & Another –vs- Republic [2005] 1 KLR 833**, the Court of Appeal held that there was provocation where the deceased confronted the Accused and another, armed with a rungu and uprooted crops from a disputed portion of land which the Accused

had planted. The Court in finding Appellants guilty of manslaughter stated as follows:

1. The fact of the case raised an issue of provocation which ought to have been put to the assessors and considered by the trial judge himself. In the circumstances, the conviction for murder could not be sustained.

20. From the evidence on record, I find and hold that that the deceased provoked the Accused when she pretended to seek assistance from her on account of a feigned illness but instead confronted her with insults that she was a prostitute.

21. Section 203 of the Penal Code provides:-

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

22. Section 206 defines malice aforethought as follows:-

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 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 not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- c.
- d.

23. Section 17 of the Penal Code provides that the use of force in the defence of person or property shall be determined according to the principles of English Common Law. In the case of Roba Galma Wario –vs- Republic [2015] eKLR, the Court of Appeal cited with approval the case of Mohammed Omar & 5 Others [2014] eKLR and the case of DPP v Morgan [1975] 2 ALL ER 347 where it was held that:-

“The essential element of self defence is that the Accused believed that he was being attacked or in imminent danger of being attacked but this belief should be based on reasonable grounds.”

24. From the evidence on record, what I infer happened is that Accused went to see the deceased presuming that she was sick as had been reported to her by Lilian only for the deceased to turn against her with insults. A fight ensued as has been confirmed by PW1 and in the process; Accused wrestled a knife from the deceased and stabbed her with it. The encounter ended with the deceased sustaining the fatal injury.

25. There is indeed evidence that Accused was also injured in the altercation. The sum total of all this evidence is that faced with an armed person, who she thought wanted to stab her, I find that Accused was justified in thinking that she was in imminent danger and was provoked to stab the deceased in self defence. (See Republic –vs- Andrew Mueche Omwenga [2009] eKLR). In so finding, this Court echoes the holding in the case of Palmer –vs- Regina (1971) All ER 1077 where the Court stated that:

“Where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the Prosecution shows beyond doubt that what the Accused did was not by way of self-defence.”

26. Having said that, I find that the Prosecution has failed to prove that Accused had the intention to cause the death of the deceased and that she was neither provoked nor acted in self defence. The case of Republic v Titus Musyoka Mutinda [2017] eKLR cited by the Prosecution is distinguishable from this case in that deceased in that case was stabbed 13 times with a sharp object which targeted delicate parts of her body, and the learned Judge ruled that the Accused obviously intended to kill the deceased.

27. Section 203 of the Penal Code states that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder and Section 204 provides for Punishment of murder to be death.

28. As stated herein above, I have found that the Prosecution has not proved malice aforethought on the part of the Accused. The issue for determination is whether a person who causes the death of another due to provocation or a result of self defence should be acquitted as has been urged by the defence.

29. The law safeguards life and generally abhors taking away life except to the extent authorized by the Constitution or other written law.

30. From what is stated herein above, the Prosecution has succeeded in proving that Accused caused the death of the deceased through by an unlawful act. I have considered the holding in the case of Republic v Simion Owuor Otieno [2017] eKLR cited by the defence vis a vis Section 202 of the Penal Code and I am not persuaded that Accused ought to be acquitted merely because she was provoked and had acted in self defence.

31. For these reasons and on the principles set out herein above and in exercise of the powers conferred on this Court by Section 179 (2) of the Criminal Procedure Code Accused is found guilty of the lesser offence of manslaughter contrary to Section 202 (1) as read with Section

205 of the Penal Code Cap 63 Laws of Kenya and she is accordingly convicted under Section 215 of the Criminal Procedure Code Cap 75 Laws of Kenya.

DATED, DELIVERED AND SIGNED THIS.....19th.....DAY OF.....April.....2018

T. W. CHERERE

JUDGE

Read in open Court in the presence of

Court Assistant - Carolyne / Aura

Accused - Present

Counsel for Accused - Mr. Emukule

Counsel for the State - Ms. Wafula