



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 83 OF 2012

REPUBLIC.....PROSECUTOR

-Versus-

BONIFACE MWITI.....ACCUSED

JUDGMENT

[1] The accused person Boniface Mwiti was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code CAP 63 of the Laws of Kenya. The particulars of the offence were that on the night of 4th December 2012, at Maili Tano market, Mugae location in Buuri District within Meru County, murdered Penina Mwendwa. The accused person denied the charge and the case proceeded to full trial. The prosecution called 6 witnesses and their evidence is already recorded and is part of record.

[2] PW1 was BK a child aged 10 years. She gave sworn evidence after the court conducted *voir dire* examination and found her intelligent enough to understand the nature of an oath. It was her evidence that on 4th December 2012, they were in her mother's house with 2 children namely S K and J A and that she was not asleep and that her mother had gone to put Jelani to bed. She stated that, the accused person also known as "boy" came and asked her mother to open the door but she refused. He asked her for the second time and she obliged. The accused started slapping her until the deceased fell down. Then, the accused took a jiko- charcoal cooking stove- and hit the deceased with it on the chest and blood started to ooze from the nose and the mouth.

[3] PW1 screamed together with the other children and people came and among them he saw Kanange and Muchangi. Kanange called the police on phone. The police later took her mother to hospital and she never saw her again. She further identified the jiko that was used by the accused to hit the deceased.

[4] PW2 was Robert M' Tonjira. It was his evidence that on 4th December 2012, he was in his house when he heard screams from his neighbours. He went to the house of Boniface (accused) when he heard Penina (deceased) call 'Kanange' 3 times and he found Penina fallen near the bed where Boniface was sitting with the children and she had fainted. It was his further evidence that when he flashed a torch on her, she was bleeding from the nose and smelled like mucous. He said that he only saw one child K (PW1) as the others were small and that the accused was holding Abdul. It was his further evidence that he asked the accused if he had done anything to the deceased but he responded in the negative. He then went to Kanange's house also known as Gikunda (PW3) and Kanange called the police from Kaliene.

[5] PW 3 was Josphat Gikunda. He testified that on 21st December 2012, he heard screams for help and he heard Penina (deceased) calling twice. That, he then heard a knock on the door and found it was Robert (PW2) who told him that they go and assist the lady who was screaming. That, when they entered the house, they found the deceased lying on the floor next to the bed and that the accused was seated on the bed holding a child while the other children were on the bed. It was his further evidence that he noticed blood oozing from her mouth and nose and they tried to lift her in vain. That, they later decided to look for means to take her to hospital and called administration police officers from Katheri. He further testified that he had known the accused as a neighbor for 12 years and that the deceased had lived with the accused for 4-5 years.

[6] PW4 was Dr. Steven Kiluva, a medical officer at Isiolo District hospital. He testified and produced a post mortem report in respect of the deceased. According to the report, the cause of death was severe head injury and haemorrhage in the right chest cavity.

[7] PW5 was APC Dave Mwangale based at Administration Police headquarters in Meru County. he was the arresting officer in this case and he testified of having received a call from Kanange who informed him there was a family quarrelling and together with his colleague, they proceeded to the scene and found the deceased lying unconscious while the accused was seated on the bed. They took the deceased to Isiolo hospital and later booked the accused at Isiolo police station.

[8] PW6 was Inspector Charles Mwanyalo, the investigations officer in this case. He testified of having received a call from APC David

Mwangale who informed him of a serious case of assault. He proceeded to the scene and interrogated neighbors whom he found at the scene (PW2 and 3) and was informed that the deceased was at Isiolo mortuary and that the deceased had been assaulted by her husband Boniface Mwiti (the accused). He later visited the scene and collected evidence from the deceased's daughter (PW1 who was the last person to have been with the deceased). He later learnt that the murder weapon used was a jiko. He further testified that he knew the deceased prior to arresting him as they had several domestic issues both before the chief and the police station.

Defence

[9] After close of the prosecution's case, the accused was placed on his defence and opted to give a sworn statement. In his defence, he stated that he was in the table room with the deceased where they used to sell traditional beer and that PW1 was sleeping in the bedroom. That suddenly, his wife (deceased) splashed beer on his face whereupon he got annoyed and he slapped her and she fell on the ground and the children woke up and started screaming and the neighbours came and took his wife to hospital whereas he was taken to the police station. He further testified that the deceased had told him that the child he was taking to bed was not his and that he did not intend to kill his wife as he had no motive of doing so.

Submissions by the defence

[10] It was submitted that the accused had raised the defence of intoxication and provocation as they had spent better part of the day drinking with the deceased and that the deceased had provoked the accused by claiming that his child was actually not sired by the accused.

ANALYSIS AND DETERMINATION

[11] I have carefully considered the evidence which was adduced by the prosecution and also the defence of the accused. The prosecution's case was heard by Wendoh J and I only heard the defence. The issues for determination are whether the accused of malice aforethought, caused the death of the deceased.

Elements of offence of murder

[12] The accused person is facing a charge of murder. Section 203 of the Penal Code defines the offence of murder in the following terms:-

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

[13] Arising from the above definition are four elements of the offence that the prosecution must prove beyond reasonable doubt, to wit:

- 1. The fact of the death of the deceased***
- 2. The cause of such death***
- 3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person and***
- 4. Proof that the said unlawful act or omission was committed with malice aforethought.***

Of fact and cause of death

[14] The prosecution should prove the fact and cause of death. PW4 was Dr. Steven Kiluva, a medical officer at Isiolo District hospital. He testified and produced a post mortem report in respect of the deceased. According to the report, the deceased died and cause of death was severe head injury and haemorrhage in the right chest cavity. This hurdle is surmounted. I move to the next.

Did accused cause the death?

[15] Is there proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person? PW1 who was an eye witness to this incident testified that on the material day she was in their house with their mother (deceased) and 2 other children when the accused came and asked her mother to open the door but her mother refused. He then asked her for the 2nd time and this time the deceased obliged. Then the accused started slapping her mother and she fell down. It was her evidence that, when she fell down, the deceased took a jiko and hit the deceased with it on the chest and blood and mucous started oozing out of her mouth and nose. On seeing this, PW1 screamed and neighbours came. Despite being a child of tender age, her evidence on exactly what happened was pointed and remained unshaken. Her evidence, was consistent, coherent and robust even under cross examination. She stated that the deceased and the accused did not quarrel on the material day. She reiterated that the accused slapped the deceased and when she fell the accused hit the deceased with a jiko on the chest and blood stated to ooze from the nose and mouth. She further stated in cross examination that she had seen the accused beat her mother before and that the deceased used to sell alcohol in the house all the time. Even though I did not see this witness testify, her evidence is credible, reliable and consistent even under intense cross examination by counsel for the accused person despite her tender age.

[16] PW2 and PW3 corroborated each other, and every material respect of the evidence by PW1. Both confirmed having heard screams emanating from the house of the deceased and upon reaching at the scene; they found the deceased on the floor unconscious with blood and mucous oozing from her mouth. They also stated that the accused was at the time seated on the bed with the children. See the specific evidence by PW2, Robert M' Tonjira.

[17] PW2 stated that on 4th December 2012, he was in his house when he heard screams from his neighbours. He went to the house of Boniface (accused) when he heard Penina (deceased) call 'Kanange' 3 times and he found Penina fallen near the bed where Boniface was sitting with the children and she had fainted. It was his further evidence that when he flashed a torch on her, she was bleeding from the nose and smelled like mucous. He said that he only saw one child K (PW1) as the others were small and that the accused was holding Abdul. It was his further evidence that he asked the accused if he had done anything to the deceased but he responded in the negative. He then went to Kanange's house also known as Gikunda (PW3) and Kanange called the police from Kaliene.

[18] See also the evidence by PW 3, Josphat Gikunda that on 21st December 2012, he heard screams for help and he heard Penina (deceased) calling twice. That, he then heard a knock on the door and found it was Robert (PW2) who told him that they go and assist the lady who was screaming. That, when they entered the house, they found the deceased lying on the floor next to the bed and that the accused was seated on the bed holding a child while the other children were on the bed. It was his further evidence that he noticed blood oozing from her mouth and nose and they tried to lift her in vain. That, they later decided to look for means to take her to hospital and called administration police officers from Katheri. He further testified that he had known the accused as a neighbor for 12 years and that the deceased had lived with the accused for 4-5 years.

[19] PW5 and PW6 corroborated what PW2 and PW3 stated. More specifically, PW5 was APC Dave Mwangale based at Administration Police headquarters in Meru County. He was the arresting officer in this case and he testified of having received a call from Kanange who informed him there was a family quarrelling and together with his colleague, they proceeded to the scene and found the deceased lying unconscious while the accused was seated on the bed. They took the deceased to Isiolo hospital and later booked the accused at Isiolo police station.

[20] PW6, Inspector Charles Mwanyalo, was the investigations officer in this case. He testified of having received a call from APC David Mwangale who informed him of a serious case of assault. He proceeded to the scene and interrogated neighbors whom he found at the scene (PW2 and 3) and was informed that the deceased was at Isiolo mortuary and that the deceased had been assaulted by her husband Boniface Mwiti (the accused). He later visited the scene and collected evidence from the deceased's daughter (PW1 who was the last person to have been with the deceased). He later learnt that the murder weapon used was a jiko. He further testified that he knew the deceased prior to arresting him as they had several domestic issues both before the chief and the police station.

[21] Last but not least on this issue, PW4, Dr. Steven Kiluva, a medical officer at Isiolo District hospital corroborated the evidence of PW1 that the cause of death was severe head injury and haemorrhage in the right chest cavity. PW1 told the court that the accused hit the deceased with a jiko in the chest and blood started to ooze out from the mouth and nose.

[22] All the foregoing pieces of evidence proves beyond any reasonable doubt that the accused unlawful act caused the death of the deceased. In any event the accused admitted having killed the deceased except he pleaded intoxication. I will examine this defence next.

Defence of intoxication and provocation

[23] The accused pleaded the defence of intoxication and provocation. It is imperative to note that the defence was raised during defence hearing. What does the law say about defence of provocation?

Defence of provocation

[24] See Section 207 of the Penal Code which states that:

“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.”

[25] See also Section 208 thereof which provides as follows:

“208 (1) The term “provocation” means and includes...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 relationship 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) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the later stands in such relation as aforesaid, the former is said to give to the latter provocation for an assault.”

[26] Furthermore, in the earlier case of *Republic v Hussein S/O Mohamed [1942] EACA at pg 66* the Eastern Court of Appeal held as follows:

“When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defence of provocation.”

[27] In the case of *Peter Kingori Mwangi & 2 Others v Republic [2014] eKLR* the Court of Appeal pointed out the two conditions that must be established for provocation to exist:

“Inherent in this definition at common law is the requirement of two conditions to be satisfied for the defence to be made out, namely:-

(1) The subjective condition that the accused was actually provoked so as to lose his self-control and

(2) The objective condition that a reasonable man would have been so provoked.”

[28] What evidence is available? PW1 who was an eye witness to this incident- she did state anywhere in her evidence of there was a quarrel between the deceased and the accused on the material. No evidence also that the deceased and the accused were drinking prior to the incident. The only evidence available is that they were selling brew in their homestead. The only credible evidence is that the accused came to the house and asked the deceased to open the door but she initially declined but obliged for the second time, and the accused just started to assault the deceased. This was uncontroverted even under cross examination. PW1 was however candid enough in stating that the deceased used to sell alcohol in that house and that they used to quarrel over a child. She was however categorical they did not quarrel on that particular day. There is nothing to show that the deceased made utterances to the effect that the child herein is not the child of the accused. I do not find any utterances or insults of a nature that if made to a reasonable person, would deprive the person of self control. The quarrel over the child was long drawn and could not provoke such instantaneous and violent reaction. PW6, Inspector Charles Mwanyalo and who was the investigations officer in this case, testified that he knew the deceased prior to arresting him as they had several domestic issues both before the chief and the police station. With this kind of evidence, the quarrels were always there. In any case, the force used on a defenceless woman following a quarrel or insult is wholly unjustifiable reaction or action. No evidence that the accused was actually provoked. The conditions of provocation were not met and I am satisfied the defence of provocation does not hold sway in the circumstances of this case. Consequently, I reject the accused person’s defence of provocation and intoxication as an afterthought.

[29] With regard to the accused person’s contention that he had no motive to kill the deceased, it is trite law that motive is not an essential ingredient to prove a crime. In *Libambula -Vs- Republic [2003] KLR 683* it was stated thus

“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See Section 8 of the Evidence Act Cap 80 Laws of Kenya.

Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.” *(Emphasis added)*

Malice aforethought

[30] Having found that it was the accused who caused the death of the deceased and no one else, the next question for determination is whether he had the necessary malice aforethought at the time of the commission of the offence to support a charge of murder. An important ingredient for the offence of murder is malice aforethought. The circumstances which constitute malice aforethought are set out under Section 206 of the Penal Code as follows:

“206. 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) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

[31] In *DANIEL MUTHEE vs. REP. CA NO. 218 OF 2005 (UR)*, the Court of Appeal while considering what constitutes malice aforethought, stated thus;

“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 persons 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.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt

on the two counts of murder was proved beyond any shadow of doubt.”

[32] The same reasoning was adopted by the Court of Appeal in the case of Joseph Mwongera Rukaria v Republic [2013] eKLR where the court stated;

“We are cognizant of the statement by the learned Justices of Appeal made in the Daniel Muthee case. In the instant case, when the appellant cut the deceased at the back side of the neck, he must have known that the act of cutting the deceased on the neck would cause death or grievous harm”

[33] In the instant case, according to the evidence of PW1 who was an eye witness, the accused hit the deceased with a jiko on the chest. By the time PW2 and 3 who were close neighbours arrived, they found the deceased lying on the floor unconscious, bleeding from the mouth and nose. The accused did not attempt to give the deceased first aid nor scream for help. The blow that was inflicted on the deceased must have been violent so as to be fatal. See the medical evidence. The attack on the deceased was unwarranted since there was no evidence that the deceased was armed. The accused person must have been aware that such an action would lead to death or cause grievous bodily harm to the deceased person. The accused person had the intention of killing the deceased.

[34] Taking into account the totality of and all the circumstances in this case, I find that the prosecution proved malice aforethought within the meaning of Section 206 (a) of the Penal Code CAP 63 of the Laws of Kenya and that the accused person had the requisite malice aforethought in the commission of this offence. I therefore find the accused, Boniface Mwititi guilty of the murder of Penina Mwendwa and convict him accordingly under Section 322 of the Criminal Procedure Code CAP 75 of the Laws of Kenya. Right of appeal explained.

Dated, signed and delivered in open court at Meru this 26th day of November 2018

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F. GIKONYO

JUDGE

In presence of

Kiarie for state

M/s Nelima for accused

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F. GIKONYO

JUDGE