



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

HCCRC NO.106 OF 2015

LESIT, J

REPUBLIC.....PROSECUTOR

VERSUS

CAROLINE WAMBUI MUCHIRI.....ACCUSED

JUDGMENT

1. The accused **CAROLINE WAMBUI MUCHIRI** is charged with Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are:

“On the 13th day of November 2015 at Majengo in Pumwani Sub-county within Nairobi County murdered PETER NJAU MBURU.”

2. The prosecution called a total of 10 witnesses. On the other hand the accused gave an unsworn statement in defence. She did not call any witness.

3. The facts of the prosecution case are that on 13th November 2015, PW1 was asleep in her house at Majengo in Gikomba within Nairobi County when a few minutes to midnight the accused knocked on her door. The accused was carrying her clothes and she reported to her that she had stabbed her husband after a disagreement and that she wanted to go away.

4. PW1 took action by first locking the accused inside her house. She then went to her neighbor PW2 and called her for her to listen to what accused had to say. When both PW1 and 2 heard the accused repeat her story this time saying that she had stabbed the deceased to death, the two women locked the accused in PW1's house then left intending to go to the Chief's Camp to inform the police.

5. As they were on their way to the police station, they met a police officer PW5 who was on spiv duties within Majengo slums Shauri Moyo. When PW5 heard the accused story from PW1, he went with them to PW1's house where he found a terrified accused who narrated to him what she had done. He then went to the house where the accused lived where he found the deceased lying dead on a sofa. PW5 said that blood was still oozing from a spot under his T-shirt.

6. PW5 reported the matter to his Duty Officer Sgt Kizito PW8. PW8 in turn called the Crimes Scene Officer, PW4, who took photographs of the deceased and of the scene. The photographs and his Report were P.Exhibits 1 and 2.

7. The knife was recovered at the scene of murder by PW8 and was P.exh.4. He also recovered the T-shirt won by the deceased at the time of incident as P.exh.5. The T-shirt was removed from the body of the deceased at the scene by a Crimes Aid Police Officer PW9. PW9 was on duty assisting the Duty officer of the night, PW8. PW9 also handed over the exhibits to the Investigating Officer.

8. The T-shirt P. Exhibit 5 and the knife P. Exhibit 4 were submitted to the Government Chemist for DNA profiling against the blood samples from the accused and deceased. The blood on both the knife and the T-shirt were found to belong to the deceased. The Government Chemist's Report was P.Exh.3 and was produced by PW7 who carried out the analysis.

9. The investigating officer in this case was PW10. He gave a summary of his investigations before producing by consent the post mortem on the deceased as P.exh.6. In the post mortem Report, Dr. Njeru who conducted the autopsy formed the opinion that the cause of death was chest injury due to penetrating force trauma.

10. The accused in her unsworn defence told the court that on the material day her husband the deceased in this case came home early and they even ate supper together. He then left their home only to return at 10p.m. while drunk. The accused stated that the deceased told her that he had returned with his sickness, that he was seeing a snake and a star and accused her of being the cause of all his problems.

11. The accused stated that the deceased started harassing her and then started beating her. That as he beat her, he threatened that he would kill her. She said that the deceased then strangled her until she lost breath. That when she could not breathe, she stretched out her hand to get any object to help herself with. When she got the object, she thrust it at him and immediately the deceased released her and at the same time shouted 'blood'.

12. It was the accused defence that she immediately left to look for help. She said that she first met with two young men who checked on the deceased condition after hearing her story. The two informed her that the deceased was dead. The accused stated that upon learning that the deceased was dead, she went to her neighbour, PW1 and told her what had happened. PW1 then called the police.

13. The accused was represented by Mr. Ogada advocate. Counsel urged the court to consider the accused unsworn defence which was the only evidence we have of how the deceased met his death. Counsel urged that from that defence the court should find that the accused believed that her life was in danger and acted in self defence.

14. He urged that the prosecution had not disproved self-defence. Counsel submitted that the fact the deceased died of a single stab wound, it was not consistent with a person stabbing another with pre-meditated intention to ensure death. For that proposition counsel heavily relied on **Ahmed Mohammed Omar & 5 others vs. Republic [2014] eKLR**. I have considered that case.

15. Ms. Onunga for the State in a rejoinder urged that the prosecution was not contesting the fact that there was no eye witness of the incident and that the only available evidence was that of the accused. Counsel urged that the only issue was whether the accused faced imminent danger of further attack to justify using the force she applied in stabbing the deceased. Learned Prosecution Counsel urged the court to find that the accused had not satisfied the court that she was in imminent danger or was averting an immediate danger or peril. For that proposition Counsel relied on **Njeru vs. Republic [2006] 2 KLR 46**.

16. I have considered the evidence adduced by the prosecution and accused defence. I have also considered submissions by both sides. Following the considerations of both the evidence and submissions, I find that the following are the issues not in dispute and the issues for determination.

17. The issues which are not in-dispute are that the accused and deceased lived together as man and wife. It is not in dispute that the accused is the one who stabbed the deceased as a result of which he died.

18.

The issues for determination are:

(1) Whether the circumstantial facts in this case are sufficient to establish the charge against the accused and whether the facts justify the drawing of an inference of guilt for offence charged.

(2) Whether the prosecution has proved malice and motive for the commission of this crime.

(3) Whether the accused defence of self-defence applies to the circumstances of this case and whether it is plausible and reasonable.

19. The accused is charged with murder which is an offence created under **section 203** of the **Penal Code** in the following terms:

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

20. The offence has three ingredients:

a) That the accused committed an unlawful act or omission.

b) That the unlawful act or omission caused the death of the deceased.

c) That at the time the accused committed the unlawful act or omission she had formed the necessary intention to cause death or grievous harm.

21. The onus of proof lies with the prosecution to prove the charge against the accused beyond any reasonable doubt. That burden never shifts to the defence unless prescribed by law. The prosecution must prove that the accused committed an unlawful act when she stabbed the deceased and that she caused him injuries that led to his death. The prosecution must prove that at the time the accused committed the unlawful act, she had formed the intention to cause death or grievous harm.

22. As to whether the circumstantial facts in this case are sufficient to establish the charge against the accused and whether the facts justify the drawing of an inference of guilt for offence charged. There was no eye witness account of the incident. The prosecution is relying on circumstantial evidence and the statement made by the accused to prosecution witnesses.

23. The key witness is PW1. This was the person the accused approached and reported to, what she had done after the incident. According to PW1, the accused told her that she had disagreed with Njau, her husband and had a fight with him in which she stabbed him, and that therefore she wanted to go away. PW1, in answer to cross examination described the accused as trembling and sweating at the time, and appeared remorseful for what had happened.

24. PW2's account was that the accused told her that she was fighting with the deceased when he took a knife. That in the process of fighting over the knife the deceased got stabbed. PW2 testified that at the time the accused spoke to her, PW1 was not nearby because she had to call her after which she suggested to PW1 that they lock the accused in her (PW1's) house then call police.

25. The accused in her defence admits that she went to PW1 and told her what had happened including the fact that she had stabbed the deceased after he tried to strangle her to death. She does not refer to PW2 in her defence. Even going by her defence, I find that there is no dispute that the accused caused the death of the deceased by stabbing him after she had a fight with him.

26. As to **whether the prosecution has proved malice and motive for the commission of this crime.** In the case of **Nzuki V Rep 1993 KLR 171** the learned Judges of Appeal set out the principles of determining whether intention to commit murder is proved as follows:

“ 1. Malice aforethought is a term of art and is either an express intention to kill or implied where by a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as the result.

2. Before an act can be murder, it must be aimed at someone and must be an act committed with one of the following intentions

(a) To cause death;

(b) Cause grievous bodily harm; and

(c) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits these acts deliberately.

3. Without an intention of one of these three types, 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 the crime of murder.

4. ...

5. The offence with which the appellant was charged and convicted was committed in an environment of beer drinking and dancing, and except for the appellants bare statement in his unsworn testimony, there was absolutely nothing on the record of the superior court from which it could be implied that the appellant had any of the intentions when he unlawfully assaulted the deceased.”

27. In the cited case of Nzuki, supra, the Court of Appeal held that even though the appellant’s conduct was done with the knowledge that the action is likely or highly likely to cause death or grievous harm, that in itself is not enough if there is no evidence to establish that the accused had formed an intention to cause death or to cause grievous harm, or knew his conduct may cause serious harm or death but committed the act deliberately any way.

28. I find that from the post mortem report P. Exhibit 6, it is clear that the deceased suffered a single stab wound on the chest areas. There being no independent evidence of the incident, repeated stab wounds if inflicted on the deceased would have led the court to infer malice aforethought. However in this case, it is a single stab wound inflicted by the accused after what she states was a disagreement between herself and the deceased.

29. It is also evident from the prosecution case that the accused reported her actions to her neighbour looking shaken and that she appeared remorseful. I find that this conduct and the circumstances of this case taken together are inconsistent with conduct of a person with a guilty mind.

30. The law in regard to motive is set out under **section 9 (3)** of the **Penal Code**. That provision was the subject of interpretation in the case of Choge Vs Republic (1985) KLR1, where the Court of Appeal held as follows:-

“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”

31. Motive has been defined by the court in the case of Libambula v Republic [2003] KLR 683 which

reasoned that point thus:

“Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap. 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”
(Emphasis added)

32. The prosecution has no independent evidence of the incident and is therefore relying entirely on what the accused told PW1 and 2. The accused stated that they had an argument and that she stabbed the deceased in self defence. Nothing has been adduced in court to prove motive. The law is also clear that motive is not an ingredient that ought to be proved. In the circumstances I find that nothing vests on this issue.

33. As to **whether the accused defence of self-defence applies to the circumstances of this case and whether it is plausible and reasonable.** It is the accused defence that she acted in self defence.

34. The defence has cited the Court of Appeal case of Ahmed Mohammed Omar & 5 Others Vs Republic [2014] eKLR which dealt with principles of English common law relating to self defence. The court held:

“What are the common law principles relating to self defence? The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in PALMER VS R [1971] AC 818. The decision was approved and followed by the Court of Appeal in R VS McINNES, 55 Lord Morris, delivering the judgment of the Board, said :

‘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 defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence 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.’

35. The prosecution on its part cited the case of Njeru Vs Republic [2006] 2 KLR 46, where the Court of Appeal held in regard to self defence:

“A killing of a person can only be justified and excusable where the action of the accused which caused the death was in the course of averting a felonious attack and no greater force than was necessary was applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack

2. In this case it is not in dispute that the appellant being a police officer on duty, had shot the deceased and killed him. It was therefore upon the appellant to show that at the time of shooting he was in the cause of averting felonious attack and that no greater force than necessary was applied. The appellant is bound to show that he was in immediate danger or peril arising from sudden or serious attack by the deceased.

3. By virtue of section 17 of the Penal Code, the principles of English Common Law were applicable in determining criminal responsibility for the use of force in defence of the person or property, under those principles, a person who is attacked may defend himself but he may only do what was reasonably necessary. Everything would depend on the particular facts and circumstances.”

36. I am well guided by the cited cases. It is clear that the court has to determine whether the attack on the accused by the deceased was serious so that it put her in immediate peril, in order to find that the accused was justified to take immediate defensive action. The court has to determine whether at the time of stabbing, the attack on the accused caused a crisis, putting her in immediate danger, in order to justify instant reaction to avert the danger.

37. For the plea to succeed, it must be shown by the accused on a balance of probabilities that she was in immediate danger or peril arising from a sudden and serious attack by the deceased. It must also be shown that reasonable force was used to avert or forestall the attack

38. In this case we have to be content with the accused account of the events of that day for lack of any other evidence. The accused said that she was strangled by the deceased and was almost passing out when she reached out and took an object and thrust it into the deceased. According to her defence, the accused did not at the time know that it was a knife she picked.

39. The accused defence is unchallenged. The accused incidence of burden was to show on a balance of probabilities that at the time she stabbed the deceased her life was in imminent danger, that the attack was serious and sudden, and that the force she used was reasonable in the circumstances.

40. I find that the accused has discharged that burden. I agree with accused counsel, and I so find that the fact she stabbed the deceased only once negates presence of malice and of premeditation to cause death or grievous harm to the deceased.

41. I find that for the reasons I have given in this judgment the prosecution did not prove that the accused had pre-meditated the deceased death or formed the intention to cause him grievous harm. The prosecution has not proved that at the time the accused caused the deceased death, she had the necessary malice aforethought that would justify convicting her of murder contrary to **section 203** of the **Penal Code**. I find that the offence proved is manslaughter contrary to **section 202** of the **Penal Code**.

42. Consequently I will 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 substituted charge of **manslaughter** contrary to **section 202** of the **Penal Code** and convict her accordingly under **section 322** of the **Criminal Procedure Code**.

DATED AT NAIROBI THIS 31st DAY OF JULY, 2017.

LESIT, J.

JUDGE