



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL DIVISION

CRIMINAL CASE NO. 40 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOHANA MUNYAU MWENIACCUSED

JUDGEMENT

1. The accused **JOHANA MUNYAU MWENI** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on 7th day of April, 2015 at Kamulu in Njiru District within Nairobi County murdered **ROSE WAIRIMU NGUGI**.

2. On 17/4/2015 he appeared before Ombija J. as he then was for plea where a plea of not guilty was entered against the same. On 7/7/2015 his trial commenced before Ombija J. who heard the evidence of eight (8) prosecution witnesses before retiring from the Judiciary. On 26/4/2016 the accused appeared before Justice Lesiit for directions under **Section 200 (1)** of the **Criminal Procedure Code** where directions were issued for the matter to proceed from where it had been left off by the previous Judge (Ombija J.) upon proceedings being typed.

3. On 10/11/2016 the trial proceeded further before me with the evidence of three (3) remaining prosecution witnesses at the conclusion of which the accused was placed on his defence where he gave unsworn statement of defence.

4. For record purposes I must state that I did not have the advantage of hearing and seeing nine (9) prosecution witnesses but have read and analyzed their recorded evidence for the purpose of this judgement with limitation that save for where the previous Judge commented on their demeanor and credibility, I am not in a position to do likewise.

PROSECUTION CASE

5. The undisputed facts of this case are that the accused and the deceased were married and living together at Ruai. They had a rocky or shaky relationship with allegations of the accused buttering the deceased on several occasions with their parents trying to reconcile them. They had been married for ten (10) years as at the time of the alleged commission of the offence though not blessed with children.

6. **PW1 LEVIS MURIGI NGUGI** a brother-in-law of the accused testified that on 7/4/2015 at about 9.13 p.m. he received a call from the accused to go to Ruai and check on the deceased whom he had hit and was lying motionless in the house. Upon receipt of this information he informed his wife and a sister-in-law called **ANNE WANJIRU** and the father of the deceased who advised him to pick him up from Buruburu which he did. They proceeded to Ruai at the house of the accused and deceased at 10.30 p.m. and found the body of the same lying on bed naked dead with several injuries. It was his further evidence that in the bedroom the clothes were all over with blood stains on the floor and in the bathroom, the washing sink, toilet bowl were blood stains as well as water in the toilet. There were two basins with clothes and the wall was bloody.

7. He reported the incidence at Kamulu Police Post and went back to the scene with police officers. It was his evidence that the relationship between the accused and the deceased was shaky. On 8/4/2015 he received anonymous call from one Rachael with information that the deceased was in Kenyatta Hospital in critical condition and she wanted to go see her. He thereafter received a call from the accused who wanted to know which hospital the deceased had been admitted at. With the help of the CID the accused was arrested at HOT DISHES RESTAURANT along Kimathi Street and he positively identified him. In cross-examination he stated that the accused had asked him to take the deceased to a better hospital.

8. **PW2 ANNE WANJIRU NGUGI** corroborated the evidence of **PW1** and stated that when they found the body of the deceased lying naked on the bed she had injuries on the lip, the eye and her hair weave had been up-rotted halfway. The mattress was soaked in blood. She

stated that the relationship between the accused and the deceased who was her elder sister was bad as she was being battered by the accused.

9. PW3 PERIS WANJIKU NGUGI the mother of the deceased and mother-in-law of **PW1** testified that **PW1** called her at about 9.20 a.m. and told her that the deceased had once again been beaten by the accused. She proceeded with **PW1** and **PW2** to the house of the accused where they found the kitchen door not locked and upon entering the house were met with blood stains in the sitting room, the lights in the bedroom were on and the body of the deceased appeared to have been washed at it was wet.

10. It was her evidence that the accused and deceased had several quarrels within their marriage. In 2009 they had quarreled over an allegation that the accused had raped the house help and the deceased stayed with her for two weeks before they reconciled. Further in 2010 there was another quarrel the cause of which was that the deceased was barren (childless) and had two lady friends who were misleading her which the accused did not like. On 5/4/2015 they invited all their children and their husbands to their home but the accused refused to attend. The deceased on that day opened up and told them that all was not well and that when the accused was drunk he would turn into "something else".

11. PW4 JAMES MUCHOKI NGUGI a brother of the deceased also went to the scene and further corroborated the evidence on the allegation of the deceased having been assaulted by the accused in the year 2009 and 2011. He stated that upon the accused being arrested by the police he threatened to send some people to him and **PW2** who had identified him. **PW5 DAVID NGUGI** identified the body of the deceased for purposes of postmortem exercise. **PW6 PC JOHN KIPCHOGE** arrested the accused and confirmed that he threatened to send thugs to those who had identified him. **PW7 PC DERRICK KIPRONO CHERUTICH** a scene of crime officer took photographs at the scene together with **PW8 CORP. OBADIAH MUTHII** who searched the scene and recovered the identity card and bank card in the name of the accused at the house and collected exhibits therefrom.

12. PW 9 ELIZABETH WAITHIRA ONYIEGO a Government Analyst received exhibits including the blood sample from the accused and the deceased, a trouser and shirt belonging to the accused and came to the conclusion that the blood stains on the shirt and trouser of the accused had DNA that matched that of the deceased.

13. PW 10 SGT DISHON OBURU ABABU investigated the matter and was able to trace the accused through his cell phone number and was subsequently arrested. The accused was taken for mental assessment and was found fit to stand trial. It was his finding that the accused and the deceased were together and after commission of the offence the accused left the deceased in the house instead of assisting her to get medical attention only to call her relatives to go and assist her having fought and hurt the deceased as per what he told **PW1**.

14. PW 11 DR. JOHANSEN ODUOR performed postmortem examination on the body of the deceased who was bleeding from the nose and mouth with bruises on the eye, face, and upper arm. Internally she had fractures of the 2nd, 5th and 6th ribs on the left side. There was extensive bleeding on the brain and as a result formed an opinion that the cause of death was head injury due to blunt trauma.

DEFENCE CASE

15. When put on his defence he confirmed that he was married to one V.N. for seven (7) years before they separated and after one year he met the deceased whom he was in love with for five (5) years before she began to drink and was always drunk on Fridays leading to constant fights and the love faded away. He confirmed that after one such fight the deceased left for her parents and he followed her there with his pastor and thereafter came back with the deceased.

16. It was his evidence that every time the deceased was drunk she would become angry and there would be no peace in their house. On 2/4/2015 she served him food and he went to work at 6.30 p.m. He then spoke to her at 11.30 p.m. The following day he passed through a place called Samakis to eat lunch. On his way home, the deceased called him and said she was at FRIENDS INN at Kamulu. He proceeded there and found her already drunk and picked up a quarrel with him. When they got home the deceased started to abuse him, entered into the bathroom and soaked her dirty clothes.

17. The deceased demanded that they employ a house help since she could not manage the house work to which he suggested since he had a child out of wedlock she should come to stay with them to which the deceased responded that he was calling her barren. She then threw a bucket of water on him which knocked his teeth. Since they were both drunk they struggled for thirty minutes while the deceased was at the time crying which attracted members of the public, since he thought he was now in danger he left the house through the back door and called **PW1**. He then proceeded to the City Centre from where he was subsequently arrested. He submitted Mathew 10:19-20 in his defence.

SUBMISSIONS

18. It was submitted on behalf of the accused person that there was no dispute that the marriage between the accused and the deceased was rocky and a disaster waiting to happen. It was submitted that on the material day both the accused and the deceased had their fair share of alcohol and were fairly intoxicated and therefore what happened that night no other person can shed light on than the accused who testified that there was a fight between them arising out of provocation and that the accused acted out of self defence.

19. It was submitted that though the marriage between the accused and the deceased was rocky, on the fateful day they called each other after work and joined each other for a drink of beer which was not a mind set of somebody who intended to commit murder. It was submitted that the accused had proved both the defence of provocation and self defence for which the cases of:- **REPUBLIC v JOTHAM BULIMO ALUSA [2007] eKLR**, **JOSEPH MOKWA v REPUBLIC [1979] eKLR**, **REPUBLIC v ANGELO KARANJA MUIRURI [2015] eKLR**, **STEPHEN KIPKEROR CHEBOI v REPUBLIC [2002] eKLR** and **JOSEPH MWONGERA RUKARIA v REPUBLIC [2013] eKLR** were submitted, all which I have had the advantage of reading.

20. On behalf of the prosecution it was submitted that the accused person was the last person who had been in the company of the deceased and that after he made the call to **PW1** he disappeared only to be arrested in an hotel within CBD of Nairobi. It was submitted that the

trouser and the shirt of the accused recovered from the scene matched the DNA profile of the deceased confirming that after the commission of the offence the accused had sufficient time to remove and change his clothes. It was submitted that the accused defence that he left some other persons at the scene is a total lie as he did not make any report to the nearest police station. In support thereof the case of **REPUBLIC v LUCAS [1981] 1QB720 at 724** was submitted. It was therefore submitted that the prosecution had proved its case beyond any reasonable doubt that it is the accused and no other person who inflicted the fatal injuries to the deceased.

ANALYSIS AND DETERMINATION

21. To sustain a conviction on a charge of murder the prosecution is required to prove beyond any reasonable doubt the following ingredients of the offence:-

- a) *The fact and cause of death of the deceased.*
- b) *The fact that the said death was caused by unlawful act of omission or commission on the part of the accused.*
- c) *That the said unlawful was caused by malice aforethought.*

22. The fact and the cause of death of the deceased is not disputed. The fact of death was proved beyond any reasonable doubt through the evidence of **PW1 LEVIS MURIGI NGUGI** who responded to the call by the accused person to go to his house where he had left the deceased motionless. He proceeded to the said house together with **PW2, PW3** and **PW4** all who confirmed that the deceased was dead. **PW7** a scene of crime officer was called to the scene where he took photographs of the body and the scene in the presence of **PW8**. Unless the deceased belonged to the league of the biblical figures which include Jesus Christ, Jairus daughter, Elijah, the widow of Nain's son and Lazarus who rose from the dead, the deceased was confirmed dead and never rose thereafter.

23. The cause of death of the deceased was confirmed by **DR. JOHANSEN ODUOR** who performed postmortem examination on her body having been identified by her father **PW5** and **PW1** at Montezuma mortuary where the body had been taken to from the scene and confirmed the following:-

- Bleeding from the nose and mouth.
- Left periorbital oedema
- Circumlinear lacerations lateral aspects of the left eye
- Laceration on upper left lip
- Multiple facial bruises
- Bruise on left upper arm
- Bruises on left upper arm and left wrist
- Fractured rib on the 2nd and 5th and 6th ribs
- Extensive scalp hematoma with assorted contusion
- Extensive subdural hematoma

As a result of the examination herein he formed an opinion that the cause of death was head injury due to blunt trauma. I therefore find and hold that the cause of death was proved as required in law.

24. On whether the said death was caused by unlawful act of commission or omission on the part of the accused persons:- **PW1** stated that he was called by the accused person who instructed him to go to his house and assist the deceased whom he had fought with and left in the house injured. Upon arrival at the house, there was nobody else there save for the lifeless body of the deceased on bed naked and according to **PW3** the mother of the deceased, the body was wet and appeared to have been washed. The accused in his defence confirmed being with the deceased at their house and fought with her for thirty minutes before leaving through the backdoor thereby corroborating the evidence of the prosecution witness who went to the house with **PW1**. Though the accused in his defence denies causing the death, having been placed at the scene by the prosecution witnesses and having confirmed struggling with the deceased and being the last person to have been seen with the deceased alive as confirmed through the phone he placed to **PW1**, it is clear to my mind that the death of the deceased was caused by unlawful act on the part of the accused person and nobody else.

25. My finding herein above is supported by the evidence of **PW9** the Government Analyst whose report confirmed that the blood stains found on the clothes of the accused person collected at the scene matched the DNA profile of the deceased persons. This therefore dislodges the accused defence that he left the deceased in the house when confronted by the crowd that had responded to her cry for help. This fact is further supported by the circumstantial evidence tendered herein, including the call made to **PW1**.

26. The only issue in dispute is whether the said unlawful action on the part of the accused person was committed with malice aforethought and whether the twin defence of provocation and self defence are available to the accused person herein. It is not in dispute that there were only two people in the house of the accused and the deceased at the time of the commission of the offence herein and since the dead cannot tell us what happened, the accused account of the events must be weighed against the circumstantial evidence available.

27. Malice aforethought is statutory defined as follows in **Section 206** of the **Penal Code**:-

Section 206 malice aforethought shall be deemed to be established by evidence proving one or more of the following circumstances:-

(a) An intention to cause death 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, by a wish that it may not be caused.

(c) Intention to commit a felony.

28. From the evidence by **PW10 DR. JOHANSEN ODUOR** the cause of death was head injury due to blunt force trauma, to the deceased had grievous harm to her head and ribs resulting into fractures of 2nd, 5th and 6th rib. The accused has confirmed in his defence that he struggled with the deceased for thirty minutes. According to the evidence of **PW3** the deceased hair was plucked off her head. The injuries sustained by the deceased when weighed against prosecution exhibit number 7, the mental assessment report on the accused person, where save for missing lower front incisor, there is no any other injuries indicated on the accused person nine (9) days after the date of the incidence herein, clearly show that the accused caused grievous harm to the deceased.

29. I have viewed the injuries sustained by the deceased against two Court of Appeal decisions:- **DANIEL MUTHEE v REPUBLIC CA NO. 281 OF 2005** and **MORRIS ALUOCH v REPUBLIC CR. APPEAL NO. 47 OF 1996** as noted by Justice Lesiit in **REPUBLIC v ANGELO KARANJA MUIRURI NAIROBI CR. CASE NO. 1 OF 2012 reported in [2015] eKLR**, where the Court of Appeal had this to say on malice aforethought:-

“(a) DANIEL MUTHEE (supra)

When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code.

(b) MORRIS ALUOCH (supra)

If repeated blows inflicted the injury then malice forethought could well be presumed . . .”

30. In this case the deceased died as a result of extensive head injury. She also sustained fractures of three ribs. The accused thereafter washed her clean and placed her on the bed naked. He thereafter tried to conceal evidence by washing the blood stains and soaking his clothes which had blood of the deceased into water. It is therefore clear to my mind that malice aforethought was established beyond any reasonable doubt.

31. There is the issue of the defence of self-defence and provocation which has been raised by the accused in his defence. The only evidence tendered by the accused is that the deceased threw a water bucket on him which knocked his teeth. However it is worth noting that the accused did not seek any medical attention. The mere fact that the scene was very messy in itself does not constitute the defence of self-defence. There is no evidence tendered by the accused to show that he was in any danger from the deceased, his evidence on record is that he was in danger from members of the public who responded to the cry of the deceased which I find as an afterthought. I am also not persuaded by the accused submission that he was provoked by the deceased. There is further no evidence that there was a fight between the accused and the deceased as alleged when looked at against the nature of the injuries on the deceased.

32. There is no evidence tendered before me to corroborate the accused account that the deceased was drunk. The only evidence before me which was not contradicted is that it is the accused who had a drinking problem and that anytime he was drunk he would assault the deceased for the simple reason that God in his wisdom or lack thereof had closed her womb and denied them the gift of children which should not have been a reason to lead to her death.

33. I have also taken note of the conduct of the accused after the commission of the offence which to me was a guilty conduct by running away from the scene calling **PW1** with information of what he had done and thereafter sending people to call and find out where the deceased was admitted together with the fact that upon being arrested having been identified positively by **PW1** and **PW4** the brother of the deceased, the accused in an act of defiance threatened to send thugs to deal with them.

34. I am satisfied that the prosecution has proved beyond any reasonable doubt all the elements of the offence of murder and hereby dismiss the accused defence as an afterthought. I therefore find the accused guilty of murder as charged and convict the same accordingly. It is accordingly ordered.

DATED, DELIVERED and SIGNED at Nairobi this 12th day of April, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

Miss Wegulu for the State

Mr. Muraguri for the Accused

Accused person present

Court assistant Paul