



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NUMBER 14 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH KAGAI NYAMBURA.....ACCUSED

JUDGMENT

Joseph Kagai Nyambura, hereinafter referred to as “the accused”, is charged with the murder of Anne Wairimu Nduati, hereinafter referred to as “the deceased”, contrary to Section 203 as read with Section 204 of the Penal Code. The offence is alleged to have been committed on 18th day of December 2014 at Mustard Estate in Eastleigh in Starehe Sub-County in Nairobi County.

To support the case against the accused, the prosecution called five (5) witnesses in total. The summary of their evidence is that on 18th December 2014 the deceased called Joseph Senare (PW3) who was her friend and told him to rush to her house. Joseph did so and on arrival he could hear loud music in the one-roomed house where the deceased lived. In company of neighbours they looked for the caretaker of the building Collins Otieno (PW2). The door to deceased’s house was locked from inside. They forced open the door and gained entry. They found the deceased and the accused lying on the ground with accused on top of the deceased. Both were injured and were bleeding. Both appeared dead to Joseph and Collins. The matter was reported to the area Chief and to the police. The accused was rushed to St. Joseph’s Clinic nearby. CPL Lillian Gacheri (PW4) from Pangani Police Station was assigned to attend to the matter. She, in company of other police officers, arrived at the scene and found a crowd of curious on-lookers gathered outside the house. On entering the house they found the deceased lying in a pool of blood. A blood-stained knife was found near the deceased. CPL Gacheri did not find the accused at the scene. She was informed that he had been taken to the clinic. She reported the matter to her superiors and called scenes of crime personnel. She also went to the clinic where the accused had been taken and saw him. He was critically injured. He was referred to Kenyatta National Hospital where he was admitted until 23rd January 2015 when he was discharged.

The body of the deceased was moved to the City Mortuary. Her mother Jane Wangui Nduati (PW1) was informed. She travelled to Nairobi to the City Mortuary where she confirmed that her daughter had died. The body was examined by Dr. Dorothy Njeru who compiled her findings in the post mortem report. The report was produced in evidence as Exhibit 3 by the Investigating Officer CPL Richard Wesonga because the doctor was not available. Defense Counsel Mrs. Kinyori did not object to the Investigating Officer producing the Post Mortem Report.

The accused told the court in his defense that the deceased was his wife of three (3) years; that he did not spend the night at home on 17th December 2014; that he went to Club Image in Thika with friends on 17th December 2014 at 7.00pm and took alcohol until morning; that he went home in the morning of 18th

December 2014 and explained to the deceased where he had been overnight but she accused him of having been with prostitutes; that to avoid a confrontation he told her that he was drunk and that she should allow him to go to bed so that they could talk about the matter when he woke up; that he went to bed but while sleeping he was woken up by stabs on his chest. He testified that he struggled with the deceased to dislodge the knife from her but she continued stabbing him and that in the course of the struggle the deceased was stabbed. He stated that he got dizzy and fell down and when he regained consciousness he found himself in hospital. He said that he stayed in hospital for a long time and that he learned of the death of the deceased when in hospital.

Mrs. Kinyori for the accused submitted after the conclusion of defense case that there are no witnesses in regard to what happened at the scene and that the only available evidence on that is the evidence by the accused person. She submitted that the accused acted in self-defense because his life was in danger after being attacked by the deceased and that the law; that self-defense is an absolute defense. Counsel cited the case of **Ahmed Mohamed Omar & 5 others v Republic Criminal Appeal No.414 of 2012 reported in [2014] eKLR** and **Republic v Joseph Macharia Waweru [2015] eKLR**. She submitted that the accused in this case did not have time to escape the attack; that he was drunk; that the force used by the accused on the deceased who was armed with a knife was not disproportionate to the nature of the attack on him; that he had not time to reflect and that whatever happened after he was stabbed was not premeditated.

Mrs. Kinyori further submitted that the accused was drunk at the time and that the defense of intoxication is available to him. Counsel referred this court to **Republic v. Victor Shioso Khali [2013] eKLR** in reference to the defense of intoxication.

On the other hand the prosecution submitted that the case has been proved beyond reasonable doubt that the accused killed the deceased with malice aforethought. It was submitted that the accused had knowledge that the act of stabbing the deceased would probably cause death or grievous harm to the deceased; that the available evidence incriminates the accused. The prosecution urged the court to find the offence proved and convict the accused.

The crime of murder is created by Section 203 of the Penal Code. It is committed when a person who of malice aforethought causes death of another person by an unlawful act or omission. Malice aforethought is defined under Section 206 of the Penal Code and includes the intention to cause the death of or to cause grievous harm to another person. The penalty for murder is death. The prosecution bears the burden of proving murder. The prosecution must prove the guilty act (*actus reus*) and the guilty mind (*mens rea*). These are the two main ingredients of murder that must be proved beyond reasonable doubt. Broken down further the two main ingredients of murder translates into proof that death of a human being has occurred as a result of an unlawful act or omission; that the unlawful act or omission was by the person charged in court and that in so acting or in so omitting to act, the person had malice aforethought as defined under Section 206 of the Penal Code.

I understand the issues for determination as follows:

- (i) Whether death of a human being has occurred.
- (ii) Whether the accused person before this court caused that death by an unlawful act or omission.
- (iii) Whether the accused possessed malice aforethought.
- (iv) Whether the defense of intoxication and self-defense is available to the accused.

There is evidence to show that the deceased was found injured in her house. Her body was moved to the City Mortuary where her mother Jane Wangui confirmed it was the body of her daughter the deceased. Dr. Dorothy Njeru examined the body of the deceased at the City Mortuary on 24th December 2014. According to the Post Mortem Report (Exhibit 3) the deceased sustained multiple stab wounds on the upper limbs across the elbow, left anterior chest wall, left and right scapular region as well as fractured

ribs on the left anterior chest wall. The doctor confirmed that the cause of death was chest injuries due to penetrating sharp force trauma. This evidence proves beyond reasonable doubt that Anne Wairimu Nduati died as a result of injuries she sustained. Evidence by the prosecution is that the deceased was injured on 18th December 2013 and died at the scene.

From the evidence from both the prosecution and the defense, there is no dispute that the accused and the deceased had an altercation on 18th December 2013. As submitted by the defense there is no evidence from the prosecution side as to what really happened inside that house other than what Collins the caretaker and Senare the deceased's friend told the court. It is the accused who provided evidence as to what happened in that house. In view of this evidence I have no doubt that the deceased was fatally injured as a result of a struggle between her and the accused that ensued inside their house that morning. The accused was not a stranger to the deceased. He referred to her as his wife of three years. Jane Wangui, the deceased's mother knew the accused. She had heard that her daughter lives with a man. She had met the accused at one time when she visited her daughter in Nairobi. It is therefore clear to this court that the two were in a relationship, whether husband and wife or boyfriend and girlfriend. It is however strange that the caretaker where the deceased lived, Collins, told the court that he did not know the accused. He told the court that he had let the room to the deceased in November 2014 and that he knew the deceased had a man, not the accused, who used to visit her. He identified that man as a Masai. Did the deceased entertain another relationship with another man? Senare told the court that the deceased was her friend and that he used to visit her. Is he the Masai man referred to by Collins? The deceased and Senare must have been close for her to call him that morning. This court does not have answers to these questions. This notwithstanding, this court has no doubts that the accused was involved in a struggle with the deceased and as a result of that struggle both sustained critical injuries. The deceased died but the accused survived. From the description of the incident, the deceased and the accused were involved in a vicious confrontation. Evidence by CPL Wesonga is that household items were scattered in the house. Collins and Senare described the scenario in that house. Both accused and deceased were lying on the floor in a pool of blood, with the accused on top of the deceased. Both witnesses thought the two were dead. Evidence shows that the accused was critically injured and could not walk or talk. He was carried to St. Joseph's Clinic. His condition could not be managed there and he was referred to Kenyatta National Hospital. CPL Wesonga and CPL Gacheri told the court that when they saw the accused he had stab wounds to the chest. CPL Wesonga told the court that the accused was unconscious when he saw him at St. Joseph's Clinic.

There is no evidence from the prosecution on the confrontation between the accused and the deceased. This gap was filled by the defense of the accused. He said he came home drunk from overnight drinking at Club Image Thika and this caused the confrontation with the deceased accusing him of having been with prostitutes. I have no other evidence to counter what the accused has told the court in his evidence though not tested on cross-examination. He testified that he told the deceased to let him sleep off his drunkenness until a time when they could discuss the matter and he then went to sleep. He said he was woken by pain of stabbing to his chest. The evidence that the accused was injured has been confirmed by Collins, Senare, CPLs Gacheri and Wesonga. It is also confirmed, medically, by Dr. Maundu in the P3 Form produced in court as Exhibit 2. This Form was produced by the Investigating Officer CPL Wesonga with approval of the defense. The doctor found six (6) stab wounds on the chest. As I have stated, there is no evidence by the prosecution as to what happened inside deceased's house. This court therefore has nothing on record to counter evidence by accused that he was attacked and acted in self-defense. Both accused and deceased sustained multiple life threatening wounds. Perhaps had help not arrive immediately, the accused would also have died. It is therefore correct, in my view to state that the accused was faced with a serious and dangerous attack.

The law on self-defense is found in Section 17 of the Penal Code which states that:

“Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defense of person or property shall be determined according to the principles of English Common Law.”

The Court of Appeal, in **Ahmed Mohammed Omar & 5 others v Republic in Criminal Appeal No.**

414 of 2012 reported in [2014] eKLR, stated that the Common Law principles relating to self-defense referred to under Section 17 of the Penal Code above are contained in the Privy Council decision in **Palmer v R [1971] A. C. 814** which decision was approved and followed by the Court of Appeal in **R v McInnes, 55 Cr. App. R. 551** where the court stated thus:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.Some attacks may be serious and dangerous. Others may not be. if there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defense..... The defense of self-defense either succeeds so as to result in an acquittal or it is disproved, in which case as a defense it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

In view of what is stated in this case and given the evidence on record it is my view that the accused was faced with what the court in the Palmer case above described as a **serious attack that put someone in immediate peril** and that **the moment was one of crisis for someone in immediate danger**. This court must, as dictated by law, work with the available evidence. Without evidence to the contrary, I have no reason to doubt that the accused acted in self-defense. The element of self-defense often merges into provocation. In my view, in cases someone is attacked suddenly with no chance of avoiding the attack, quick action is called for in defense of a person or property. The victim of that sudden attack has no opportunity to act reasonably but survival instinct kicks in and in that heat of moment self-control is absent.

In the **Republic v Joseph Macharia Waweru High Court Criminal Case No. 58 of 2010 reported in [2015] eKLR**, the court citing with approval **Mungai v Republic (1984) KLR 85** stated that:

“No doubt this element of self-defense may, and, in most cases will in practice merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defense of person or property or as acts done under the stress of provocation. The essence of crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.”

However, that is not all. In the **Joseph Macharia Waweru** case cited above, the court cited with approval **Mokwa v Republic [1976-80] 1KLR 1337** where the Court of Appeal stated that:

“Where self-defense is successfully raised as a defense to a charge of murder, a verdict of manslaughter on the ground that excessive force was used in self-defense is only open to the court if the prosecution discharged the onus of showing that the accused had time for reflection and that he could have counted and aimed the blows which he inflicted.”

The burden in a case where the defense is raising self-defense, the burden of proof does not shift from the prosecution. It is for the prosecution to prove that the accused is guilty of the crime of murder. The duty of the accused is to lay before the court facts upon which the defense of self-defense is based in order to enable the court and the prosecution to understand the basis of such defense. It is for the prosecution to establish that the accused was not acting in self-defense (See **Chan Kau v R (2) (1955) W. L. R. 192**).

I have carefully considered the evidence availed to this court. I find no evidence to prove malice aforethought on the part of the accused. I find that the prosecution has not adduced evidence to establish that the accused, in stabbing the deceased, was not acting in self-defense. He sustained life-threatening injuries and he could have died as well had help not arrived soon enough. I agree with the defense, in the absence of evidence proving otherwise, that he acted in self-defense and that the attack on the deceased was not out of proportion to what was necessary under the circumstances the accused was faced with.

I have considered the defense of intoxication. The evidence by the accused on this defense may or may not be true. However, given the circumstances, this court gives the accused the benefit of doubt. In my view even without the defense of intoxication, this case falls short of proof beyond reasonable doubt.

Unlawful death of the deceased and the identity of the person who inflicted the fatal injuries causing that death have been proved beyond reasonable doubt. The prosecution has however failed to prove that the accused acted with malice aforethought or that he did not act in self-defense. Justice is a double-edged sword cutting both sides. Both the accused and the deceased deserve justice from this court. The deceased and her family deserve justice by punishing the person who killed her and the accused deserves justice in according him a fair trial. Fair trial dictates that a man should not be sent to the gallows where there is no evidence to prove to the standard requires that he committed the offence. In our case the accused has successfully raised the defense of self-defense and this court finds that the offence of murder cannot be reduced to that of manslaughter because the prosecution has not discharged the onus of proving that the accused had time for reflection before attacking the deceased.

In conclusion therefore this court finds that the accused is not guilty of the offence of murder. Consequently, the accused is hereby acquitted of the offence of murder. He has been in custody since January 2015. I order that he be set at liberty forthwith unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered this 19th day of June 2017.

S. N. MUTUKU

JUDGE