



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL CASE NO. 25 OF 2013

REPUBLIC.....PROSECUTOR

- V E R S U S -

MARY NKIROTE.....ACCUSED

R U L I N G

The accused person **Mary Nkirote** was charged with murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on the night of 23rd/24th November, 2013 at Soweto Village in Naromoru within Nyeri County, she murdered **Julius Gitonga**.

She was presented to court on 5th December 2013 and plea set for 10th December 2013. Plea was taken on 4th February 2014, after the mental assessment report was filed. She pleaded not guilty. The trial did not commence until two years down her life on 25th November 2015.

The prosecution called a total of 10(ten) witnesses, nine of whom were heard by Justice Mativo. I only heard P.W.10.

The case for the prosecution was that on the 23rd November 2013, there had been a wedding of one of the accused persons' daughters.

After the wedding, P.W.1, P.W.2 and their brother, all minors went to sleep at their grandmother's the accused's house. When they got there, their grandfather, the deceased, was not at home. They went to bed before he arrived.

According to P.W.1 14-year-old O K, who gave unsworn evidence, he heard his grandfather come in that night. He was drunk and was making noise. The accused person told him to keep quiet so as not to disturb the children who were sleeping. Instead, he ordered her to get out of the house, and stay out. She refused to leave the house. Later at night, he heard his grandmother hitting and dragging something. When he enquired as to what was happening, she told him to sleep. In the morning he found his grandfather lying outside covered with a jacket. She sent his siblings P.W.2 and one M home, telling him to remain behind because she wanted to send him on an errand. He testified that after his siblings had left she demanded to know from him whether he knew what she had done. He responded in the affirmative. She warned him that if he dared tell anyone he would burn him in the house. He testified that the accused hit the deceased with a hammer. He identified an axe – PEX. 1 as the weapon she had used.

On cross examination by Mr. Muhoho, counsel for the accused, he confirmed that his grandmother's house had three rooms with the sitting room at the center separating the 2 bedrooms. That he and his siblings had slept in one bedroom while their grandmother the accused, and grandfather the deceased, slept in the other bedroom. He did not see his grandfather come home that night, neither did his grandfather not talk to him, he could not see what was happening in the other room or the rest of the house from where he was sleeping, neither did he see what he alleged was being dragged. He only heard a bang.

His sister A K who was P.W.2 also gave unsworn evidence. She testified that on the material night at 11.00p.m. she was in bed at her grandmother's. She was not asleep but was telling stories with her brother P.W.1 when she heard her grandfather coming. On arrival he threw the accused out of the house where she remained for some time before later coming back in.

Apparently after this commotion she fell asleep. When she woke up, her brother told her that their grandfather had mud, and the accused had refused to touch him. The accused told them to go home. They left. On the way they met their mother P.W.6 to whom they reported that they had left their grandfather lying down, near the door with his head covered with a jacket. On cross examination she testified that she had gone to sleep early at 7.00p.m. and her brother P.W.1 joined her later. She confirmed that she did not actually see her grandfather come in but she only heard him talking. She did not know what happened.

Their mother F G testified as P.W.6. Her testimony was that she was on her way to church on the morning of 24th November 2013 when she met P.W.2, her daughter, who told her that her father (the deceased) was sick and she should go and see him. She went to her parents' home where she found elders in the compound. Her father was lying on the ground covered with a jacket. She inquired as to her mother's

whereabouts. She was told that she had left to buy sugarcane to take to the church, and that her father had been beaten by some people. She confirmed that he was dead. She said he used to drink alcohol. She said that when she asked her mother what had happened, her mother told her that her father had been beaten by some drunkards.

P.W.3 James Muriuki Kinyua, a brother of the deceased, testified that he met the accused person on her way to buy some sugar cane to take to the church. She told him that the deceased had met some drunkards, and was lying outside the house where she had covered him with a jacket.

His brother's home was ~ 140 meters away from his own. He proceeded there. On arrival he found him lying on the ground covered with a jacket. Upon removal of the jacket he saw that he had an injury on the head and was already dead. There was blood on his mouth and ears, there were blood stains on the floor. He called for help. P.W.5 Wilson Mwangi Nderi and P.W.7 Fredrick Muthomi, elders in the community responded. They came to the homestead and they saw the body. When they enquired from her what had happened, the accused told them that he was brought home by some unknown people who had left him there. It is P.W.7 who called the police.

P.W.8 was Dr. Omenda Juma Jonny a medical officer at Nanyuki teaching and Referral Hospital. He carried out the postmortem and wrote the report on 29th November 2013. He found that the body had multiple injuries; -

- 3cm cut on the right temporal region of the head

- pin sized hole approximately 1mm in diameter on the right temporal region.

- 2 cuts on the occipital region of the head each approximately 3 cm.

- one cut on the left temporal region of the head approximately 2cm

- bruises on the lower extremities of the legs on both tibial surfaces

- commuted fracture of right temporal extending to the right parietal and occipital region measuring 19.6cm. with hemorrhagic region beneath the scalp covering this region

He formed the opinion that the injury was caused by being hit with a mallet. He produced the postmortem report as PEX.2. His opinion was that the cause of death was cerebral hemorrhage secondary to skull fracture due to blunt trauma. Upon cross examination he told the court that the injury was caused by a mallet – that he learnt this from the persons who brought the body and from his own observations. He confirmed that he had not been shown the mallet, but that the injuries were caused by a blunt force.

P.W.9 Bruce Chitalu was a former inspector of police and at the time of the offence was based at Naromoru. He testified that on 24th November 2013 at about 8.30a.m he and the OCS visited a scene at Mwichuri village. They found a huge crowd. The accused was seated on a bench. There was a dead body lying on the ground covered with coat. Upon enquiry they learnt that it was the accused who had murdered the deceased. They were led to the bedroom where they found a pillow and bed sheet soaked in blood. On the floor was a mallet which had blood on one side. There were blood stains leading from where the deceased was found to where the mallet was, an indication that he was dragged from the bedroom to where his body was found. They also learnt from the children that there had been a quarrel between the accused and the deceased the previous night. On uncovering the body, he saw the injury and blood on the right side of the head, marks on the ear, and cuts that looked like they had been cut with a knife as well, but the knife was not traced. He did a sketch of the scene. Though it was undated, he insisted that he had drawn it on the material day. The house had three rooms 10x10 in size. He later learnt that it was set on fire by angry villagers.

Upon cross examination the former police and investigating officer of the case told the court that the exhibits collected from the scene which were the pillow and bed sheet soaked in blood got lost after the officer who took them over died in a traffic accident while taking them to Nanyuki. Neither was the blood at the scene nor the mallet taken for forensic analysis. He said photos of the scene were taken but by the time he left the station the scenes of crime officer had not brought the photos to the station. He said he was told by a brother to the deceased that it was the accused who had murdered the deceased. That to them, the accused person was just a suspect of the murder.

P.W.10 No. 88358 P.C. Zai Wamalwa took charge of the matter on 13th November 2015 from the late P.C. Koome. He produced the psychiatrist's report on the accused as PEX4 and the prosecution then closed its case.

The issue for determination is whether the prosecution has established a prima facie case to warrant the accused person being put on her defence.

Mr. Muhoho filed written submissions on no case to answer on the 15th March 2017. His main argument was that the state had presented a purely circumstantial case against the accused person, that there were not a single eye witnesses to the murder and the evidence of the two minors was purely circumstantial and unreliable. That the alleged murder weapon was not taken through forensics analysis, and crucial evidence, the alleged blood soaked pillow and sheets had not been presented to court.

The state through Ms. Jebet argued that the evidence given before court was sufficient to prove the charges against the accused person.

There is no doubt that the onus is on the prosecution to prove their case beyond a reasonable doubt to warrant any conviction but the path leading there must begin with a *prima facie* case upon which in our criminal justice system, an accused person may be put to the defence.

The offence of murder is defined at s.203 of the Penal Code

“Any person who of malice afore thought causes the death of another person by unlawful act/or omission is guilty of murder.”

Section 204 provides for the death penalty where any person is convicted of this offence. Section 203 of the Penal Code defines the offence of Murder to be where;

Malice aforethought is defined under section 206 of the Penal Code;

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (a) 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;**
- (b) 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;**
- (c)**
- (d)**

In **Republic vs. Andrew Moeche Omwenga [2009] eKLR** Justice Maraga (as he then was) stated as follows;

It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- (a) the death of the deceased and the cause of that death;**
- (b) that the accused committed the unlawful act which caused the death of the deceased and**
- (c) that the Accused had the malice aforethought.**

In this case a person, the husband to the accused, one Julius Gitonga died. The pathologist established the cause of death not to have been by a natural cause but as a result of blunt trauma fracture to his skull.

Who caused this injury to the deceased’s skull? The position of the prosecution is that it was his wife the accused. That to begin with her actions showed that she was the perpetrator of the heinous offence; leaving him lying out there covered with a jacket, and going about her *kawaida* Sunday morning chores, forbidding the children not to uncover their grandfather, threatening PW1 with dire consequences should he reveal what he knew. Secondly, the prosecution placed reliance on the evidence of the investigating officer that there the murder weapon a blood stained mallet was recovered, that there was blood soaked sheets and a blood soaked pillow recovered from the bedroom, and traces of blood from the bedroom an indicating that the deceased was dragged from his bedroom. Thirdly, they relied on the unsworn evidence of the two children.

In **Ramanlal Trambaklal Bhatt vs. Republic [1951] E.A.332** the Court of Appeal laid down the principles for determining whether a prima facie case has been established or not.

“Remembering that the legal onus is always on the prosecution to prove its case beyond a reasonable doubt, we cannot agree that a prima facie case on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made but rather hopes the defence will fill gaps in the prosecution case nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put accused on her defence. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight, sufficient to put accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It is true as Wilson J. said that the court is not required at this stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively. That determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by ‘prima facie’ but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

Starting with the testimony of the two minors, each gave unsworn evidence. The Court of Appeal dealt with the issue of unsworn evidence in **Samwel Muriithi Mwangi v Republic [2006] eKLR** and had this to say on the issue;

To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused

person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence.

Further, a close look at their evidence shows that it was highly speculative. It was also worked backwards from what the police found at the scene. They had gone to sleep around 8.00p.m. They had been at a wedding the whole day. That when their grandfather came in about 11:00pm they were awake talking. Could they have been awake at 11:00p.m. just telling stories? That is highly unlikely.

They say they heard a quarrel between the deceased and the accused, where it was the deceased who threw her out. Each of them told the court they heard the grandfather come in and throw out their grandmother. One said she refused to go out. The other said she actually stayed out for some time and later came back into the house. They say they heard her hit something. None of them saw anything being hit or being dragged. They gave unsworn evidence which was uncorroborated and inconsistent. It cannot be said with any certainty that whatever they claim to have heard had anything to do with the death of their grandfather.

It was alleged that the accused person threatened the older child – P.W.1 with dire consequences should he report what she had done. What had she done? He had said he only heard sounds, and never saw anything. There was nothing for him to report hence that statement is not supported by the events that took place that night. Had it been that he had actually seen her or found her doing anything that led to the death of the deceased then some weight would reasonably be placed on his statement. It is noteworthy that he never mentioned this to his mother P.W.6. whose testimony was that it was PW2 who reported to her that her father the deceased was sick, and she needed to go and check on him. If the child P.W.1 had received such a serious threat from his grandmother at least he would have mentioned it to his mother if nothing else. However even in her testimony she does not mention this.

On the murder weapon, P.W.1's testimony was that the accused person hit the deceased with a hammer or mallet. Again this is not something he saw. P.W.9 testified that the same was recovered, and it had blood stains. However, it was not presented to the government analyst for forensic examination to connect it to the death of the deceased. There is no evidence at all that the said mallet was used to hit the deceased, or that it had blood stains, or if it had blood stains the same belonged to the deceased. It is noteworthy that no other weapon was recovered from the house.

According to the pathologist the deceased had multiple injuries-

- the skull fracture on the right side approximately 19.6.cm**
- pin sized hole approximately 1mm on the right side of the head**
- several cut wounds**
- on the right side of the head -3cm**
- on the left side of the head – 2cm**
- two at the back of the head each 3cm**
- bruises on both legs**

Except for the blunt injury to the head, he made no explanation as to what could have caused the other injuries. If P.W.1 was to be believed, the grandmother hit the grandfather with the hammer, and then dragged him out of the house, how then could one explain the other injuries which included cut wounds, the hole in the head? The police's version is that these multiple injuries were caused by a knife which was not recovered.

There was the blood soaked pillow and sheets allegedly recovered in the house and blood stains from where he was lying to the bedroom. If she dragged him from the house, as the prosecution wanted the court to believe this, what investigations were made to recover any clothes she may have been wearing? This is because with the amount of blood alleged to have been at the scene, she could not have escaped blood stains. No samples were collected from the accused person and the deceased. If the deceased bled so much as to soak a pillow and sheets there must have been other evidence at the scene. In any case these items were crucial evidence which was not produced in court; No evidence was placed before court that they were in the possession of the late PC Koome. Photos of the scene were taken but were never produced in court. A sketch of the scene was drawn but was undated. More importantly no forensic report was made to connect the accused person to her husband's death.

Hence except for what the two children said, there is no other evidence before the court to support the case for the prosecution.

The deceased is said to have loved his tiple. That came from his own daughter PW6. and on the material date, after his daughter's wedding, it appears he went to have some and arrived home late. The investigating officer and the other witnesses said that the accused person told them the deceased had been beaten by other drunkards, that he had been brought home by other people and left there. This scenario was not investigated. Is it possible that he was actually brought home by fellow revelers and those were the sounds the children heard if at all? Was any investigation carried out as to where the deceased had been drinking before he came home that night? Did the police try to find who were the last persons to be seen with him?

Did the accused have the motive or malice aforethought to kill her husband? I must answer no to this question. Too many questions remain unanswered.

There is the scenario from which the prosecution was drawing a sense of guilt on the part of the accused person. The alleged quarrel with her husband the previous night, and the fact the accused person appeared the least concerned about her husband's state. From these set of facts is it possible that the accused person was used to deceased's drinking bouts? Should the investigating officer have asked the question whether it was usual for the deceased drink come home late, and just sleep outside the house? Or whether the accused had woken up and found him sleeping on the ground near the door and assumed he was just drunk and may have been in a fight, and as usual went about her duties, sending the grandchildren to tell their mother that their grandfather was sick? Or that she was just fatigued by his drinking and did not want to bother him?

These are questions the prosecution ought to have asked.

There was no evidence of abuse or violence in the family that would have given the accused person a motive to kill her husband?

The police quickly jumped onto the conclusion that the accused is the one who had killed her husband and clearly did not carry out any investigations. The accused did not confess to the crime; neither was she caught red handed as the saying goes. The accused person being the wife of the deceased was the first suspect of the murder. However, the investigators and the prosecution failed in their duty to establish a case sufficient enough to warrant the accused person being put on her defence.

The evidence is so scanty that it falls into the category of "some evidence" whose credibility and weight has been put to the test and found wanting. To put the accused on her defence would be tasking the defence to answer all the glaring questions that were left open by the investigators and the prosecution. That would be highly prejudicial to the accused person.

Having considered all the evidence before me, the law and the facts, I find that no *prima facie* case has been made out against the accused person to warrant her being put on her defence.

I make a finding of not guilty under s.306(1) of the Criminal Procedure Code and acquit the accused person accordingly.

Right of appeal 14 days.

Dated, delivered and signed in open court at Nyeri this 23rd November 2017.

Teresia Matheka

Judge

In the presence of;

Court Assistant Hariet

Ms. Jebet for the state

Accused person

Mr. Muhoho for the accused person