



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL DIVISION

CRIMINAL CASE NO. 67 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH THOMAS OLANG.....ACCUSED

JUDGEMENT

1. The accused **JOSEPH THOMAS OLANG** 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 the 14<sup>th</sup> day of June, 2013 at about 7.00 p.m. at Kidfarmaco Estate in Kikuyu Town within Kiambu County murdered **JOYCE NJERI KAGI**. He pleaded not guilty to the charges and to prove its case against him, the prosecution called a total of nine (9) witnesses and when put on his defence he gave sworn statement of defence and called no witnesses.

PROSECUTION CASE

2. The prosecution case against the accused was that the same was living with his girlfriend, **PW1 EUNICE WANJIRU NJOROGI** at a flat in Kikuyu wherein the deceased was also living with her cousin **PW3 ESTHER NJERI MURUGU**. On the material day it was **PW1's** evidence that she was called by the accused who told her that she needed to come back to the flat since someone had been killed thereat. She told him that she was not allowed to leave work and the accused later called her with information that he had been arrested on suspicion of being the murderer. She then decided to switch off her phone and did not go back to the flat until on 14/6/2013 when she received a phone call from Kikuyu Police Station to go to the station which she did on 15/6/2013 when she accompanied them to her house where the accused was brought to her house but nothing was recovered. She was thereafter asked to identify some items: - ankle socks and handkerchief belonging to the accused.

3. Under cross-examination she stated that she had separated with the accused and on 14/6/2013 the same traced her to her house at the scene of murder allegedly to say good bye to her since he was leaving for Kisumu. It was her evidence that she had earlier pressed charges against the accused for assault and after he agreed not to go near her again she dropped the charges and did not see him for about two - three months before he showed up in the month of June. She left him in the house with instructions that he should leave for her the keys at a flower pot next to the door when leaving for Kisumu.

4. **PW2 JACKLINE WAMBUI GACHERU** on 14/6/2013 received a phone call from **PW3** to go to her house and find out what had happened and on going thereat found the door open with people around a body of a neighbour she knew who had been stabbed with a knife lying on the couch naked and the room looked as if there had been a sign of struggle therein. At the scene she confirmed that the deceased had died. She stated that she saw the accused at the scene who said that he had seen the deceased but left later to go to church.

5. **PW3 ESTHER NJERI MURUGU** a lab technician by profession stated that although she was on leave she had a locum at Gikamburu Health Centre from 8.00 a.m. to 6.00 p.m. When she went to her house which she shared with the deceased she found her door closed from outside but without padlock and when she entered into the house she found the table and the TV fallen down and the deceased lying down without clothes with blood all over. She then ran out and called people. She later learned that her immediate neighbour had been arrested who she confirmed to be the accused who had lived next to her for about three months.

6. **PW5 CORP. JONAH SAWEH** was on 15/6/2015 instructed by the OCS to accompany them with the accused to recover the murder weapon after he had made a confession. They recovered a blood stained knife, pair of socks and handkerchief which they handed over to Silas Kiptoo the investigating officer. **PW6 CI CHRISTOPHER KIMITI** received a call from PC Kiptoo on the murder of the deceased and proceeded to the scene where he found the body of the deceased lying in a pool of blood with several knife stabbed wounds on the neck and the hands. On 15/6/2013 he revisited the scene with PC Kiptoo where they found the accused whom they went with to the police station. They interrogated him and he confessed that he is the one who killed the deceased. He then led them to the secondary scene where they

recovered exhibits herein. On 16<sup>th</sup> June they took the accused to hospital where his blood sample was taken for purposes of DNA analysis. On 17<sup>th</sup> June he was taken for mental assessment and was found fit to take plea.

7. It was his evidence that the accused told him that he wanted to befriend the deceased who resisted. He then went to her house and a fight broke out. **PW7 CI JEREMIAH MUSYOKI** testified that on 16/6/2013 he was requested by the investigating officer to record a confession from the accused. It was his evidence that the environment was good for taking his confession and that he interrogated him before he recorded the statement. The accused self recorded his confession in which he stated that the deceased who was a neighbour of his girlfriend and a student in college approached him for a relationship which he refused. She then requested him to help her fix a TV aerial which was not working. The deceased then locked the door and insisted that they have sex which he declined. He thereafter agreed to have sex with her but after that said he was going to report to the police when the deceased took a knife and attempted to stab him. He managed to take the said knife which he used to stab the deceased.

**8. PW4 DR. JOSEPH KAGUNDA KIMANI** a government analyst on 19/6/2013 received exhibits from PC Kiptoo for analysis and made the following findings:-

- a. The handkerchief and the knife were both heavily stained with human blood.
- b. The trouser, the pair of socks and the pants of the deceased were lightly stained with human blood. The pants and the vaginal swab were both stained with semen and spermatozoa.
- c. He formed the opinion that the DNA profile generated from the blood stains from the trouser of the deceased and the semen/spermatozoa were of unknown male origin. The DNA profile generated from the knife and the vaginal swab matched the profile of the deceased.
- d. He further concluded that the DNA profile generated from the semen/spermatozoa stains on the high vaginal swab of the deceased matched the DNA profile generated from the accused blood sample.

9. In cross-examination he stated that the DNA profile generated from the trouser and the pants of the deceased belonged to unknown male which was not of the accused but stated further that when they carried out a high vaginal swab he was able to generate DNA profile of the accused. He stated that there was a possibility of the deceased having participated in sexual activities with two people, the unknown male and the accused.

**10. PW8 JOHNSEN ODUOR** conducted postmortem on the body of the deceased and confirmed that the deceased had the following injuries:-

- a. A group of stab and stab wounds on the left side of the neck covering an area of 12 x 12 cm.
- b. Stab wound in mid chest at hypochondrium 2 cm long 1 cm deep.
- c. Stab wound on the dorsum of right hand.
- d. Stab wound on the left hand.
- e. Slash wound on the palm of the right hand.
- f. Stab wound upper back.
- g. Stab wound mid-upper back.
- h. Stab wound right upper back lateral to medial edge of shoulder blade.
- i. Stab wound right upper back below the lower angle of the shoulder blade.
- j. Stab wound mid back.
- k. Stab wound left lower back.
- l. Stab wound, left gluteus.
- m. Lacerated jugular vein.

As a result of the examination he formed an opinion that the cause of death was exsanguinations due to stab wounds.

**11. PW9 PC SILAS KIPTOO** investigated the matter. He visited the scene on 14/6/2013 and found the body of the deceased lying on the floor in the sitting room. The house was disturbed as if there had been a struggle. The deceased was naked so he suspected rape before the murder. There was an underwear near besides the deceased blood stained clothes. The accused who was at the scene assisted them carry the body of the deceased from the plot to the police motor vehicle. On 15/6/2018 he went back to the scene where he met the accused who

insisted that he wanted to record his statement before going to Kisumu. At the station he confirmed that there was a complaint against the accused by his girlfriend of sexual assault. The accused thereafter made a confession and took the police to the scene where he had hidden the murder weapon where they collected items which were positively identified by the accused's girlfriend. He produced photographs which were taken at the scene of crime.

12. When put on his defence the accused gave sworn statement of defence and stated that on 14/6/2013 he was washing his clothes in the house of **PW1** when the deceased requested her to help her repair a TV set as there was a soap opera she wanted to watch. When they got to the house the deceased locked the door and started touching him in a seductive manner. He resisted her advances and as he was repairing the TV the deceased approached him totally naked holding a knife and stated that he must have sex with her or she would scream that he had attempted to rape her and since he was the only Luo in the block once she screamed whatever he said will not save him. He then decided to have sex with her and when they were done he told her that he was going to report the matter to the police. At that stage the deceased became so wild and tried to attack her with the knife that is when he took the knife from her and stabbed her so as to get an exit out of the room.

13. It was his evidence that when he slashed the deceased arm she released the key. He then slapped her and she fell on the floor giving room to run out of the flat holding the knife which he went and dumped at Ondiri River together with the jacket he was wearing. He then came back to the house of **PW2**. He was later arrested and took the police to Ondiri River where they recovered the items he had thrown thereat. In cross-examination he confirmed that he willingly went to visit the deceased and did not have an opportunity to flee since she had locked the door. He could not scream since the deceased had warned him of the dangers of doing so. He stated that he did not rape the deceased but willingly had sex with her. It was his evidence that after he attacked the deceased he left the scene and went and dumped the murder weapon and his jacket.

### SUBMISSIONS

14. On behalf of the prosecution it was submitted that all the ingredients of the offence of murder was proved by the prosecution taking into account the confession of the accused. The crime scene as per the photographs taken thereat which showed a great struggle and the nature of injuries inflicted on the deceased and the conduct of the accused thereafter for which the case of **REPUBLIC v TUBERE S/o OCHEN v REPUBLIC [1945] EACA** was submitted. It was submitted that the death of the deceased was unlawful thus constituted murder for which the case of **REPUBLIC v GUSEMBI S/o WESONGA [1948] 15 EACA 65** was submitted in support.

15. On behalf of the defence it was submitted that a guilty mind is crucial for a charge of murder as was stated by Maraga J. (as he then was) in the case of **REPUBLIC v ANDREW MUECHE OMWANGA [2009] eKLR**. It was submitted that the accused did not go to the scene armed with a knife and that it was the deceased who brought the knife to force the accused to have sex with her. It was submitted further that the government analysis report placed more than one person at the scene when it found that the semen/spermatozoa present in the deceased pants belonged to unknown male person.

16. It was submitted that the demeanour of **PW1** the girlfriend of the accused person was questionable and that her action of switching off her mobile phone showed that she knew something about the murder. Finally, it was stated that the accused never escaped from the scene, assisted the police officers carry the body of the deceased to their vehicle and took himself to the police station to record his statements showing that the incident was not intentional. It was therefore submitted that the accused person can only be guilty of manslaughter.

### ANALYSIS AND DETERMINATION

17. In a charge of murder, the prosecution is required to prove beyond any reasonable doubt the following elements of the offence:-

*a) The death and cause thereof.*

*b) That the said death was caused by unlawful act of omission or commission on the part of the accused person with malice aforethought.*

18. The death and cause thereof is not in dispute in this case. The deceased on the material day was found at the crime scene by **PW2 JACKLINE WAMBUI GACHERU** who observed that she had a stabbed wound on the neck and totally naked. She confirmed that the deceased was dead by touching her body. **PW3 ESTHER NJERI MARUGU** who was staying with the deceased also found her in the house dead. **PW6 CI CHRISTOPHER KIMITI** visited the scene and found the body of the deceased lying in a pool of blood with several knife stab wounds. He called the scene of crime personnel who took photographs of the same which were produced in evidence. This evidence was corroborated by **PW9** the investigating officer and the accused person who helped the police carry the dead body of the deceased to the police motor vehicle having earlier informed **PW1** his girlfriend that there was a neighbour who had died at the flat. Whereas this court believes in miracles as at the time of this judgment, the deceased was still dead and I therefore find and hold that the death of the deceased was proved beyond any reasonable doubt.

19. The cause of the death was also proved by the evidence of **PW8 DR. JOHANSEN ODUOR** who produced his detailed postmortem report dated 17/6/2013 where he formed an opinion that the cause of death was exsanguinations due to stab wounds. This expert evidence was corroborated by those of the accused person in his defence and also in his confessionary statement, the police officers who visited the scene and all the civilian witnesses who confirmed that the deceased had several stabbed wounds on her body at the time when she was found dead at the crime scene.

20. That this death was caused by the accused person is also not in dispute. The accused person in a detailed confessionary statement voluntarily given to **PW7** the Chief Inspector of Police **JEREMIAH MUSYOKA** and produced in evidence and which he confirmed in his defence admitted having stabbed the deceased person using a kitchen knife which he later hid and which was analyzed by **PW4 DR. JOSEPH KAGUNDA KIMANI** a government analyst who confirmed that the blood stained on the said knife matched the DNA profile generated from the blood sample belonging to the deceased. The accused was positively placed at the scene of the crime and there is therefore no doubt in my mind and hold that the death of the deceased was caused by unlawful act on the part of the accused person.

21. The only issue in dispute and which this court is now called upon to determine is as to whether the said death was caused with malice aforethought. Put differently whether the accused had any justifiable reason for his action leading to the death of the deceased. Since it was only the deceased and the accused who were at the crime scene the answer to this question depends on the accused defence weighed against the circumstantial evidence availed by the prosecution.

22. It is the accused's contention that the deceased demanded sex from him which he gave into and that they had sex which is confirmed by the evidence of **PW4** through the high vaginal swab which found that the semen in the deceased vagina matched the DNA profile of the accused. It is the accused's evidence that upon successfully having sex with the deceased, he informed her that he was going to report to the police and that this made the deceased charge at him with a knife which knife he took from her and used in stabbing and slashing her. It was this evidence that the deceased wanted sex with him against his will and that the same had threatened that if he declined she could scream and shout that he wanted to rape her and being the only Luo in a flat of Kikuyus nobody will ever believe his story. If this threat is what made him give into her alleged sexual advances then what begs an answer is why after having sex with her he would threaten to report her to the police.

23. This line of defence is further put into doubt as it was the accused's contention in his evidence in defence that it was the deceased which made him have sex with her. Why would he thereafter threaten to report her to the police knowing very well that she still had the same opportunity to shout rape. It is therefore apparent that the accused killed the deceased so as to stop her from raising alarm.

24. From the evidence of **PW4** by the time the deceased came to the flat at 4.00 p.m. from college she had already had sex as evidenced by the presence of the semen/spermatozoa of unknown male person found in her underpants and trouser and unless she had uncontrollable sexual appetite so as to insist in having sex with the accused who was staying with his girlfriend at the flat, I find the accused contention unbelievable. I have had a look at the photos taken at the scene and produced in court and dismiss the accused defence that he stabbed the deceased in self defence. The stab wounds on the back of the deceased could not have been inflicted by the accused in self defence.

25. The accused in his defence and submissions raised the issue of self defence which is provided for under **Section 17** of the **Penal Code** to wit:-

***“17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for use of force in the defence of person or property shall be determined according to the principles of English common law.”***

26. The court of appeal in the case of **AHMED MOHAMMED OMAR & FIVE (5) OTHERS v REPUBLIC, NAIROBI CRIMINAL APPEAL NO. 414/2012** reported in [2014] eKLR had this to say:-

***“What are the common law principles relating to self defence? The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in PALMER v R [1971] A.C. 814. The decision was approved and followed by the Court of Appeal in R v McINNES, 55 Cr. App. R. 551. Lord Morris, delivering the judgment of the Board, said:***

***“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. . . . Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. . . . The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter.”***

27. As stated herein above, since it was only the accused and the deceased who were in the room, the court can only weigh the accused's defence against the circumstantial evidence tendered on behalf to the prosecution and as stated herein, the state of the crime scene, the injuries inflicted upon the deceased and the fact that there was no injury sustained by the accused and the fact that the accused as per his evidence in defence had just had sex with the deceased which he states was voluntary, only leads to an irresistible conclusion that the accused was not in any imminent or apprehension that the deceased would have caused death or grievous hurt to the accused.

28. I am unable to believe the accused that the deceased turned wild upon being informed that he would report to the police that they had had consensual sex as per his evidence and therefore dismiss his defence of self defence as an afterthought and lacking merit when viewed against his initial report and statement to the police.

29. The accused account is that the deceased came to him naked and started touching him in a sensual and seductive manner and they thereafter had sex after she had threatened him, whereas the same is under no obligation to say anything in his defence. I find that the accused was silent on how and when the deceased went for the knife which she alleged used to threaten him with.

30. On the authority of **REPUBLIC v TUBERE s/o OCHEN supra** submitted by the prosecution where the court held that malice aforethought can be established by the following elements:-

**a) The nature of the weapon used,**

**b) The manner in which it was used,**

*c) The part of the body targeted,*

*d) The nature of the accused before, during and after the incident.*

I would agree with the submissions by the state that the accused sexually assaulted the deceased and killed her thereafter noting that the accused was at that time in the house of his former girlfriend **PW1** who had filed sexual assault complaint against him at the police station and it logically followed that the same had a reason to kill the deceased so as to stop her from making a report to either the police or his girlfriend **PW1**, and find and hold that malice aforethought was established beyond reasonable doubt.

**31.** I have further taken into account the conduct of the accused person of hiding the murder weapon, his jacket, socks and handkerchief which were blood stained from the scene. His action of calling **PW1** with information of murder of the deceased, the force used on the deceased and find and hold that the prosecution has established beyond any reasonable doubt that the death of **JOYCE NJERI KAGI** was caused by unlawful act on the part of the accused person and accordingly find the same guilty of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and convict the same thereof.

**32.** In conclusion I find and hold as follows:-

*a) The prosecution proved all the elements of the offence of murder beyond any reasonable doubt.*

*b) The accused defence is hereby dismissed as an afterthought and lacking merit.*

*c) The accused is found guilty and convicted as charged and it is so ordered.*

Dated, delivered and signed at Nairobi this **23<sup>rd</sup>** day of **October 2018**.

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Miss Wegulu for the State*

*Ms. Malia for Muoki for the accused*

*Accused present*

*Court assistant – Karwitha*