



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 96 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

MARY WANJIKU MWANGI.....ACCUSED

JUDGMENT

1. **Mary Wanjiku Mwangi** “the accused” herein is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the accused on 21st August 2013 at Kiamumbi Estate in Kasarani within Nairobi County murdered **Samuel Waweru Mutega**.

2. She denied the charge and the matter proceeded to hearing with the prosecution calling six (6) witnesses.

3. **PW1 Jane Wanjiru Muiruri** is a paternal aunt to the deceased and she is the one who brought him up. She had lived with the deceased upto one year prior to his death when he rented his own house. On 22nd August 2013 at 11p.m. she received a call from an unknown number which she later learnt was from a police officer at Kiamumbi Police Station. The officer informed her that the deceased had been stabbed, and the culprit was in the cells. She went to the police station early the next morning. The culprit who is the accused was shown to her and she told her they had fought over a phone. It was her evidence that the deceased had informed her a week prior to his death that he had got a wife and he would introduce her to him. She identified the body to the doctor for post mortem. She also identified the murder knife which had been shown to her at the police station.

4. **PW2 No. 234550 Inspector Billy Kipruto** was the officer in-charge of crime at Kiamumbi Police Station. He testified that while on duty on 21st August 2013 11p.m. the accused was brought by members of the public on allegations of stabbing her husband (the deceased) who had been brought with her. After the explanation he booked the report. Also brought was the murder weapon – a white handled kitchen knife (Exb.1). He advised that the deceased be taken to hospital which was done.

5. **PW3 Peter Ndegwa** performed the post mortem on the deceased’s body, which was identified by **Henry Mutega** (father), PW1 (an aunt), and **P.C. Mugambi** of Kasarani Police Station. He found a penetrating stab wound on the left chest above the left nipple and measured 7cm x 2cm. The chest cavity was penetrated between 2nd and 3rd ribs on the left. The pericardial sac was perforated at the top. The heart was stabbed at the left chamber. His opinion was that the cause of death was exsanguination due to a severe chest injury due to a single penetrating stab wound. He produced the report as Exhibit 1.

6. **PW4 Henry Kiptoo Sang** a Government analyst received a knife in a khaki envelope and a blood sample belonging to the deceased from P.C. Isaac Mugambi. They were accompanied by an exhibit

memo. The knife was moderately stained with human blood. He did a DNA analysis on the blood on the knife and two blood samples. He found that the blood stains on the knife matched those of the deceased. His analysis report was produced as Exhibit 2.

7. PW5 Joseph Mbugua was a neighbour to the deceased in Kiamumbi. He returned home on the evening of 22nd August 2013 9 p.m. Him and his wife went to sleep at 10.30 p.m. They were woken up by loud bangs on the door. He opened the door and found their neighbours outside. He followed to see what they were looking at. He saw a person lying on the ground on his back. He was bleeding profusely from the left side of his chest and was not talking. He identified him as Sammy his neighbour. There was no electricity but neighbours had torches on, which enabled him to identify the injured person.

8. Those present became agitated and opened the curtain to the door of the deceased's house and they found a woman inside. She was questioned and she said they fought over a phone because of a person who had called. People started beating the lady. Arrangements were made and the deceased and accused were taken to Kiamumbi Police Station before proceeding to hospital. The lady was placed in cells while the deceased was taken to hospital and was pronounced dead on arrival. He said he did not identify the lady found in the deceased's house as he was drunk and tired.

9. PW6 No.48112 Isaac Mukambi a police officer was informed of this incident by his boss on 23rd August 2013 at 10.30 p.m. at Kasarani. The report came from Kiamumbi Police Station together with the accused and the murder weapon (a knife) Exb. 3. He visited the scene together with other officers, and found the house cleaned but there was blood on the wall. He scooped the blood using cotton wool. He said the knife (Exb. 3) had blood stains. He took the knife (Exb. 3) and blood samples to the Government Chemist for analysis. He filled a P3 form and sent the accused to the doctor for mental and age assessment (Exb. 4). He stated that exhibit 4 showed that the accused was below 18 years of age at the time of the incident.

10. The accused made an unsworn defence and called no witness. She denied committing the offence. She stated that she was 17 years of age at the time of this incident and was staying with the deceased who was her boyfriend. That on 21st August 2013 at 9 p.m. she was in the house when the deceased arrived from work. She served food and they ate. She left to relieve herself outside. While in the toilet she heard screams and ran out to see what it was. Reaching the house she found the deceased lying next to the door. He did not respond when she talked to him. She then screamed for neighbours to assist.

11. Neighbours came and when she tried to explain what it was and she was attacked by them. They got a vehicle and took them to the police station. She was locked up in the cells as the deceased was taken to the hospital. Shortly thereafter she learnt that the deceased had died. She was then charged.

12. Mrs. Nyamongo for the accused submitted that the case of the prosecution had not been proved. That there was no eye witness, and the knife taken to the police station was never dusted for fingerprints. She also submitted that PW5 was a hostile witness and he did not witness anything. She argued that the accused was only connected to the offence because she was found in the deceased's house. Her defence was clear that she did not commit the offence. She added that had the deceased committed the offence she would have run away which she did not do. She contended that the accused had no reason to make her kill the deceased. She finally submitted that no motive for the murder had been proved, and so the accused should be acquitted.

13. Mr. Oroni for the prosecution in response submitted that the accused and deceased fought. The deceased was found lying at his door and no one except the accused was found in the vicinity. The accused emerged from the deceased's house holding a Knife. She was taken to the police station she was the only one who was in the house with the deceased. No one heard her screaming for help. The noises had been from both of them. The blood on the knife was found to belong to the deceased.

14. The accused person is charged with murder contrary to section 203 as read with section 204 of the Penal Code. For a charge of murder to be proved the following must be established.

(i) The fact of death.

(ii) The act of killing by the accused i.e. *actus reus*

(iii) The intention to kill i.e. *mens rea*/malice aforethought

15. The fact of death is not disputed. PW1 and PW4 who are aunt to deceased and investigating officer identified his body for post-mortem. The doctor (PW3) who performed the post mortem confirmed that the deceased had died, and gave the cause of death in his report (Exb. 1).

16. There is no dispute that there was no eye witness in this matter. The court will therefore rely on circumstantial evidence to make a determination of this case. Circumstantial evidence is described as evidence that relies on an inference to connect it to a conclusion of fact. It is the opposite of direct evidence. The kind of evidence to prove circumstantial evidence is enunciated in the case of **Republic – vs- Kipkering Arap Koske (1949) 16 EACA 135 at 136** where it was held:-

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.”

17. There is no dispute that the accused was a “live in” girlfriend of the deceased. The aunt who brought up the deceased (PW1) testified that the deceased prior to his death had told her that he had married and would introduce her to the wife. It never came to pass.

18. The accused and deceased lived on a plot in Kiamumbi estate. The plot had several rental houses. One witness who testified as PW5 lived on that plot in one of the houses. Mrs. Nyamongo submitted that this witness was a hostile witness. That is not correct. At no point did this court declare PW5 as a hostile witness. The record is very clear on what transpired in respect to PW5.

19. It was PW5’s evidence that on the fateful night they heard noises and bangs on the door. Neighbours responded and gathered outside the deceased’s house. The deceased was found there lying down on his back bleeding. There was no woman outside the deceased’s house. A woman was pulled from inside the house and she came out with the blood stained knife (Exb. 3). He told the Court that he could not identify the woman found in the deceased’s house as he was tired and drunk.

20. The accused in her defence says she does not know how her husband was injured, or who injured him. That she came from the outside toilet and found him injured. That it’s while screaming for help that she was attacked by neighbours who beat her up and took her to the police station. She says nothing about the knife (Exhibit 3).

21. There is no reason or suggestion of any reason why PW5 and the neighbours would lie against the accused. PW2 who was the officer in-charge of crime at Kiamumbi Police Station received the accused at the station on the same night of 21st August 2013 at 11p.m. The allegation was that she had stabbed her husband Samuel Waweru Mutega. She had been brought to the station by members of the public. These members of the public were the neighbours in that plot where the accused and deceased lived.

22. It was PW5’s evidence that when the crowd removed the woman out of the deceased’s house they questioned her. She responded that they had fought over a phone because of a person who had called. PW1 also stated that while at the police station on 24th August 2013 she met the accused. She asked her why the incident had happened. The accused told her they had fought over a phone.

23. I have considered the accused’s defence. It is not tenable she was not speaking the whole truth of what happened. She has not denied living with the deceased whether as husband and wife or boyfriend and

girlfriend. Considering the evidence of PW1, PW2 and PW5 I am satisfied that the accused and deceased fought over a phone. She was the last person who was with the deceased before he got injured and eventually died.

24. She handed to the neighbors a blood stained knife as they were trying to take the deceased to hospital. The DNA in the blood stains on the knife matched those of the samples of the blood of the deceased. There were only two people in the house occupied by the accused and deceased. The defence of the accused is an afterthought. Mrs. Nyamongo submitted that had the accused committed the offence, she could have run away. There is no way she could have run away because the neighbours were at their door after hearing the screams. I am satisfied that the circumstantial evidence herein irresistibly points to none other than the accused and accused alone as the person who stabbed the deceased. The knife produced as exhibit 3 was the murder weapon. The stabbing resulted in the death of the deceased.

25. Having found that the accused is the one who killed the deceased, I now move to the next issue. The issue is whether the accused had the intention to kill the deceased. Intention to kill or malice aforethought is defined under Section 206 Penal Code as:

“a. An intent to cause the death 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. An intent to commit a felony.”

26. This incident took place in the house where the accused and deceased were living together as husband and wife. No one witnessed the incident. It cannot therefore be known who between the two provoked the other or what exactly happened besides what the accused told the neighbours and PW1.

27. The Court of Appeal in the case of ***Joseph Kimani Njau –vs- Republic Criminal Appeal No. 375 of 2011 (Nakuru) 2014 eKLR*** in a similar scenario stated thus;

“In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes of death of another. We find that the conduct of the appellant in beating the deceased was unlawful. Being persuaded by the decision in Juma Onyango Ibrahim –vs- Republic and Nzuki –vs- Republic, we find that the prosecution had not proved malice aforethought on the part of the appellant to the required standard. We find that the totality of the evidence adduced by the prosecution is an account of two eye witnesses who saw the appellant beat the deceased with bare fists and kicks on her head. The testimony of these two witnesses, PW1 and PW2 is credible and cross examination did not shake their evidence. Their evidence was water tight and the prosecution was able to prove beyond reasonable doubt that it was the appellant who beat the deceased. The testimony of PW1 and PW2 was not able to establish mens rea; their testimony established actus reus.”

I am duly guided by this authority.

28. My finding therefore is that the ingredient of malice aforethought has not been proved. I find the offence proved to be that of Manslaughter. I therefore reduce the charge of Murder contrary to Section 203 as read with Section 204 to Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. I convict the accused of the said reduced charge of Manslaughter.

Orders accordingly.

Dated, signed and delivered this **16th** day of ***November*** 2017 in open court at ***Nairobi***.

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE