



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NUMBER 105 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

TEVIN GADDAFI NYANGENDO alias DAN.....ACCUSED

JUDGEMENT

Tevin Gaddafi Nyangendo alias Dan, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of this offence are that on the 4th day of November 2014 at Umoja III Estate within Nairobi County he murdered Lucy Wambui Githaiga. Eight witnesses testified in support of the prosecution case. The accused is the only defence witness.

Shadrack Ngariuki, PW1, is the son of the deceased. He received information on 5th November 2014 about the death of his mother and went to the City Mortuary to confirm. Jacob Okoth Otieno, PW2, is the neighbour to the deceased and the accused in Umoja III Estate. He testified that he found the accused and the deceased quarreling on 5th November 2014 at 10.00pm when he arrived home. The quarrel continued for some time and PW2 went to the balcony of his house to see what was happening. He could see the house where the deceased and the accused were but not inside. He heard the accused shout “*umenikata*” loosely translated as “you have stabbed me”. He also heard the deceased say “*umenidunga*” loosely translated as “you have stabbed me.” PW2 went downstairs. He saw the accused walking towards the gate and feared he might escape. He followed him and caught up with him at a local clinic. The accused was bleeding profusely from the face. The accused told PW2 that he was looking for first aid. The clinic was closed. With help from another person whom PW2 referred to as a Masai, PW2 restrained the accused and took him back to the scene where they found a crowd gathered. Both the accused and the deceased were taken to Mama Lucy Hospital for treatment. The deceased died while undergoing treatment. The accused was stitched on his wound and handed over to the police. He was taken to Buruburu Police Station where he was placed in custody.

PW4 is the pathologist Dr. Dorothy Njeru. She examined the body of the deceased on 7th November 2014. She found a stab wound measuring 6cm long and sharp on one edge on the left side of the head above the eye. Her opinion was that the deceased died due to exsanguination (excessive loss of blood) due to stab wound to the head.

PW5 is PC Erick Njogu. He was assigned to visit Mama Lucy Hospital where he found the accused under treatment being stitched on his forehead and the deceased having died. PW5 said he observed a stab wound on the left side of the head near the left ear of the deceased. In company of the accused PW5 and other officers visited the scene and saw blood stains on the floor of the house. They recovered a blood-stained knife (Exhibit 2). PW6 Henry Kiptoo Sang examined various exhibits recovered from the accused and the deceased including the knife, accused’s long trousers (Exhibit 3), deceased’s white jacket (Exhibit

6), blood sample of the deceased and buccal swab samples from the accused. The DNA found on the blood stains on the knife were from the blood of the deceased; the long trouser was stained with accused's own blood, bloodstains on the white jacket belonged to the deceased and an unknown male. The report from the Government Analyst was produced as Exhibit 4. CPL Hesborn Otieno, PW8, is the Investigating Officer. After recording statements from witnesses and collecting exhibits he compiled his report and made up his mind to charge the accused.

PW3 was IP Mohamed Abdi. He took a charge and caution statement from the accused. He was abandoned as a witness by the prosecution after the defence counsel objected to his producing the statement because he was not qualified to take such statement.

The accused gave a sworn statement of defence. He told the court that the deceased was his wife for 4 years; that on 4th November 2014 they went to drink but at around 10.00pm the deceased started insulting him accusing him of having lovers; that the deceased asked for Kshs 2,500 from him for her Merry-go-round but he told her that he did not have the money; that the deceased became angry and poured her drink over him; that he decided to go home leaving the deceased behind in the bar and that he fell asleep but was woken up by sharp pain on his head. He testified that when he opened his eyes he saw the deceased holding a knife in her hand and realized that he had been stabbed on the forehead and was bleeding. He told the court that the deceased claimed that he had left the bar to go to his lovers and that she would kill him; that she aimed the knife at his chest but he shielded it with his hands and got injured on his left hand; that he left the bar and started struggling with the deceased to snatch the knife from her hands; that in the course of that struggle, he was stabbed on the chest near the ribs and that both of them fell down and that he heard the deceased say that she had been stabbed. He said that he never took the knife from the deceased's hands and that they fell while the deceased was still holding the knife. He said he went outside to look for help and that both of them were taken to Mama Lucy Hospital.

At the close of the defence case, Mrs. Kinyori, counsel for the accused submitted that the prosecution has not proved the case beyond reasonable doubt; that the key witness PW2 did not understand the quarrel between the accused and the deceased since they were speaking in Kikuyu language which he did not understand; that the accused told PW2 that he was going to look for first aid; that the accused was cooperative throughout; that witnesses confirmed the evidence by the accused that he had injuries and that Dr. Shako who examined the accused confirmed that he had healing wounds on his upper and lower limbs. Counsel submitted that the accused has explained the circumstances of the case and that his evidence is plausible. She submitted that the deceased was injured near the ear and that this is not a place the accused would have aimed at. Counsel urged the court to find that the prosecution has failed to prove the case against the accused beyond reasonable doubt and acquit him. The prosecution did not wish to submit but relied on the evidence on record.

I have examined with care the entire evidence. It is clear from the evidence of PW1 that his mother and the accused used to drink often and at any time. On the day of the incident, both were drunk as testified by PW2 their neighbour and the accused. PW2 was not able to hear most of the words uttered by both the accused and the deceased during their quarrel but he could hear the few Kiswahili words uttered between them. He heard the accused say "*umenikata*" and deceased say "*umenidunga*". This evidence is confirmed by other witnesses that both the accused and the deceased had injuries. Dr. Shako who examined the accused testified that "***Physically he had multiple old healing wounds on the upper and lower limbs and right side of the abdomen.***" She testified that the accused had a single fresh wound measuring 4cm long. It had been sutured.

Although from Dr. Shako's evidence it is not clear whether the healing wounds on the upper and lower limbs were inflicted on the same day with the fresh wound that had been stitched, I have no doubt in my mind that the accused sustained an injury during the altercation with the deceased. On the other hand, the deceased died due to excessive loss of blood. PW4 testified that had the wound been attended to urgently deceased's life could have been saved.

The defence counsel is raising the defences of provocation and intoxication. Counsel cited **Republic v. Nicholas Ngugi Bangwa [2015] eKLR**; **Republic v. Victor Shioso Khali [2013] eKLR** and **Roba**

Galma Wario v. Republic [2015] eKLR in support of the defences of provocation and intoxication. I have read the authorities and considered the evidence and submissions. The offence of murder is proved when the prosecution tenders evidence to prove death of a person as a result of an unlawful act or omission by the accused with malice aforethought. Malice aforethought is defined under Section 206 of the Penal Code to include intention to cause death or grievous harm to the person whether that person is the one killed or not.

Section 207 of the Penal Code 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. Provocation is defined under Section 208 (1) of the Penal Code as follows:

The term “provocation” means and includes, except as hereinafter stated, 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 relation, or in the relation 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.”

I have considered this provision of the law and Section 17 of the Penal Code on self defence. It is true as submitted by the defence that self defence is an absolute defence to a criminal charge as it absolves the accused person from criminal liability.

The issue is whether the actions of the accused are within the purview of the two defences. It is an established fact that both the accused and the deceased sustained injuries. There is no eye witness as to what exactly happened. PW2 could only hear part of the words uttered during the confrontation between the two of them. The accused does not deny that an altercation and verbal insults were uttered. He does not deny that the deceased was injured but he states that he is not the one who stabbed the deceased but that she was injured when both of them fell as they struggled over the knife.

Having carefully considered the evidence of the accused, I am doubtful that he was sleeping when the deceased came home. They were seen by PW2 arguing. The argument escalated and PW2 heard the words “*umenikata*” and “*umenidunga*”. From this evidence the accused was attacked first but he was not sleeping in a drunken stupor as he wants this court to believe. This attack with a knife must have provoked him to some action to either snatch the knife from the deceased to use it on her or to struggle to snatch the knife from the hands of the deceased in self defence in order to prevent further attacks. There is no evidence to what exactly happened. My considered view is that the accused did not form the intention to kill the deceased. He also suffered a cut wound which was serious enough to require stitching. Perhaps this wound would have been fatal had he not been immediately attended to. The deceased would have survived had she been urgently attended to.

While I find that the death of the deceased occurred as a result of a stab wound, I do not have sufficient evidence to show what exactly happened, whether the accused stabbed her or she was injured as they struggled over the knife as testified by the accused. I am persuaded to find that the struggle over the knife was in self defence. I also find that the accused did not intend to cause death or grievous harm on the deceased. His action of crying when he learned that the deceased had died and his action of looking for help after the deceased was injured go to testify to this. In my view the events of that day are unfortunate events resulting from the drunken state of both the accused and the deceased. The benefit of doubt goes to the accused in this case.

In conclusion, it is my finding that the prosecution has failed to prove the offence of murder against the accused person beyond reasonable doubt. The accused will benefit from the doubts created by the evidence. I hereby enter acquittal against him under Section 306 (1) of the Criminal Procedure Code. He is free to go home and enjoy his freedom unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered this 27th day of April 2017.

S. N. Mutuku

Judge