REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 20 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

RICHARD WAMORE WAFULA alias TOM.....ACCUSED

JUDGEMENT

The accused person Richard Wamore Wafula faced a charge of murder contrary to Section 203 as read with Section 204 of the penal code. The facts of the case as pleaded by the state are that on the 20th day of October, 2016 at Kware area in Ongata Rongai Township, Kajiado North Sub-county the accused murdered Fabrina Muyeka. The accused who was represent at the trial by Mr. Itaya denied the charge. The senior prosecution counsel called eight (8) witnesses to discharge the burden of proof beyond reasonable doubt as set out in Section 107(1) of the evidence Act.

Prosecution Evidence at the trial

According to the prosecution on the 20th day of October, 2016 **PW1 Shadrack Mwania Kithuka** a co-tenant at the same estate where the murder occurred testified that he saw the deceased on the ground having sustained injuries at the back. In the same scene was also the accused person lying in the ground with visible physical injuries at the abdomen, tied with a piece of cloth. For that reason, he saw police arrive and carry the victims away. He only came to be informed that he was required to record a statement on the matter.

PW2 –Evans Otieno, testified as a tenant at the Kware property where the alleged murder took place. The evidence tendered by PW2 was to the effect that on the material day he heard a commotion and as a result he was curious to know what it was all about. PW2 stated that immediately he came face to face with a lady lying in a pool of blood and next to her was also a man with injuries. Further PW2 together with the police escorted the victims to Kenyatta National Hospital.

PW3 – Peter Njanjo explained in his evidence that he is the landlord of the property where he rented out house No. 8 to the deceased – Ms. Fabriza from April 2016. Pw3 told the court that prior to the assault incident between the accused and the deceased they had created a disturbance by exchanging bitter words. It was at this stage he ordered the accused to get out of the compound. PW3 presented further evidence that after a few minutes he was called that the two are lying outside the compound with visible bodily harm. He was therefore to accompany other people and the police to Kenyatta National Hospital for both victims to be examined and treated for the injuries.

PW4 – Yvonne Voleza testified that on the 20th October, 2016 while at her house No. 8 next to the deceased house No. 9 she saw her being pushed by the accused person. She told the court that in the process the quarrel escalated into a fight. In a short while PW4 stated that the deceased left the compound leaving her child Melisa behind. The evidence of PW4 further reveals that there were distressful voices allegedly from the deceased person. As she ran outside to check, only to see the accused leaning towards the fence and later falling down on the ground. It was also a testimony within the same scene was the deceased person lying down on the ground having suffered physical injuries. That the accused was at the same time stabbing himself with a knife. PW4 further told the court that in short distance from the accused was the deceased with physical injuries. PW4 was shown the alleged murder weapon and was able to identify it by its physical features. It was confirmed by Pw4 that the accused was a regular visitor to house No. 9 occupied by the deceased.

PW5 Lawrence Kinyua, testified as the Government analyst attached to the National Chemist Laboratory. In his evidence pw5 acknowledged receipt of exhibit samples from PC. Nyamwega comprising of the Lesso, the stones, the knife which were all blood stained. Pw5 further explained that he subjected the exhibits to a DNA profile with the blood sample of the deceased. According to his testimony the analysis revealed that the blood stains in the Lesso, Stone matched the DNA profile of the deceased. He also confirmed that the DNA profile from the blood stained knife generated a DNA profile of the deceased and that of unknown male.

The next witness was Venanzio Karimi Mwaniki who testified as PW6. According to PW6 on this material day while performing his duties within the compound he noticed the accused initially seated outside the house of the deceased. On the day in question pw6 also told the court

that a quarrel ensued between the accused and the deceased. As the deceased exited the compound PW6 testified that she was followed closely by the accused person. What followed were screams from the deceased. According to the testimony of PW6 when he moved closer he saw the deceased on the ground with physical injuries. At the same time the accused armed with a knife had turned against himself by cutting his stomach. This became a matter for the public and police to intervene by making arrangements of taking both victims to the hospital.

PW7 – Cpl. Liko of Ongata Rongai Police station testified as the first responder who visited the scene in compliance to the telephone calls made by members of the public at the scene. He together with his colleagues went to the scene of the crime where they discovered that both the deceased and the accused had sustained serious injuries. PW7 moved both victims to Kenyatta National Hospital where the deceased was pronounced death while the accused was admitted for purposes of treatment.

PW8 – PC Erickson Nyamwega, in his evidence told the court that he was tasked with the investigations of the crime. On receipt of the report from pw7 he made arrangement to visit the scene. According to Pw8 he was later to receive the necessary exhibits Lesso, stones and knife which he escorted to the government Chemist for a DNA analysis. He also stated that the report from the analyst adduced as exhibit 3(a) formed part of the basis of recommending the indictment of the accused person. It was also his evidence that he made arrangements for the post-mortem to be conducted by Dr. Ndegwa. With regard to exhibit 6 being the autopsy report produced in evidence by Pw8 confirmed that the deceased had died as a result of exsanguination due to severe chest injuries due to penetrating sharp force trauma.

At the close of the state case the accused was placed on his own defence under Section 306(2) of the criminal procedure code. The accused elected to give unsown testimony where he denied the offence. According to his version the accused stated that the scuffle stated with the theft which occurred in their house. He therefore thought of sorting it out with the deceased by having a family meeting. Instead the accused explained the deceased turned the offer down by starting a quarrel with him. It was further his testimony that the disturbance escalated into a full blown fight when the deceased armed herself with a knife ready to attack. It was at that juncture explains the accused when a struggle ensued that she stabbed him at the abdomen. Upon that infliction of injuries, he became unconscious altogether only to find himself at the hospital. He denied that he assaulted the deceased to occasion the fatal injuries.

Submissions on behalf of the accused person

Mr. Itaya submitted that the prosecution has not discharged the burden proof beyond reasonable doubt for the accused to be convicted of the offence of murder contrary to Section 203 of the penal code. Secondly, there is no direct evidence that the accused was the one who inflicted the fatal injuries. Thirdly, learned counsel contended that the deceased and (c) that the accused had no malice aforethought.

Analysis and Decision

An accused person is guilty of murder if it is proved that his act of causing death was unlawful and accompanied with malice aforethought (see the definition under Section 203 of the penal code) this position has been succinctly put forward in ***Johnson Njue Peter v Republic 2015 eKLR*** where the Court of Appeal stated:

> ***"That there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction for the offence of murder. They are: (a) the death of the deceased and the cause of that death. (b) That the accused committed the unlawful act which caused the death"***

(d) Death of the deceased and cause of that death.

The fact of death of the deceased is not disputed in the present case. The prosecution adduced both direct and circumstantial evidence to proof that the deceased died soon thereafter on 20th October, 2016 at Kware Area. The eye witnesses to the chain of events and who testified to this fact include P21 Shadrack Mwania, Yvone Voleza PW2 and Venanzio Karimi Mwaniki. The landlord Peter Njanjo Ndiangui was also involved in separating the accused person and the deceased during the initial stages of the scuffle. PW7 CPL. Riko who received a telephone call and thereafter visited the scene confirms that the victim of the murder was the deceased person.

The deceased was therefore positively identified by these witnesses some of who knew her as a co-tenant residing in house No. 9 at Kware Area. The accused person also does not dispute the death of the deceased. As a result, there is no iota of doubt whatsoever that this ingredient has been discharged by the prosecution.

(b) Cause of Death

The question which must be answered is, what was the cause of the deceased death? The issue of causation is relevant because the prosecution must satisfactorily adduce evidence on the causal link between the death and the unlawful act; implicated of against the accused person. The circumstances with regard to causing death are clearly defined under Section 213 of the penal code. In the following language:

> ***"A person is deemed to have caused to have caused the death of another person although his act is not the immediate or not the sole cause of death in any of the following circumstances: (a) if he inflicts bodily harm on another person in consequence of which that person other person undergoes surgical or medical treatment which causes death. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatments or had proper precautions as to his mode of living. (c) He by actual or threatened violence causes such other person to perform an act which causes the death of such a person, such an act being a reason of avoiding such violence which in the circumstances appear natural to the person whose death is caused (d) He by an act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death. (e) His acts or omission would not have caused death unless it had been accompanied by an act of omission of the person killed or of other person"***

From the evidence adduced and examined by this court PW1 Shadrack Mwania saw the accused within the property on 20th October, 2016. Pw1 further did explain that the two seemed to have fought and as a result the deceased suffered fatal injuries that at one point PW2 Peter Njanjo did separate the two when they started quarrelling causing disturbance to other tenants. Further PW4 Yvone stepped out of the compound to check out the source of the noise only to observe the accused holding a knife stabbing himself at the abdomen. Whereas in a short distance away the deceased was lying down in a pool of blood. That on this fateful day PW7 CPL. Riko visited the scene and recovered the knife used to inflict harm in good working condition. The knife produced as exhibit 2 was subjected to DNA analysis with the blood sample of the deceased revealed that it was the weapon used to inflict the penetrating chest wound. As per the testimony of PW7 the body of the deceased which was collected from the scene had been taken to the city mortuary for post-mortem to be carried out. That upon Dr. Ndegwa performing the post-mortem his report exhibit 6 indicated that the cause of death was exsngulation due to severe chest injuries due to penetrating sharp force trauma.

The government analyst report provided by PW5 as exhibit 3(a) also highlighted that besides the DNA match of the blood stained knife with the blood sample of the deceased it was established that some of the DNA profile was that of unknown male. That therefore supposedly proves that the knife which inflicted harm against the deceased was used by the accused to stab himself. There is clarity that the cause of death of the deceased is attributable to the stab injuries inflicted by the accused using exhibit 3. It is evident that from the evidence present including PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 and the exhibits do support by a preponderance of the evidence that sharp penetrating stab wound was the cause of the deceased death. As I have emphasized the serious injury inflicted played the primary cause of the death of the deceased.

The next question is whether there is evidence of unlawful acts of omission or commission.

Murder or manslaughter is the killing of another human being without justifiable cause. Where the act which the accused is engaged in is unlawful and that by its nature it injures another person with an intention to kill or do grievous harm that act is considered both unlawful and dangerous.

The test for homicide by use of unlawful act was laid down in the case of ***Guzambizi v Republic 1948 EACA 65*** where the court held that:

> ***"every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self-defence or in defence of" property----------"***

This is consonant with our constitution 2010 under Article 26 which provides that: "***Every person has a right to life and no one shall be deprived intentionally of his life, except to the extent authorised by this constitution or other written law."***

In this case the prosecution brought in evidence of PW1, PW2, PW3, PW4 and PW5 that proved that the unlawful act commenced with a quarrel, pull and push and finally a dangerous act of stabbing the deceased with a knife. The killing of the deceased occurred in the course of committing the crime of assault. From Dr. Ndegwa's, post-mortem the deceased died as a result of the penetrating stab wounds. According to the post mortem report the application of force was done with the intention of inflicting the deceased with some physical injury but not merely to punish a negligible misconduct.

As reaffirmed earlier there is a causal link between the unlawful act of assault and the death of the deceased. In the case of ***Republic v Nicholas Onyango Nyolo 2011 eKLR*** the test of unlawful act in murder cases is applied where the court upheld:

> "***That the critical events of the offence of murder include: (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 aforethought which constitutes the mens rea of the offence"***

In the instance case, forming the second element on the underlying unlawful act, the prosecution called eight witnesses who gave both direct and circumstantial evidence which linked the accused to the alleged crime. On his part the accused person testified and blamed the deceased for the death.

The accused no doubt put up a spirited defence but the version of his story was dislodged by the circumstantial evidence of PW1, PW2, PW3, PW4, PW5 and PW6. The significance fact which remains uncontroverted is that of the accused turning against himself to inflict serious harm against his own body to disguise it as an attack from the deceased.

I think this was meant to show that in inflicting injuries against the deceased he was acting in self-defence. With respect to the accused defence in my view the law on this doctrine is very clear as set out in various cases more specifically the celebrated cases of ***Republic v Mcinnes 1971 WLR 1600 and Palmer v Republic 1971 WLR 891.*** In Palmer Case Lord Morris delivering the opinion of the Privy Council stated:

> "***In their Lordships view, the defence of self-defence is one which can be and will be readily understood by any jury. It is straight forward conception; it involves no abtrust legal thought. It requires no set words by way of explanation. No formulae need to be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do what is reasonably necessary but everything will depend upon the particular facts and circumstances. Of these a jury can decide."***

This principle from the English Criminal Law is applicable to our local circumstances when it comes to the doctrine on self-defence as provided for in section 17 of the penal code.

In the face of the prosecution evidence and unsworn testimony of the accused person applying the proportionality test violence against the deceased taken together with the right to life so far outweighs any harm that have been inflicted on the accused. The unique factor in this case is the fact that the accused was the author of his own injuries apparently to make it look that the attack upon the deceased was an act of self-defence.

I have carefully re-examined the circumstances and totality of the evidence in this case the dictum in the persuasive case of ***Exparte Minister of Justice, S. V Vanwyk 1967 1 SA 488*** is a reference in what approach to take on the proportionality test to the facts of this case. The court held interalia:

> "***This test allows the court to assess the defence in the context of factors such as the nature of the attack, the intense threatened, the relationship of the parties, their respective age, sex, size and strength, the location of the incident, the nature of the means used in the defence, the result of the defence"***

It is apparent from the evidence tendered in court the defence of self is not permissible on the premise that the deceased was not armed nor did she assault the accused. Secondly, the force used against her was unnecessary as the scenario presented by pw6 was that of a victim running away from her aggressor. I think therefore that there can be any doubt whatsoever that the injuries the deceased had then sustained were directly those she sustained from the stabbings of the accused. The decision to inflict serious harm was not deserving nor was it due to necessity or imminence of an attack from the deceased to require engagement in retaliatory self-defence as the accused wished this court to belief. To that extent self-defence is not available as a defence on the part of the accused.

The third ingredient is whether the prosecution established malice aforethought.

In murder cases malice aforethought must be proved by the prosecution beyond reasonable doubt. It is the Mensrea of the offence in contrast with the actus reus being the execution of the intention.

The first starting point in an attempt made to define and give a rational meaning to the phrase malice aforethought is in Section 206 of the penal code. The code envisages that establishing one or more of the following circumstances malice aforethought being the key element of the offence has been proved to the required standard.;

> **(a) An intention to cause the death of or grievous bodily harm to any person whether such person is the person actually killed.**
>
> **(c) Knowledge that the act of omission causing death will probably cause death or grievous harm to some person whether such person is actually killed or not although such knowledge is accompanied by indifference, whether death or grievous bodily harm is caused or not.**
>
> **(c) An intent to commit a felony**
>
> **(d) Sn intention by that act or omission to facilitate the flight or escape from custody of somebody who has committed felony."**

I agree with the definition taken by a former Chief Justice of Connecticut who defined malice aforethought as follows:

> "***Malice in this definition is used in a technical sense, including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confirmed to ill will toward one on more individuals, but is intended to denote an action forming from any wicked and corrupt motive, a telling done malo animo where the fact has been attended with such circumstances, as carry on then the plain indications of leave regardless of social duty and fatally bent on mischief, and therefore malice is implied form any deliberate or cruel act against another, however sudden (Yale law journal volume 19 issue 8 Article 4) by Howard J. Curtis."***

This definition is remarkable as it represents our jurisprudential direction as defined in Section 206 of the penal code as construed in the many celebrated Land Mark decisions of the Superior Courts. It must be noted that under Section 203 of the penal code for the offence of murder with at or she unlawfully and with malice aforethought, either express or implied causes the death of another human being.

Consistently with the above statements on the definition and principles on malice aforethought it follows that it is not necessary to establish foresight of death before inferring malice. The various decisions from the superior courts restate the legal position on malice aforethought in Kenya. In the case of ***Republic v. Martin Oluoch Okwaro & 2 others 2015*** the court held:

> "***It is apparent in a case of murder the prosecution must prove that the accused person, had the intention to cause the death of it to do grievous harm to any person that he had the knowledge that his acts or omission could cause death or would probably cause death either to the person intended or to some other person or that he had the intent to commit a felony"***

Further as held in the case of ***Rex v Tubere s/o Ochen 1945 12 EACA at page 63*** the predecessor of the court of Appeal held that:

> "***That in determining malice aforethought the curt has to consider the weapon used, the manner in which it is used and the part of the body injured it was further held that an inference of malice would flow more easily from the use of a spear or a knife that from the use of a stick" (*****See text on criminal law by William Musyoka Law Africa 2016 reprint at page 314 also the principle**

in Yoweri Damalira v Republic 1956 23 EACA 50A)

The question I ask at this stage is whether malice aforethought in the killing of the deceased has been established by the prosecution beyond reasonable doubt.

Now turning to the instant case the prosecution called a total of eight witnesses to prove its case. Indeed, largely the substratum of the prosecution case is well founded on circumstantial evidence. The evidence as to the actual infliction of the penetrating stab wound was indirect. What the key witnesses PW1, PW2, PW3, PW4 and PW6 alluded to categorically was the aspect of a quarrel, pull and push, some kind of fight ensued but when it came to the stab wounds none of them witnessed the incident. However, it is also clear that Pw6 saw the accused cutting himself with a knife which positively was identified by PW7 as the murder weapon. The analyst report by PW5 also confirmed that the DNA profile carried on the blood sample of the deceased matched with the blood stained duly recovered at the scene as the one used to inflict harm. In relation to this there is definitive findings that the injuries both the deceased and accused had were caused by the same knife.

I wish to point out that the evidence placed before court ought to establish sufficiently that the accused had the requisite degree of knowledge with regard to the consequences of grievous harm or by his acts of assault he would have foreseen fatal harm of the deceased. Sometimes one finds it difficult to draw a clear line between a person intending the consequences of his or her unlawful act as opposed to a risk of danger which unforeseeably result in death.

Furthermore, there is evidence on record from PW1, PW2, PW3, PW4 and PW6 that the duo had engaged in a disturbance on the material day from the early hours of the day. The final blow occurred at about 11.00 a.m. This being a domestic violence case one cannot rule out the possibility of provocation as defined in Section 207 as read together with Section 208 of the penal code.

The prosecution witness Pw6 alluded to this fact when he referred to the utterances made to the accused by the deceased to the effect that "***Mimi si Mchawi"*** it is not in contention that the key prosecution witness did not foresee any death arising out of the quarrel the two victims had on that particular day. It was just a normal day like any other for this couple who woke up and decided to ventilate their grievances in public.

Whether in their quest of ventilating the anger and emotions held in each one escalated to a level to bring it within the scope of Section 208 of the penal code is also not very clear. This court also by virtue of Section 119 of the evidence Act cannot strictly also rule out acts of provocation particularly when it comes to people in a relationship.

In Section 208 of the penal code the term provocation means and includes, except as hereinafter stated,

> ***"Except as hereinafter stated, any wrongful act of insult of such a nature as to be likely, when done to an ordinary person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in relation of master and servant, to deprive him of the power of self-control and to induce him to commit an assault of a kind which person charged committed upon the person by whom the act or assault is done or offered***"

> ***"When such an act or insult is done or offered by one person to another, or in the present of another to a person who is under the immediate care of that other or to whom the latter stands in any that relation as aforesaid the former is said to give the latter provocation for assault"***

In reference to the evidence tendered by the prosecution witnesses, PW1, PW2, PW3, PW4 and PW6 there is no dispute that the conflict between the accused and deceased went on for some time without much intervention from the public. The incident was to catch their attention when they heard a scream from the deceased. It is on record that when each one of them curiously took a step and moved to the actual scene the unexpected had happened where the deceased life was no more, and the accused had suffered serious abdominal injuries. In this case violence and tantrums was left to rage on too long that in the circumstances loss of self-control cannot be ruled out. The only antidote is that the accused person in his state of anger drew a knife aimed it at the deceased and killing her unlawfully.

A consideration of these instances creates a doubt whether the accused killed the deceased by a sustained assault but without the necessary intention to cause death or grievous harm as defined in Section 206(a), (b) of the penal code. I therefore find that the prosecution is able to proof that the accused killed the deceased without justification or excuse. His acts of sustained assault which involved use of a knife was a serious, dangerous acts of omission and commission which caused the death of the decease but without malice aforethought.

Consequently, I find the accused guilty of the offence and do convict him of manslaughter contrary to Section 202 of the penal code as punishable under Section 205 of the penal code. I sentence the accused to ten years' imprisonment.

Dated, signed and delivered in open court at Kajiado this 18th day of July, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Itaya advocate

Mr. Meroka for DPP

The accused person.

SENTENCE

The accused was initially charged with the offence of murder contrary to section 203 of the penal code a punishable in section 204of the penal code.

After considering the evidence my findings that the case proved by the state fell under section 202 as read with section 205 of the penal code. An accused person found guilty and convicted of the offence of manslaughter faces a maximum sentence of life imprisonment which was set by parliament for the offence.

During sentencing hearing, the victim impact statement from Edward Andayi, an uncle to the deceased discovered the physical, evidential and social impact that has been occasioned by the death of the deceased. The Principal Prosecution Counsel Mr. Meroka outlined that the accused may be treated as a first offender. In mitigation learned counsel made a plea to this court to consider the accused as a first offender and who has shown remorse during the pendency and determination of the case. The defence counsel also invited the court to factor in the pre-sentence report from the probation officers which recommends a non-custodial sentence.

I have considered the aggravating factors which to me includes the aspect of the deceased's death was not random act of violence but one initiated and completed by the accused person.

The passage of time in which the accused held and occasioned acts of assault against the deceased provides more supporting evidence of an assailant who was not to relent in committing the crime. Unless the accused fully intended to kill the deceased the infliction of punishment would just have ended at simple beatings without using of a lethal knife. There is no evidence that the accused judgement was impaired or suffering from any mental insanity. The extensive intervention by the core tenants could not even dissuade him from assaulting the deceased.

The victim was a person who stood in a filial relationship with the accused. she therefore had a legitimate expectation to be protected from any acts of domestic violence. In my view, these are aggravating factors that carry weight in sentencing the accused person.

In examining the facts of this case, the principles in sentencing policy guidelines, the account that the accused is a first offender, further that the accused pending his trial has been in remand custody since 2nd November 2016 should all count towards the final verdict on sentence. What stands out in this case is aggravating factor of the right to life under 26 of the Constitution. The accused conduct did not fall on any of the exceptions recognised by the constitution or statute to render his action to kill the deceased justifiable. Weighing one factor after another I come to the conclusion that a sentence of ten years' imprisonment will apply against the accused to achieve justice to the victims and also allow him to undergo rehabilitation to make him a better member of the Kenyan society.

Dated, signed and delivered in open court at Kajiado this 26th day of July, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Itaya advocate

Mr. Meroka for DPP

The accused person.