



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.2 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

ISAAC MWANGI MUCHOKI *alias* RUTO.....ACCUSED

JUDGMENT

1. Isaac Mwangi Muchoki *alias* Ruto (the accused) is charged with the offence of murder contrary to Section 202 as read with section 204 of the Penal Code. The particulars are that on the 18th day of November 2011 at Muthurwa Market in Nairobi within Nairobi County, murdered Loise Adoyo Ouma.

The prosecution case

2. The summary of the prosecution case is that the accused stabbed his wife (the deceased) with a knife (Exhibit No. 1) at Muthurwa Market on 18th November 2011 at about 11.00a.m. The two had cohabited for 2 years in Dandora while they operated businesses in Muthurwa market. Prior to the incident, they had differed and separated. On the fateful morning the accused went to seek out the deceased at her stall. Judith Omusugu (PW1) who occupied a neighbouring stall heard them quarrel after which the accused was ejected by the security guards. The accused later came back and after a quarrel with the deceased, Evans Njuguna Macharia (PW3) who was in a nearby stall heard a scream. When he came out he saw the deceased holding her stomach screaming and the accused running away. John Muchoki Kabugi (PW6) similarly witnessed the incident. He helped lift the deceased into Sarah Muhia's (PW4) car who rushed her to Kenyatta National Hospital. The deceased died while undergoing treatment. Dr. Joseph Ndungu (PW9) conducted the post mortem and found that the cause of death was a penetrating stab wound.

3. Meanwhile No. 44428 PC Peter Kamau visited the scene and recovered a blood stained overall (Exh. No.2) and knife (Exh. No. 1). The accused was subsequently arrested by No.78723 PC Hilary Kirui. He was examined by Dr. Kamau and found mentally fit to stand trial.

The defence case

4. After considering the prosecution evidence summarized above, the court found a *prima facie* case established against the accused. Put on his defence, the accused gave an unsworn statement in which he gave a long description of how their relationship had degenerated prior to the fateful date. He stated that they had started off well and he had helped her set up a business in Muthurwa where he himself had a running business. He said that when the wife's business thrived, she started being unfaithful and their relationship deteriorated. He said that on the material date 18th November 2011 he went to her stall and asked for tea but she called security to remove him. He later went back and a quarrel ensued over the question of unfaithfulness. In the course of the quarrel, he grabbed the kitchen knife which she had and

bruised her with it. She screamed and “mungiki” men appeared. He ran away and stayed away out of fear. He later learnt that the wife had died. Four days later, he learnt that she had been buried.

5. This being a case of murder, the prosecution must prove death, the cause of such death and the malicious intention of the accused in causing such death. Needless to state also, the standard of proof is one beyond reasonable doubt and any doubt arising from the evidence must be resolved in favour of the accused.

Death and cause of death

6. The evidence presented before court left no doubt that the deceased died on 18th November 2011 after being stabbed at Muthurwa Market. Evidence showed that the accused, the deceased, Judith Omusugu (PW1), Evans Njuguna Macharia (PW3), Sarah Wambui Muhia (PW4), and John Muchoki Kabugi (PW6) were all traders at the Muthurwa market stalls. PW1, PW3 and PW6 all saw the deceased alive and well on the morning of 18th November 2011. PW3 and PW6 later heard her scream and saw her fall after being stabbed. PW4 who had her car nearby rushed her to Kenyatta National Hospital. PW4 testified that she left her being attended to but she was later informed that she had passed on. The deceased’s brother Jacob Ochieng (PW2) testified that he identified the body at Kenyatta National Hospital. Dr. Joseph Ndungu (PW9) carried out the post-mortem on 1st December 2011 at the Kenyatta National Hospital. He observed a stab wound in the upper part of the abdomen extending to the right side of the chest through the lung. There was 2 litres of fresh blood in the right chest cavity and partial collapse of the right lung. He formed the opinion that the deceased died of penetrating stab wound. Dr. Ndungu produced the post-mortem report as Exhibit No. 6. I accepted the prosecution evidence as conclusive proof of death and its cause.

Whether the accused caused the death of the deceased.

7. I have already found above that the deceased died as a result of being stabbed. The issue is whether the accused was the person who stabbed her.

8. I accepted the prosecution evidence that there was a close relationship between the accused and the deceased. John Muchoki Kabugi (PW6) who operated a business in the Muthurwa market stalls next to the deceased’s told the court that the deceased used to be visited frequently by a man named Isaac (the accused). Judith Omusugu (PW1) identified the accused as the deceased’s husband. She knew him by his *alias* name Ruto. The deceased’s brother, Jacob Ochieng (PW2) identified the accused as his brother-in-law and said that the deceased used to live with him. Evans Njuguna Macharia (PW3) told the court that he knew the accused as the deceased’s friend and that he used to visit her frequently at the stall. The accused on his part admitted in his defence that the deceased was his wife. There was therefore no issue at all on the fact of their marital relationship.

9. It is clear from the evidence above that the accused was well known to the witnesses. He was known as the deceased’s husband and he was also known as a trader at the Muthurwa Market, a fact that he also admitted. There was ample evidence that the accused was seen at the scene that morning and that he quarreled with the deceased. Judith Omusugu (PW1) said that she met both the accused and the deceased in the morning around 6.00a.m on 18th November 2011. Judith said that she witnessed the quarrel between the couple that morning. She narrated that the accused (whom she referred to by his *alias* name Ruto throughout her testimony) said that Loise (the deceased) had not slept at home. He asked her for tea and when she refused, he took a cup and poured tea on her. PW1 said that Loise went to call the market security who came and ejected the accused warning him not to bring domestic chaos to the market. After leaving, the accused shouted from the fly over warning the deceased that “*she will see today*” PW1 later left the market and when she came back learnt that the deceased had been stabbed by the accused.

10. John Muchoki Kabugi (PW6) whose stall was next to the deceased, testified that he saw the accused arriving at the deceased’s stall at around 8.00a.m. he (accused) sat on the crates of soda between PW6’s stall and the deceased’s stall. PW6 said that he saw the accused leave. That the accused called him

(PW6) on phone but disconnected when he answered. The accused came back later after about 4 hours but refused to speak to PW6 when PW6 asked him why he had called him only asking PW6 to leave him alone. The accused continued sitting on the crates as PW6 went about his business. PW6 said that he later heard a scream and on turning saw the deceased falling down and the accused running away. PW6 ran after the accused but turned back to assist the deceased. He saw a knife by her side but concentrated on getting her help.

11. Evans Njuguna Macharia (PW3) testified that he was inside his stall when he heard a scream. He rushed out and saw the deceased screaming while holding her stomach and the accused running away. He saw a blood stained knife just outside his stall. The deceased was bleeding from the stomach. PW3 further said that he had heard the accused telling the deceased that he would kill her. He had also heard them quarrel bitterly that morning although he did not know what the quarrel was about.

12. Sarah Wambui Muhia (PW4) also heard screams while in her stall. Soon thereafter she was asked to assist take the deceased to hospital. She carried her in her car a Probox KBL 412C. Sarah said that the deceased told her that she had been stabbed by her husband.

13. It is evident from the testimony of PW1, PW3, PW4 and PW6 that the deceased was stabbed at Muthurwa market stalls by the deceased. Although none of them saw the act of stabbing, the circumstances obtaining them point to the accused and no one else. I believed the testimony of these witnesses. They were present at their stalls going about their normal business. Their testimonies were consistent and corroborative. PW1 had heard and seen the deceased and the accused quarrel in the morning. She saw him being ejected by the market security and later heard him issuing threats from fly over PW3 actually saw the accused running away when he rushed out upon hearing the deceased scream. He had earlier heard him threatening her that he would kill her. Finally PW4 who rushed the deceased to the hospital said that the deceased told her on the way that she had been stabbed by her husband. Such a statement from the deceased in the circumstances of this case amounts to a dying declaration admissible under Section 33(a) of the Evidence Act.

14. The murder weapon (Exhibit No.1) and a blood stained overall/dust coat (Exhibit No.2) said to have been worn by the deceased were collected outside her stall by No. 44428 PC Peter Kamau (PW8). PW8 testified that he prepared an exhibit Memo [Exhibit No. 3] and forwarded the exhibits to the government analyst for forensic analysis. The government analyst report [Exhibit No. 4] prepared by P.W. Kangethe dated 1st August 2013 indicated that the knife (Item A) was moderately stained with blood while the apron (item B) was heavily stained with blood and that the DNA profile generated from the stains both on the knife and overall matched that of the deceased. Confirming the knife as the murder weapon. PW8 further testified that the accused ran away after the incident and was arrested on 30th December (2011?) at Mlolongo.

15. The accused admitted in his defence that the deceased was his wife and that they carried business at the Muthurwa Market stalls. This admission confirms that he was known by the witnesses. He also admitted having quarreled with his wife that morning ostensibly on account of the wife's unfaithfulness. He said that he grabbed the kitchen knife from her and scratched or bruised her with it. This admission further confirms the fact that he is the one who stabbed the deceased, a fact which I have already found proven beyond reasonable doubt by the prosecution.

Whether the accused had malice aforethought.

16. A murder charge cannot be sustained unless the prosecution proves beyond reasonable doubt that the accused acted with malice aforethought as provided by Section 206 of the Penal Code. The Court of Appeal has on many occasions expounded on Section 206 of the Penal Code. See **Nzuki V. Republic 1993 KLR 171**.

17. In the present case, there was undisputed evidence that the accused and the deceased were on a rocky part of their marital relationship. The quarrel according to the witnesses concerned domestic issues. Indeed the accused submitted through his counsel, that he was angered by the wife's unfaithfulness. The

accused was annoyed that he had set up the business for the wife only for her to start seeing other men. He confronted her and she hurled insults at him while holding a kitchen knife. According to the defence, this caused the accused temporary insanity. It was then that he grabbed the knife from her and stabbed her.

18. **Section 207** of the Penal Code recognizes the defence of provocation in the following terms:

‘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.’

19. In **Peter King’ori Mwangi & 2 others v Republic Criminal Case No. 66 of 2014 [2014] eKLR** the Court of Appeal interpreted the defence of provocation in the following terms:-

‘We start from the premise that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So what is provocation? In the case of Duffy (1949) I ALL ER 932; provocation was defined as “some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...”

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

- **The “subjective” condition that the accused was actually provoked so as to lose his self-control; and**
- **The “objective” condition that a reasonable man would have done so.**

20. In the present case, however, there was ample evidence that the accused and the deceased engaged in a quarrel in the morning. The accused then went away while issuing threats. That was between 6.00a.m. and 8.00a.m. He came back several hours later about 11.00a.m. and stabbed the deceased. He had been heard earlier by PW1, PW3 and PW6 threatening that he would kill the deceased. There was ample evidence also that at the material time, they had separated and were not living in the same house. Therefore even if he was enraged, it was a continuing state of anger not sudden provocation that made him stab her. On the contrary, the evidence shows that the accused went away in anger and came back armed to stab the deceased. He had a premeditated plan which he executed. He used a dangerous weapon and did not care that the deceased would suffer harm. I find that the circumstances of this case fall within the provisions of **Section 206(a) of the Penal Code**. It is my view that the accused may have been desirous of engaging in unlawful but common action of domestic violence, but chose the wrong weapon and ended up with fatal consequences. I am convinced beyond reasonable doubt that he intended to cause harm to the deceased and did not care about the consequences.

21. In the premises and for the foregoing reasons, I find Isaac Mwangi Muchoki guilty of murder contrary to Section 202 of the Penal Code. He is accordingly convicted.

Judgment dated, signed and delivered at Nairobi this **30th** day of **January** 2017

R. LAGAT-KORIR

JUDGE

In presence of:

.....: Court clerk
.....: Accused
.....: For accused
.....: For State