



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
HIGH COURT CRIMINAL CASE NO. 8 OF 2016
REPUBLICPROSECUTION
VERSUS
JUSTUS MUTINDA MWANGEACCUSED
JUDGMENT

1. The accused person faces one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code (Cap 63 laws of Kenya.)** The particulars are that:

“On the 10th day of January 2016, at Baba Ndogo Estate in Ruaraka, within Nairobi County he murdered one Rose Kavata Muthama.”

2. The prosecution called a total of five (5) witnesses in support of their case.

3. The brief facts of the prosecution case are that the accused and deceased who lived together as man and wife were in their house together with their daughter PW1. A disagreement ensued between the accused and deceased. PW1 said that she saw the accused threaten the deceased with a knife and soon thereafter the deceased was bleeding from her leg. She said that the accused tried to stop the bleeding by tying the leg with a cloth but the deceased succumbed having lost a lot of blood.

4. The accused in his unsworn defence admitted most of the prosecution facts but denied stabbing the deceased intentionally. He alleged that the deceased came armed with a knife and as the two struggled to have the knife, the deceased placed the knife between her legs and was stabbed accidentally as they struggled.

5. The learned counsels appearing in this case made submissions. The defence counsel Mr. Gatambia urged that only PW1 was present at the scene of incident and being a child her evidence ought to be treated with caution since her statement was recorded on the 18th of May, 2016 approximately 4 months after the incident happened. Counsel urged that the fact that she was living with the deceased family all this time, the possibility of her being coached could not be ruled out.

6. Mr. Gatambia further urged that from the evidence of PW1, it was apparent that the accused and deceased were in constant altercations and it was the deceased who verbally provoked the accused causing him to lose his temper. Finally counsel urged that the calmness of the accused when the deceased was moving from one room to the other was inconsistent with a person having the mens rea element to commit murder. Counsel urged that it should not be lost that the accused took every reasonable step to

stop the bleeding on the deceased.

7. Learned prosecution counsel Ms. Onunga in her submissions urged that the prosecution witnesses gave an elaborate account of events that took place on the fateful day. Counsel urged that PW1 was present at the scene and confirmed that the door was locked from inside. Counsel urged that PW1 saw the accused threaten the deceased with a knife after they had quarrelled and soon thereafter PW1 saw the deceased bleed from the calf. Counsel urged that the accused sat pretty and did not take the deceased to hospital despite the bleeding and urged that his conduct was consistent with a person with a guilty mind. Counsel urged that PW1's evidence was corroborated by PW4 and 2. They saw deceased lying dead on the bed while accused sat in the sitting room.

8. The accused person faces a charge of murder contrary to **Section 203** of the **Penal Code**. This section creates the offence of murder and provides as follows:

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

9. Malice aforethought is an essential ingredient in the offence of murder. The circumstances that constitute malice aforethought are set out under *section 206* of the *penal code* as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

1. 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,

2. 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;

3. An intent to commit a felony;

4. 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.”

10. The onus and evidential burden lies with the prosecution to prove its case against the accused person beyond any reasonable doubt. The prosecution must prove that it was the accused who caused the death of the deceased by stabbing her with a knife. The prosecution must equally prove that at the time the accused stabbed the deceased, he had formed an intention to either cause death or grievous bodily harm.

11. I have considered the evidence adduced by both parties and their submissions herein. I find the following issues not in dispute. It is not disputed that PW1, accused and deceased all lived together in a three roomed house and were all together in that house on the date of incident. It is not in dispute that the accused and deceased had a small altercation before deceased suffered the stab wound. It is not in dispute that P.EXHIBIT 1 a knife recovered from the bedroom at the scene was the one which inflicted the stab wound on the deceased. It is not in dispute that the deceased met her death due to the stab wound injury.

12. I find the following are the issues for determination:

I. Whether PW1 was a minor, whether her evidence required corroboration and whether that corroboration was found in the rest of the evidence.

II. Whether the deceased was injured accidentally.

III. Whether the prosecution has established malice aforethought.

IV. Whether the prosecution had established a motive for the offence.

V. Whether the accused defence was plausible and reasonable.

13. The prosecution is relying on the evidence of PW1, the only eye witness to the incident. PW1 was aged 7 years old when she testified. The court conducted a voire dire examination and was satisfied she was possessed of sufficient knowledge to testify, that she understood the duty to tell the truth. PW1 did not know the meaning of an oath and so gave an unsworn statement.

14. PW1 stated that on 10th January, 2016, at around 11.00 am, the accused and deceased had a quarrel before the accused went into the kitchen and came out holding a knife. PW1 said that she saw the accused flash the knife in front of the deceased making stabbing motions towards her as deceased moved from one room to the other. PW1 stated that she then saw the knife cut the deceased on her leg above the knee as the accused held the knife. PW1 saw the accused then take her black trouser and use it to tie the leg.

15. PW1 said she noticed that the deceased did not scream after she was cut and that later the deceased started breathing slowly. PW1 said that the accused sent her outside to buy him airtime and that was when people noticed some blood on her clothes. On being asked why she had blood, PW1 said that she first lied that she had cut herself with a razor blade as she was sharpening a pencil. However, one mama Z did not believe her and called one Guka PW2 who came and later called police.

16. The law is completely settled on the issue of the evidence of children. The law is that where the evidence against an accused is that of a child, that evidence ought to be corroborated by other material evidence. **Section 124** of the **Evidence Act** regarding the evidence of children provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.”

17. Similarly in the Court of Appeal decision in **ONSERIO v. REP. [1985] KLR 618**, it was held:

“An accused can only be convicted on the evidence of a child of tender years if corroborated by other material evidence in support thereof implicating him as set out in section 124 of the Evidence Act.”

18. PW1 was 7 years old at the time of incident and also at the time she gave her evidence. **Section 2** of the **Children Act** defines a child of tender years as **“a child below the age of 10 years”** Being 7 years therefore, PW1 was a child of tender years and her evidence requires other material evidence in support thereof implicating the accused.

19. PW1 was the only other person present besides the accused and deceased inside their house when the incident occurred. I find that the accused does not deny being alone in the house with PW1 and the deceased at the time of incident.

20. PW1's evidence was that just before the incident her parents had quarrelled, PW1 said that upon quarrelling, her father, the accused stood up and went to the kitchen where he armed himself with a knife and then chased the deceased around the 3 rooms in the house. PW1 said that it was when the two went into the bedroom, as the accused made stabbing motions at the deceased that she saw the deceased bleeding from her leg.

21. The accused has disputed going for the knife. He contradicted PW1's evidence saying that first it was the deceased who started the quarrel by being very abusive. Secondly she went for the knife in their kitchen and carried it to the bed room. He said it was in the course of struggling to get the knife from her that she was stabbed. The accused stated that the deceased had placed the knife on her thighs as they

struggled leading to her being accidentally stabbed on her thigh.

22. I did analyse and evaluate the other evidence adduced in this case. The post mortem form produced in respect of results of autopsy carried out on the deceased gave a clear description of the nature of the injury the deceased suffered. The doctor found that the deceased had stab wound on the left lateral leg measuring 8cm by 2cm by 8cm (length, width and depth) on the left side of the left leg. The doctor found that the left popliteal blood vessels were severed.

23. According to the Oxford English Dictionary Popliteal area is the area of the human body situated at the back of the knee. The deceased therefore was stabbed on the left side of the left leg on the outer side and at the back of the knee.

24. PW1 said that the injury was on the calf area which she pointed. Given the deceased bleed profusely leading to her death, PW1's evidence that the injury was on the calf area of the left leg can be understood as the bleeding was coming from the back side of the leg.

25. The accused said the injury was on the top of the thigh. That is definitely not true as the findings of the pathologist clearly establishes that the deceased had no injury on or near the thigh. The injury was on the side of the left leg on the outer side, and at the back of the left knee. The injury was not in consonance with the descriptions given by the accused.

26. More importantly however is one other fact the nature of the injury could not have been caused in the manner the accused described. The pathologist measured the wound and said that it was 8cm long, 2cm wide and 8cm deep. Being on the outer left side of the leg, the injury is consistent to stabbing by a third party rather than by accidental stab.

27. Having considered this evidence I find that the evidence of PW1 that the accused was holding the knife at the deceased making stabbing motions before the deceased was injured have received support in the post mortem findings by the pathologist. I find that the prosecution evidence has established that it was the accused who stabbed the deceased on her leg causing her the injury from which she died.

28. The evidence of PW2 and 4 was to the effect that when they entered the house to find out what happened, they found the deceased lying dead on the bed in the bedroom while the accused was seated in the sitting room talking with his brother. PW2 took time to find out why he was seated comfortably instead of taking steps to assist the deceased get treatment.

29. It was PW2's evidence that the accused told him that the deceased was not badly injured but was pretending as was her behaviour and would eventually wake up. That statement shows that the accused had a measure of indifference towards the deceased.

30. Can indifference constitute malice or prove motive to murder? I considered the evidence of PW1 that her parents quarrelled often and constantly. It was her evidence that her parents had quarrelled the night before and that her mother went to bed annoyed and woke up still annoyed. PW4, a neighbour on the floor below where the accused and deceased lived confirmed that evidence. PW4 testified that the accused and deceased quarrelled and fought almost daily to the extent none of the neighbours tried to intervene.

31. The other evidence I considered is the doctors finding at post mortem. The deceased suffered a single stab wound to the left leg.

32. I will cite three cases on the issue of malice. The first one is:

Nzuki v Republic [1993] KLR 171, the Court of Appeal held that malice aforethought can be inferred from the acts of an accused person. The Court elaborated as follows:

"Malice aforethought" is a term of art and is either an express intention to kill, as could be

inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670.

33. The second one is the persuasive decision of ***CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004***, where the *Court of Appeal of Uganda* stated:

“In determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

34. The third one is ***REX V. TUBERE S/O OCHEN (1945) 12 EACA 63***, where the former Court of Appeal for Eastern Africa stated thus on the issue:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...”

35. These three cases point to the fact that malice can be inferred from facts and circumstances of the case, the weapon used and the part of the body injured.

36. The deceased was stabbed under the knee on the left side. The weapon used was a knife. I find that this was a single stab wound, to the leg just behind the knee and in the course of one of numerous quarrels. I find that these circumstances and facts negate prove of presence of malice to cause death.

37. The accused appeared indifferent to PW2, a village elder to the area where the accused lived given his response to the question why he had not taken the deceased to hospital. I do not find that accused had total indifference given the fact he tried to control the bleeding by tying the deceased injured leg.

38. As for accused defence that it was accidental injury as he and deceased struggled to take over the knife I do not find it plausible, or reasonable on the basis of my findings herein above.

39. I have carefully considered the evidence adduced in this case. I find that the accused stabbed the deceased once on the leg. The area of the body he stabbed and fact it was a single stab, and fact it was inflicted in the course of one of numerous arguments, quarrels and fights the couple had, leads me to believe that the prosecution has failed to establish an intention to cause death or grievous harm and motive for the offence.

40. I find that the prosecution has failed to prove murder contrary to **section 203** of the **Penal code** as against the accused. I am however satisfied that the accused caused the deceased death by an unlawful act. The prosecution has therefore proved the lesser charge of manslaughter contrary to **section 202** of the **Penal Code**.

41. Accordingly, I reject accused defence. I substitute the charge against the accused from murder contrary to **section 203** of the **Penal code** with that of manslaughter contrary to **section 202** of the **Penal Code** under the powers provided under **Section 179** of the **Criminal Procedure Code**.

42. I find the accused guilty of the substituted charge of manslaughter contrary to **section 202** of the **Penal code** and convict him accordingly under **Section 322** of the **Criminal procedure Code**.

DATED AT NAIROBI THIS 27TH DAY OF APRIL, 2017.

LESIIT, J

JUDGE