



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 27 OF 2015

REPUBLIC PROSECUTOR

-VERSUS-

CHARLES GATI RANGE.....ACCUSED

JUDGMENT

1. **CHARLES GATI RANGE**, the Accused person herein, was charged with the murder of his girlfriend **ESTHER BOKE** (hereinafter referred to as '**the deceased**') on the 04/08/2015 at Remanyanki village in Kuria East District within Migori County in the Republic of Kenya.

2. The Accused person denied committing the offence and the case was set for hearing with seven witnesses testifying. When the accused person was placed on his defence he admitted that there had been a scuffle between the deceased and himself inside the house of the deceased over whether a cock or a hen was to be slaughtered for supper and that they were both drunk. During the struggle, the deceased fell and was injured by the knife she had on one of her hands. The accused person then left for his home. He only learnt of the death of the deceased on the following day and he voluntarily surrendered to the police at Remanyanki AP Post.

3. The witnesses who testified in this case were a son to the deceased one **ONESMO MATHIAS** as **PW2**, the **Government Chemist** as **PW1**, the Doctor who conducted the post-mortem examination on the body of the deceased one **Dr. SAMMY MWATELA RUWA** as **PW3**, the Assistant Chief of Kebarati Sub-Location within which the deceased lived one **JOSEPH MWITA SENSO** as **PW4**, a neighbour to the deceased one **NYABOKE CHACHA MOHABE** as **PW5**, a wife to a brother of the late husband of the deceased one **AGNES MOHABE STEPHEN** as **PW6** and **No. 81670 Cpl. HELEN KOECH** of DCI office Kuria East District who was the investigating officer as **PW7**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court.

4. All the prosecution witnesses did not witness how the deceased died. They all severally only saw the lifeless body of the deceased either at her home where she was lying on the front of the door of her house with her body drownsed in blood or in the mortuary except PW1. When PW2 was woken up in the night of 04/08/2015 by the screams of his brother **Laban** (not a witness) and told that the deceased had been killed at her home, he rushed there and confirmed so. He saw a blood-stained broken kitchen knife and one plastic shoe besides the body of the deceased. He observed that the deceased was injured on the left side of her body and was bleeding profusely. He then called and informed PW4 who in turn reported the matter to the Area Chief, the Remanyanki Administration Police Post and the Nyamtiro Police Post. Likewise, when PW4 visited the scene in the morning of 05/08/2015, he also saw the deceased lying dead outside the door of her house having bleed so much. He observed the deceased carefully and even turned her round and saw one deep stab wound on the back. He also saw the broken knife and the plastic shoe.

The scene as described above is what PW5 also witnessed.

5. When the police arrived at the scene on 05/08/2015 including PW7, they took photographs and searched the house of the deceased. They entered inside the house and found the household items scattered all over confirming that there had been a serious disturbance. They collected the body to Migori County Referral Hospital mortuary where it was preserved and a post mortem examination conducted by PW3 after the body of the deceased had been identified by PW5 and PW6. The police also collected some exhibits at the scene including the broken knife and a pair of plastic shoes which were said to belong to the accused person. They also proceeded to Remanyanki Administration Police Post and collected the accused person who had surrendered there. The post mortem examination confirmed that the deceased had died out of massive loss of blood from a single deep stab wound at her back which perforated the left lung. PW3 filled in the Post Mortem Report which he produced in evidence.

6. PW7 investigated the case. When she visited the scene, she drew a sketch map and interviewed several witnesses. She also recorded their statements and witnessed the post mortem examination on the body of the deceased. She collected blood samples of the deceased and the accused person and forwarded them to the Government Chemist Laboratories in Nairobi alongside several blood-stained clothes of the deceased and the accused person, the knife and the blood-stained shoe for analysis. PW7 prepared an Exhibit Memo Form which accompanied all the samples and the clothes. She also escorted the accused person to Migori County Referral Hospital where the accused person was assessed and found to be mentally fit to stand trial. The Mental Assessment Report was prepared and produced by PW3. PW7 then preferred the charge against the accused person and produced the broken knife, the blood-stained clothes, one blood-stained plastic shoe and another plastic shoe which had no blood stains, the statement of Laban and the photographs as exhibits.

7. PW1 testified that the samples and several pieces of blood-stained clothes were forwarded to their offices in Nairobi for analysis and after the analysis it was proved that the blood stains on the knife, the top garment and the shoe were of the deceased and the bloodstain on the trouser of the accused person matched the blood of the accused person. A Report, the DNA Profile Analysis and the Exhibit Memo were produced as exhibits by PW1.

8. The accused person tendered the brief sworn defence which I captured hereinabove.

9. Based on the foregone evidence, this Court is now called upon to decide on whether the accused person is guilty of the charge of murder.

10. The offence facing the accused persons is an information of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63 of the Laws of Kenya. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

(a) ***Proof of the fact and the cause of death of the deceased;***

(b) ***Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the ‘actus reus’ of the offence;***

(c) ***Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the ‘mens rea’ of the offence.***

11. The first ingredient has two limbs. As to whether the deceased indeed died, the prosecution availed PW2 to PW7 in such proof. I am hence satisfied that indeed the deceased herein died.

12. On the cause of the death of the deceased, PW3 produced a Post Mortem Report which he prepared upon conducting a post mortem examination on the deceased. The said report confirmed that the deceased had died out of massive loss of blood from a single deep stab wound at her back which perforated the left lung. Since there is no any other evidence contradicting that of PW3 on the cause of death of the

deceased, this Court so concurs with that medical finding.

13. I will now turn to the second ingredient as to ascertain whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person. Whereas the accused person admits that there was a scuffle inside the house of the deceased between the deceased and him, he denies that he inflicted the fatal injury on the accused person. According to the accused person, the deceased fell on the knife she held in one of her hands and was injured. The accused person however admits pushing the deceased and he saw the deceased fall on the knife. Although it appears that the evidence of the accused person is the only eye-witness account of what happened leading to the fatal injury, I will still subject that evidence to appropriate evaluation. It was only one stab wound. It was at the back of the deceased. It was so deep that it penetrated and perforated the left lung and severed several internal tissues. With such an injury, it is evident that immense force was applied on the knife. If one is to take it that the deceased fell on the knife then it required someone to firmly hold the knife for the deceased to fall on it to be able to cause such an injury. That cannot be the case here. The only reasonable inference is that it was the accused person who stabbed the deceased from the back and escaped leaving her dead. I hence have no hesitation in finding that it was the accused person who, by way of an unlawful and unjustified act, caused the death of the deceased. The second limb is also answered in the affirmative.

14. On the third ingredient, I as well have no hesitation in finding that no malice aforethought was proved in this case. The incident was an isolated one. There was no evidence of running bad blood between the deceased and the accused person. They were lovers and had lived together for 6 years. Their relationship was known even by the children of the deceased and they all had no problem with that as their father was long dead. There is also the issue that both of them were drunk and picked up the quarrel on which chicken to be slaughtered. In those circumstances, I am not satisfied that malice aforethought was demonstrated.

15. The foregone finding is guided by **Section 206** of the **Penal Code** which defines '**malice aforethought**' and the following decisions of the Court of Appeal. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975)AC 55”. (emphasis added).

16. In the case of **Nzuki vs. Republic (1993)KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly

strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed: -

“There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”

17. The foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, it is clear that the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

18. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

19. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 29th day of June 2017.

A. C. MRIMA

JUDGE