



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HIGH COURT CRIMINAL CASE NO. 79 OF 2015**

**REPUBLIC .....PROSECUTION**

**VERSUS**

**CATHERINE WANJIRU NGERE.....ACCUSED**

**JUDGEMENT**

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 8<sup>th</sup> day of August, 2015 at Gachororo area in Juja, within Kiambu County the accused murdered one Peter Ngere Ngugi.”**

2. The prosecution called a total of five (5) witnesses.

3. PW1 was the mother of the deceased. She testified that on the 8<sup>th</sup> day of August 2015, she realised that her son the deceased herein and his wife the accused herein were quarrelling. The accused visited her house and informed her of the quarrel and indicated to her that she wanted to leave. The accused left with her child after which she left for her house which was about 7 metres away.

4. PW1 stated that minutes later, the accused returned to her house while holding the deceased who was bleeding from the hand. On reaching at PW1’s door, the accused threw the deceased at the door and stood there just staring at the deceased. PW1 stated that the deceased then asked **“is this how people die?”** and that is when she started screaming for help. PW1 testified that she later went to the deceased house where the incident had taken place and saw blood at the entrance to his house. On getting into the house, PW1 described the inside as normal and having no traces of blood. PW1 further stated that the accused did not deny stabbing the deceased the entire duration they were with her after the incident.

5. PW3 was working at PW1’s house on the 8<sup>th</sup> of August 2015 when this incident occurred. She stated that at around noon, she was in the kitchen cooking when she heard screams from outside. She testified that she went outside to check and saw the deceased bleeding profusely from one hand. PW3 stated that at that time, the accused and deceased were holding each other as the accused demanded for a phone from the deceased. PW3 said that she left the compound and went to search for PW2 who was a brother to the deceased so that he could help. On coming back, PW3 said that she found the deceased lying on the ground.

6. PW4 was DR. Johansen Oduor, the Chief Government Pathologist who conducted the post mortem on

the deceased body on 11<sup>th</sup> August, 2015. PW4 testified that externally the body was in a blood stained shirt and a bandaged right arm at the elbow area. PW4 stated that upon removing the bandage, the body had an injury on the right elbow which was deep revealing torn muscles and torn blood vessels. PW4 described the body as being very pale which was indicative of significant loss of blood.

7. PW4 stated that the body had bruises under the skin of the left arm above the wrist joint and on the right arm at the wrist joint below the elbow joint. PW4 stated that internally, the body had torn blood vessels on the right forearm at the elbow joint which were major vessels to the heart. He testified that as a result of the tearing of the blood vessels, the heart pumped the blood to the outside leading to significant loss of blood. PW4 concluded that the deceased died as a result of bleeding caused by penetrating trauma to the right arm. PW4 produced his report as P. Exhibit 1.

8. PW4 ruled out a fall as the cause of the injuries and stated that the inner part of the arm especially at the elbow joint where the injury was could not have been caused by a fall on an object. He further stated that the bruising marks below the wrist joint were defence injuries as the deceased tried to defend himself.

9. PW5 used his vehicle to transport the deceased to hospital upon being requested by the deceased family. He stated that when he saw the deceased, the deceased had two bandages wrapping the upper and lower arms of his right hand. PW5 testified that he was directed by the deceased father to proceed to the police station before they could head to the hospital. He stated that upon arrival at Juja Police Station, they were advised to rush the deceased to hospital which they did. On arrival at Gatundu District Hospital, they were informed by the doctors who attended the deceased that he had passed on.

10. The prosecution closed their case at this stage having failed on numerous occasions to avail the Government Chemist Report and the Investigating Officer to testify.

11. The accused opted to give an unsworn statement in her defence. She stated that on the 8<sup>th</sup> day of August 2015, which was on a Saturday the deceased had woken up early and left home. The accused stated that the deceased returned at around 8.00am while drunk and that he demanded to be given food. The accused stated that having no alternative, she decided to give the deceased the food meant for the children and soon thereafter left for PW1's house. While at PW1's place, the accused said that she sent her eldest child to go and pick her phone from their home. She said that the child came back alleging the father had refused to open up the door. The accused stated that she decided to go pick it up herself. She said that when she tried to get into the house, the deceased physically prevented her from entering.

12. The accused stated that she decided to go to PW1's house and put down her child as a protective measure before going back to struggle with the deceased in order to get her phone. She stated that she returned back to face off with the deceased and as she tried to gain entry into her house to get her phone, the deceased kicked her and threw her outside the house where she fell. She stated that the deceased in turn fell inside the house and when she went to check on him, she found him bleeding from the hand. She testified that she helped him stand up and together they proceeded to the PW1's house who started screaming for help on seeing the deceased bleeding. The accused stated finally that she had no intention of killing her husband as he was the father of her children and that she loved him very much.

13. The defence counsel Mr. Muchiri in his submissions urged that the deceased was the first to assault the accused and that the scuffle did not end there. Counsel urged that the incident happened and that the accused acted in self-defence as she admitted in her defence that there was a scuffle. Counsel urged that malice aforethought was none existent as the accused had not pre-meditated the action and that she helped the deceased by taking him to his mother.

14. Counsel further urged that from the facts given by the prosecution and defence and in the absence of the Scene of Crime and Government Chemist Reports, there was doubt as to the weapon used to cause the injury which caused death. Counsel urged that the accused did not run away but proceeded to Juja Police station where she reported the incident. Counsel urged the court to consider that two (2) witnesses were not called to testify, the Government Chemist Analyst and the Investigating Officer. Counsel finally urged the court to acquit the accused but in the event the court was convinced otherwise, it should find

that there was lack of malice aforethought and follow the due process.

15. Learned counsel for the Prosecution Ms. Njuguna in her submissions urged that the act of the accused taking the child to PW1's house shows that the accused was prepared to physically injure the deceased. Counsel urged that the injuries suffered by the deceased were very severe and any reasonable person would have realised the injury would cause death. Counsel further urged that PW3 testified that the accused led her to where she had thrown the bottle which was the murder weapon. Finally counsel urged that the accused defence was inconsistent with the injury suffered by the deceased.

16. 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”**

17. 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.”**

18. Having considered the evidence adduced by the parties herein I find these issues are not in dispute. It is not in dispute that the accused and deceased were husband and wife and that they lived together near PW1's house. It is not in dispute that PW1 was the mother of the deceased and as such a mother in-law to the accused. It is not in dispute that there was a scuffle and a disagreement between the deceased and accused on the day in question. It is not in dispute that the deceased died of exsanguination due to penetrating force trauma at the right hand elbow.

19. The issues which I find in dispute are:

**I. Whether the prosecution has established who occasioned the fatal injury on the deceased.**

**II. Whether the prosecution has established that the accused had the malice-aforethought requisite for the murder offence.**

**III. Whether failure by the prosecution to call the government analyst and the investigating officer was detrimental to their case.**

**IV. Whether the accused defence is plausible and reasonable in all the circumstances of the case.**

20. There was no eye witness in this case, and therefore the prosecution's case that the deceased was stabbed did not receive any direct evidence from any of the prosecution witnesses. The prosecution relies

on circumstantial evidence and on the post mortem findings by the Pathologist, Dr. Johansen Oduor, PW4 and other evidence by PW1 and PW3 who were the people around at the alleged scene during the incident.

21. PW1 and PW3 both stated that the accused was having a scuffle with the deceased in their house before they saw the deceased bleeding. They both stated that the accused and the deceased were all alone outside their house when they were having this scuffle.

22. PW4's evidence was to the effect that the deceased died due to excessive loss of blood from the injury that he had suffered on his elbow. According to PW4, the injury was so deep that the blood vessels were torn resulting in excessive blood loss. PW4 explained that this type of injury could not have been caused by a fall on an object especially considering that it was on the inner side of the elbow joint. PW4 made a finding that the penetrating force trauma was caused by a sharp edged object.

23. The accused admits that there was a scuffle over her phone between her and the deceased. The accused however does not give an explanation of how the penetrating force trauma on the deceased hand was occasioned. All she said was that the deceased kicked her and that both of them fell down.

24. The finding by PW4 that the injury on the deceased was a stab wound caused by a sharp edged object places a statutory burden upon the accused person to explain how the injury on the deceased was caused. This is given the fact that they were only the two of them when the injury was sustained. That evidence places upon the accused a statutory burden to discharge a rebuttable presumption as spelt out under **sections 111(1) and 119 of the Evidence Act**. These sections stipulate as follows:

**111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."**

**"119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."**

25. The accused does not dispute being involved in a scuffle with the deceased. She does not deny having helped him when she realised he had suffered a wound. However in an attempt to explain how the injuries were occasioned on the deceased, the accused stated that she fell down after the deceased kicked her and saw him equally fall down. She stated that it was only after she got up and checked on the deceased that she realized he was bleeding. The question is how the deceased got stabbed on the inner forearm and to such great depths.

26. In the Indian case of **Trimukh Maroti Kirkan v. State of Maharashtra [(2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80]** Supreme Court of India held as under: (SCC p. 694, para 22)

**" Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any**

**explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.”**

27. The accused and the deceased were husband and wife. The incident that led to the death of the deceased happened where the two resided. From the evidence adduced, it is evident that the two were alone at their place of residence quarreling and struggling over a phone. The only person who can explain how the deceased met his death is therefore the accused. I find that the explanation she gave in her evidence fell short of discharging the statutory burden under **section 119** of the **Evidence Act**.

28. The prosecution did not avail evidence of a potential weapon that was or might have been used to cause the injuries on the deceased. None of the witnesses described any weapon that the accused might have used to stab the deceased. In **Ekai V. Republic (1981) Klr 569** it was held

**“that failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon.”**

29. Similarly in **KARANI V. REPUBLIC (2010) 1 KLR 73**. At page 79, the Court delivered itself as follows:

***“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit”.***

30. I find that the failure to adduce the probable murder weapon is not fatal to the prosecution case given the evidence adduced by PW4 that the injury suffered by the deceased was occasioned by a sharp edged object. It is also in evidence that the deceased was taken from the scene to the hospital before the police visited it. I further find that the failure to produce the murder weapon by the prosecution can be explained by the fact that the accused had the opportunity to dispose of the weapon before presenting herself to the police.

31. Counsel for the defence urged that the prosecution failed to call all the crucial witnesses in this case. I do agree with the learned counsel. There was need to avail the Government Chemist and the Investigating Officer.

32. In **BUKENYA & OTHERS 1972 EA 542** LUTTA Ag. VICE PRESIDENT held:

**“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”**

33. Though it is upon the prosecution to avail all the witnesses they deemed necessary, they must make sure the witnesses availed are relevant and useful in establishing the truth. In the instant case, two vital prosecution witnesses were not availed. However, I do find that the witnesses the prosecution availed sufficiently established the truth in this case. Even though the two witnesses not called were vital, there was sufficient evidence to assist the court determine the matter. Nothing turns on this point.

34. The other issue is whether the accused defence was plausible. I have set out the accused defence in detail earlier in this judgement. I find that the accused does not deny being involved in an altercation with the deceased. However, I find her explanation as to how the deceased got the injury on his hand neither believable nor reasonable. I find that the accused evaded to explain exactly how the deceased was injured.

What the accused stated cannot stand in the face of the prosecution evidence and in particular the expert evidence of PW4.

35. PW4 has clearly stated that the injury on the inner part of the forearm in particular on the elbow joint could not have been caused by a fall on an object but a sharp penetrating object with force trauma. It means the deceased was stabbed on his elbow joint with a sharp object.

36. There were other defensive injuries that PW4 noted on the deceased body. The accused failed to explain how the deceased suffered all these injuries yet she was the only person with the deceased when they were physically solving their arguments. I find that the accused has failed to give a reasonable explanation as was required of her on a balance of probabilities.

37. I find that the prosecution has established that the accused and deceased were having an altercation before the deceased started bleeding. The prosecution has succeeded in establishing that the two were alone when the incident occurred. They have further established that the injury suffered by the deceased could not have been inflicted from a fall. Having done so, the prosecution has shifted the burden to the accused person as she is the only person who can shed light on the incident in question. Having failed to give a reasonable explanation as I have found in this judgment, I find that the court is justified in drawing a conclusion on the basis of the evidence by the prosecution that it was the accused who stabbed the deceased following which he succumbed to the injury inflicted.

38. Final issue is whether the prosecution proved malice aforethought and the motive for the commission of this offence. I find it was clear from the evidence available before this court that there was an argument between the accused and the deceased few moments before the deceased was stabbed. I find that from the accused conduct prior to and after the incident she stayed calm and sought help from PW1. The accused only confronted the deceased after he had refused to give her his phone. All these facts considered cumulatively point to a person who had not premeditated the offence. I find that the prosecution failed to prove that the accused had formed an intention to cause death or grievous bodily harm to the deceased.

39. I find that the prosecution has failed to establish the charge of murder to **section 203** of the **Penal Code**. I find that the prosecution has established the lesser charge of manslaughter contrary to **section 202** of the **Penal Code**. Consequently I substitute the charge against the accused from murder contrary to **section 203** of the **penal code** to manslaughter contrary to **section 202** of the **Penal Code**. I find the accused guilty of the lesser charge of manslaughter and convict her accordingly under **section 322** of the **Criminal Procedure Code**.

**DATED AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY, 2017.**

**LESIT, J**

**JUDGE**