



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 66 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH MBURU NJOROGE.....ACCUSED

JUDGEMENT

Introduction and Background

Joseph Mburu Njoroge, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence state that on the 11th day of June 2013 at Ricard Flats in Ngara Area, Starehe District within Nairobi County he murdered Samuel Njoroge Ngige. The accused was arraigned in court on 12th June 2013 but his plea was not taken until 24th June 2013. He denied the offence necessitating this trial. He is represented by Mr. Ratemo Oira, advocate.

The trial commenced on 1st April 2014 before Honourable Lady Justice Florence Muchemi. She received evidence from three prosecution witnesses. Upon her transfer, I took over the proceedings in this trial in June 2015. I received evidence of six prosecution witnesses and the defence of the accused.

Prosecution case

The prosecution case is supported by evidence of nine witnesses. They presented a case that on 10th June 2013, Michael Maina Kibe (Maina), PW1, in company of the deceased paid a visit to the accused at Ricard Flats in Ngara. Maina and the deceased had been drinking with other friends at a place known as Desai until around 11.30pm when they left to go to Maina's home. Maina decided to pay his long-time friend, the accused, a visit before going home. He asked the deceased to accompany him. On arriving in House No. 79 on the fifth floor of Ricard Flats where the accused lived, they found the accused with his girlfriend Wairimu. They were drinking.

In the course of the visit, the deceased told the accused that he knows him and that he had met him at Pangani Police Station. The accused denied having met the deceased but the deceased insisted they had met prompting Wairimu to tell the accused that the two had indeed met at the Police Station. This exchange seemed to have annoyed the accused who is said to have banged the table. Evidence shows that the accused left the room briefly, returned and held the deceased by the shirt but Maina intervened and calmed the situation. The accused is said to have sat down but immediately the deceased left the room, the accused is said to have followed him to the balcony. Maina followed the two but found the accused alone. He asked the accused where the deceased was to which the accused responded that the deceased had thrown himself over the balcony to the ground below. Maina went downstairs and outside. He found the deceased lying motionless on the floor. He was bleeding from the mouth and the head.

The matter was reported to the police who collected the body. Maina, the accused and Wairimu were arrested. Maina and Wairimu were later released from police custody and the accused was charged with this offence.

Defence case

The accused is the only witness for the defence. He testified under oath. He told the court that on 10th June 2013 around 1.00am he was at home in House No. 79 Ricard Flats Ngara with his wife Jacqueline Wairimu. They were drinking alcohol celebration his having secured a job. He told the court that Maina, his long-time friend paid him a visit in company of the deceased; that the deceased told him that he had met him before but he denied having met the deceased; that the deceased persisted that he had met him at the Police Station and this annoyed him as a result of which he hit the table; that the deceased ran outside while Maina held him telling him to let the matter be; that Maina followed the deceased but returned and told him that he (accused) had killed the deceased to which he said that he could not have done it since he had remained inside while the deceased ran out. The accused denied killing the deceased or following him outside.

At the close of the defence case Mr. Ratemo submitted that the prosecution has failed to prove the case against his client beyond reasonable doubt. He stated that the investigations were poorly done and that the deceased died instantly after jumping over the balcony. He urged the court to find that the accused is not guilty of murder and acquit him.

Analysis and determination

Murder is defined under section 203 of the Penal Code thus:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

From this definition we get the ingredients of murder which must be proved by the prosecution on whose shoulders the burden of proof lies. The standard of proof required by the law is proof beyond reasonable doubt.

The prosecution must prove firstly, that death of a person, the victim of murder the subject matter of the trial, has occurred; secondly that the death resulted from an unlawful act or omission on the part of the accused; thirdly, that the accused before the court is the one who caused that death and finally, that he possessed malice aforethought, the intention to cause the death. The case must leave no doubt in the mind of the trial judge because any existing doubts must go to the benefit of the accused.

As stated above, I took over this case after three witnesses had testified. I have however taken time to carefully read their evidence alongside the evidence given under my watch. Of all the witnesses who testified, it is only Maina, PW1, other than the accused that was present. Yash Ondieki, PW2, told the court that he was the caretaker of Ricard Flats heard some commotion of people quarrelling while he was still in his house. He said he heard someone saying “umeua” and identified the voice as that of Maina. When he went outside he found the body of the deceased lying near the gate to the Flats.

Caroline Wairimu, PW3, who told the court that she was sister to the deceased received information of the death of her brother later that night (11th June 2013). She went to Pangani Police Station and found Maina, a woman called Wairimu, and another man; that Wairimu told her that her brother the deceased had jumped over the balcony and died following a quarrel between him and the accused.

CPL Carole Wambui (PW5) visited the scene at Ricard Flats and called scenes of crime to take photographs and CPL Livingstone Luhanda took photographs of the scene. Dr. Peter Ndegwa, PW6 and Dr. Joseph Maundu, PW7 examined the body of the deceased and the accused respectively while SG Wesley Langat investigated the case.

That the deceased died is not in dispute. Dr. Ndegwa told the court that on examining the body he found a fractured right humerus, lacerations on the left temporal scalp, sub-contusions on both sides of the head and fractured skull from left to right temporal region. He formed the opinion that the cause of death was head injury due to blunt force trauma consistent with a fall from a height.

What is disputed is whether the accused caused the death of the deceased and if so whether he intended to cause the death. PW9 told the court that his investigation revealed that after the altercation between the accused and the deceased:

“The deceased ran out of the house. The accused followed him up to the balcony. It is believed that he pushed the deceased over the balcony. Deceased fell down the flat and met his death.....”

The law places the duty to prove that the accused pushed the deceased over the balcony as a result of which he died on the prosecution. As stated in this judgement, it is only Maina who was present. The other witnesses relied on what they were told and the persons who informed them, for instance one Wairimu said to be accused wife or girlfriend, did not come to court to testify. This court will scrutinize the evidence of Maina to determine its value. The relevant part of his evidence reads as follows:

“The accused left the room and went outside. The deceased sensed something. He told me that we must leave the house. The accused then came inside and grabbed the deceased by his shirt. I intervened and told him to calm down. The accused sat down for a moment. I asked the deceased we go away. The deceased woke up (*sic*) and walked out. The accused followed him. I was left in the house but I immediately decided to go out to see what was happening. When I stepped out, I did not see the deceased. I saw the accused at the end of the balcony which is a long one outside a row of rooms. The balcony has grills at the edge for security. I went to where the accused was. I asked him where the deceased was. He said the deceased had thrown himself (*sic*) from the balcony to the ground. We were on 5th floor at that time.”

On cross examination, Maina told the court that he did not witness the accused person killing the deceased nor the incident. He said it was the accused who told him that the deceased had jumped over the balcony.

This court was told that the house where the accused lived was a one roomed bedsitter. Given that Maina told the court that he followed the deceased and the accused immediately they went out and given that the balcony had grills as testified and as shown in the photographs, it is strange that there is no evidence of a commotion between the accused and the deceased before the deceased was pushed over the balcony if he was pushed over. This court doubts that the deceased could have willingly and without resistance let the accused push him over the balcony. Maina did not hear any commotion neither did he tell the court he witnessed the accused pushing the deceased over the balcony given that he followed them outside immediately.

PW2, Ondieki who said he heard Maina saying “umeua” and heard footsteps of people going outside accused’s house did not testify to hearing any commotion at the balcony. According to PW3, Caroline, the information that the deceased had jumped over the balcony came from Wairimu, accused girlfriend. Maina who was a friend of the deceased did not tell Caroline anything about the events leading to the death of the deceased. In his (Maina’s) testimony in court he did not testify to witnessing the accused pushing the deceased over the balcony despite having followed immediately the accused went after the deceased.

My careful analysis and consideration of the evidence discloses a lacuna in the evidence. Since no one witnesses the accused pushing the deceased over the balcony, this court is left with circumstantial evidence that because the accused followed the deceased outside immediately following their disagreement, he must have pushed him over the balcony. For that hypothesis to hold water, it must pass the legal test set out in various authorities including **Rex v. Kipkering Arap Koske and Another [1949] 16 EACA; Abanga alias Onyango v Republic Criminal Appeal No.3 2 of 1990 (UR)** and **Musoke v. R [1958] EA 715.**

- i. **The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- ii. **Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- iii. **The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and that**
- iv. **It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.**

I find the circumstances surrounding the death of the deceased not firm and cogent. I find that those circumstances are not of a definite tendency to unerringly point towards the guilt of the accused. I find the chain of events not complete and I find that there are other co-existing circumstances which would weaken or destroy the inference of guilt on the part of the accused. There is a possibility that the deceased jumped over the balcony going by my analysis of the evidence. There are existing doubts in the evidence. Where such doubts exist, the law requires that they be resolved in favour of the accused.

In conclusion therefore, it is my finding that the prosecution has failed to meet the threshold of proving this case beyond reasonable doubt. The accused will get the benefit of these doubts. I hereby find the accused, Joseph Mburu Njoroge, not guilty of murder. He is hereby acquitted of the offence of murder. He shall be set at liberty forthwith unless for any other lawful reason he is held in custody.

Orders shall issue accordingly.

Dated, signed and delivered in open court this 29th February 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Macharia for the prosecution

Mr. Ratemo Oira for the accused

Mr. Joseph Mburu Njoroge, the accused

Mr. Daniel Ngumbi, court clerk