



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 11 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DANIEL NZOMO MUTUA.....ACCUSED**

**JUDGEMENT**

**Introduction**

Daniel Nzomo Mutua (hereinafter “the accused”) is charged with the murder of Dorothy Kagendi Nyaga alias Caroline Wambui (hereinafter “the deceased”) contrary to section 203 as read with section 204 of the Penal Code. The murder is alleged to have been committed on 10<sup>th</sup> January 2012 at Kibera Laini Saba within Nairobi County.

The accused was arraigned in court on 19<sup>th</sup> January 2012 but the trial did not commence until the 3<sup>rd</sup> December 2014. The major reason for the delay is the plea bargain offer made by the defence to the prosecution. At the time of starting the trial the office of the Director of Public Prosecutions (ODPP) had not communicated as to whether the offer was acceptable or not.

**Prosecution case**

On 9<sup>th</sup> January 2012, Dorcas Mutono, PW1, (Dorcas) was on duty at Wasafiri Club (the Club) in Kibera Laini Saba Nairobi. She was letting out rooms to customers. About 7.00pm the accused and the deceased went to the Club to look for accommodation. They were not new to Dorcas. They were customers at the Club. They preferred room number 5 at the end of the line of rooms on the ground floor of the Club. Dorcas sold them room number 5 for Kshs 250 and issued them with a receipt number 5717, Exhibit 1. The receipt is in the name of Rasta, a name the accused was known by. At the time the accused spotted dreadlocks commonly referred to locally as “rasta”. After booking the room the accused and the deceased left to return later.

Dorcas left work at 1.00am by which time the couple had not returned. She reported on duty the following morning on 10<sup>th</sup> January 2012. She was called by Mary Kakai (not a witness) and told to go to room number 5. Dorcas went to room number 5 and pushed the door open. The door was not locked. She entered the room and found the deceased lying on the floor. She had a cut on her breast and blood oozing from her mouth. She was swollen on the face. The accused was holding her chest. The accused told Dorcas to leave. Dorcas left and went to seek help from people passing by. On returning to room number 5 they found the accused had left. She made a telephone call to Miriam Nkatha (PW6), the owner of the Club, and informed her about what had happened. In the meantime the people helping her called AMREF who came and took the deceased to hospital. She died on her way to Kenyatta National Hospital.

The accused was traced at Madaraka where he used to work at a car wash. He was handed over to the police at Capital Hill Police Post. He was later transferred to Kilimani Police Station and charged with this offence.

### **Defence case**

The accused is the only witness for the defence. He testified under oath and told the court that the deceased was his wife since 2011 and that they had a child aged four years; that he was called while at work in Madaraka by some women and other people to go and take his wife, who had been at Wasafiri Bar and fell sick, to hospital; that he gave them Kshs 1,500 to go and take his wife to hospital intending to go to the hospital in the evening; that he was arrested and taken to the police station. He denied having been at Wasafiri Club and told the court that he did not know what happened to his wife.

At the close of the defence case Mr. Wachira for the accused submitted that the prosecution has failed to prove the case beyond reasonable doubt; that the prosecution is relying on circumstantial evidence which does not prove it is the accused to the exclusion of anyone else who killed the deceased; that the scene of crime was a public place and anyone could have accessed the room and that the behaviour of the accused is not that of a guilty person because he did not attempt to escape when confronted by the people who arrested him. Counsel further submitted that the receipt allegedly issued to the accused did not bear his name or identity card; that the case for the prosecution is based on suspicion and that there is no evidence to support this suspicion; that there were no visible injuries found on the body after post mortem examination was carried out.

### **Analysis and determination**

The prosecution called a total of ten witnesses in a bid to prove its case. The law places the onus of proving a criminal case like this one on the prosecution. The prosecution must prove the death of the deceased occurred as a result of an act or omission by the accused person charged before the court and the prosecution must prove that the accused, in causing that death, possessed a guilty mind or he had formed the intention to cause the death of the deceased. The above must be proved beyond reasonable doubt.

Of the ten prosecution witnesses, only Dorcas interacted with the accused and the deceased on the evening of 9<sup>th</sup> January 2012. Alice Ndung'u, PW2, and Mary Wangari, PW3, both residents of Kibera Laini Saba narrated how they learned of the death of the deceased, whom they referred to as their friend, in the morning of 10<sup>th</sup> January 2012. Both women knew the accused and the deceased as friends. They teamed up with other people to look for the accused at Madaraka. They found him and told him to accompany them to hospital but on finding that he was reluctant to accompany them they sought the help of a security guard to arrest him. They took him to Capital Hill Police Post where he was handed over to the police.

I have carefully examined all the evidence by the prosecution and the accused. There is no direct evidence linking the accused to the murder of the deceased. I have to turn to circumstantial evidence. Circumstantial evidence is the evidence of surrounding circumstances that is relevant to point towards the accused as the perpetrator. In **R. v. Kipkering Arap Koske [1949] EACA 135**, the court had this to say in respect of circumstantial evidence:

**“It is now settled that for a court to convict on circumstantial evidence there must be evidence which points irresistibly to the accused person to the exclusion of any other person. At the same time there must be no co-existing factors or circumstances which may weaken or destroy the inference of the guilt of the accused person.”**

See also **Teper v. R [1952] AC 489**.

On the issue of the cause of death, Dr. Kizzy Shako, PW7, performed the post mortem on the body of the deceased on 2<sup>nd</sup> February 2012 almost two months after the deceased had died. The doctor told the court that the body had decomposed and had skeletonized to an extent that it had no skin tissue on some parts.

She noted collection of blood under the scalp and bleeding under the skull on both sides of the head. The doctor attributed death of the deceased to head injuries due to blunt force trauma. The doctor told the court that she did not observe any visible injuries.

The evidence of Dorcas is that she observed a cut on the deceased's breast and blood oozing from her mouth. Mary Wangari, PW3, also described the injuries she observed on the deceased as a cut on the right breast, cut on the lips and bleeding without specifying where the bleeding was. Miriam Nkatha, PW5, told the court that she found the deceased lying near the door of room number 5 and that she had a swollen face and was bleeding from the mouth. From the evidence of these witnesses this court has no doubt that the deceased had sustained these injuries before she died.

The prosecution did not lead evidence of the doctor to show the impact of the state of the body to the injuries seen on the body of the deceased: that is whether the state of skeletonization of the body affected the outcome of the examination of the body in that no injuries could be seen on the body due to skeletonization. I take the view that lack of soft tissue on the body of the deceased could have affected the results of the post mortem in respect to the soft tissue injuries suffered by the deceased. However, the findings of the doctor on the cause of death are that it was due to head injury resulting from a blunt force trauma. In other words, despite the skeletonization of the body, the cause of death was discernible.

On cross examination the doctor told the court that a fall could have caused the blunt trauma on the head of the deceased. However, I have taken the evidence in its totality without separating it and arrive at a conclusion that the head injury as noted by the doctor taken together with the evidence that the deceased had a swollen face and was bleeding from the mouth lead to the conclusion that she must have sustained these injuries. The cause of death was due to the head injury due to a blunt force trauma to the head. I find the fact of unlawful death of the deceased proved beyond reasonable doubt.

I will now turn to the identity of the person who inflicted injuries on the deceased resulting in her death. Dorcas is the only witness who testified in this respect. She met the accused in company of the deceased on 9<sup>th</sup> January 2012, issued him with a receipt in the name of Rasta which is the nickname the accused was known by. She saw him again on 10<sup>th</sup> January 2012 while holding the chest of the injured deceased. The accused was known to her before 9<sup>th</sup> January 2012. He was a frequent customer at the Club. He had rented room number 5 on other occasions and had spent nights in that room in company of the deceased. The other witnesses did not see the accused come into the Club on 9<sup>th</sup> January 2012 or on the morning of 10<sup>th</sup> January 2012.

Section 143 of the Evidence Act provides that no number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any act. In other words a fact can be proved by evidence of one witness. A court is cautioned to examine such evidence closely and to record reasons for relying on it. This caution is aimed at ensuring that there is no miscarriage of justice.

I have examined critically the evidence of Dorcas including the receipt issued to the accused; I have examined the evidence of Alice Ndung'u and Mary Wangari. Their evidence touch on the behavior of the accused after the two women in company of others who are not witnesses informed him of the deceased's condition. The accused chose to give them money to take the deceased to hospital on account of his work. According to their evidence the accused was reluctant to accompany them and they had to seek help from a security guard to arrest the accused to stop him from escaping.

Before I make my conclusions on the evidence against the accused I wish to mention that the evidence of SGT Elija Yongo (PW8) was not helpful to the prosecution case. He did not even know where the offence was committed. He said it was Madaraka. He did not know that the victim was a woman. He referred to the victim as a man. I will disregard this evidence because in my view I doubt whether this witness was talking about a victim in the current case.

The evidence of Elizabeth Oyiego (PW9), the Government Analyst, also did not help the prosecution case. She was not at fault. She examined the samples presented to her: that is, the blood sample from the

accused and his blue jeans stained with blood. She was not given the blood sample from the deceased to compare. Elizabeth found the DNA profile obtained from the bloodstains on the accused's jeans was of female origin. She was aware of her limitations and recommended that the blood sample from the deceased ought to have been taken and submitted for analysis and comparison. The police did a poor job of investigating this matter.

Poor investigations notwithstanding, I find as a fact that the circumstantial evidence in this case points irresistibly to the accused person to the exclusion of any other person. I have carefully analysed and considered all the evidence and I find no co-existing factors or circumstances which may weaken or destroy the inference that the accused is guilty. In the same breath, I have cautioned myself on the dangers of relying on the evidence of a single witness on identification. I am satisfied that the accused, who was known to Dorcas before this incident and who was seen twice by Dorcas was positively identified as the person who inflicted fatal injuries on the deceased.

I find the act of unlawful death and the identity of the accused as the perpetrator proved beyond reasonable doubt. I however find no evidence to prove that the accused had pre-meditated the death of the accused. Whatever happened in room 5 will remain the accused's secret since dead men/women tell no tales. He may have had the motive because there is evidence to show that he used to suspect that his girlfriend the deceased used to move with other men but there is no evidence to show he had formed an intention to kill her.

Finally I disagree with Mr. Wachira in his submissions that the prosecution has failed to prove the case or that anyone could have killed the deceased. I find that the prosecution has failed to prove murder to the standard required. Instead, the prosecution has proved the offence of manslaughter beyond reasonable doubt. Consequently, I hereby acquit the accused of the offence of murder as charged and instead convict him on manslaughter contrary to section 202 as read with section 205 of the Penal Code. It is so ordered.

**Dated, signed and delivered this 27<sup>th</sup> day of April 2016.**

**S. N. MUTUKU**

**JUDGE**

**In the presence of:**

Ms Esther Macharia for the prosecution

Mr. Wchira for the accused

Mr. Daniel Nzomo Mutua, the accused

Mr. Daniel Ngumbi, court clerk