



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 102 OF 2012

REPUBLIC PROSECUTOR

VERSUS

MOHAMMED UME ADO..... ACCUSED

JUDGMENT

1. The accused **Mohammed Ume Ado** is charged with murder contrary to section 203 as read with Section 204 of the Penal code. The particulars of the offence are that on 2nd December 2012 at about 6a.m. while at Mirangi Lodge, Eastleigh within Nairobi County murdered **Yasmin Ali Godo**.

2. From the prosecution evidence, it appears that this was a case of domestic violence with fatal consequences. Lucy Wanjiru Muiruri (PW1) and Saadia Mohamed Guyo (PW3) testified that the accused and the deceased lived together in room 13 in Mirangi Lodge Eastleigh. They considered them married and were aware of their regular domestic quarrels. On the material date, they heard the two quarrelling before retreating to their room where the deceased was later found dead. In prosecuting the case, the prosecution advanced the theory that the accused assaulted and strangled the deceased causing her death.

3. The accused on the other hand while admitting that there was a verbal quarrel between himself and the deceased denies harming her in any way. His defence is that after their quarrel in the open reception area, the deceased went to their room. Several minutes later when he followed her to the room, he found her dead having committed suicide by hanging herself.

4. This being a murder case, 3 elements must be proved by the prosecution: that there was a death and the cause of such death; that the accused caused such death; and that in so doing, the accused had malice aforethought or malicious intent.

Death of deceased

5. Three prosecution witnesses testified to having seen the deceased's body soon after the incident. These were PW4 Simon Ngeri who was on duty as watchman at the Lodge and PW1 Lucy Wanjiru Muiruri who was the Lodge Manager, and PW2 Saadia Guyo who was a friend of the couple and resident at the Lodge at the material time. PW5 Inspector Francis Muthee Gichuhi removed the body to the city mortuary. Other than the testimony of the 3 witnesses, the prosecution called Dr. Peter Muriuki Ndegwa the pathologist who performed the post-mortem. He testified that the cause of death was asphyxiation as a result of suffocation. He produced the post mortem report as Exhibit No.2. The court found the evidence to have conclusively proved the death of the deceased.

The Prosecution evidence

6. PW1 Lucy Wanjiru Muiruri, the manager of the Lodge described the Lodge as having provision for 15 rooms, 2 bars and a restaurant. She said that Yasmin Ali (the deceased) rented room 13 on a long term basis. That initially she occupied the room alone but was later joined by the accused sometimes in June 2012. She considered them man and wife.

7. Lucy Muiruri recalled that she was woken up by Simon the watchman around 8.00a.m. on 2nd December 2012 to be alerted that there was a fight in Room 13. That the lady (Yasmin) had locked herself in the room while the man (Mohammed) was trying to break the door. Lucy said that the watchman left but came back a short while later to inform her that the man had broken the door, entered the room and that he had come out of the room and left. That he (the watchman) had entered the room and found the lady unconscious. Lucy rushed to the room and found the lady lying unconscious on the bed with some bruises on the neck. Her body was on the bed while her feet hang over the bed. She confirmed that she was not breathing and on checking her pulse found none. The accused's parents later arrived at the scene and informed her that the accused had gone to Shauri Moyo Police Station to make a report. Lucy told the court in cross-examination that the couple had been living together for about 5 months and that she had once intervened in a fight between them.

8. Simon Ngeru Mwangi (PW4) testified that he was the watchman at the Lodge. He knew both the accused and deceased as occupants of Room No. 13. On 2nd December 2012 at 6.00a.m, he opened the inner gate (middle) for them and they proceeded towards their room. Shortly, he heard noises and quarrelling in their language which he thought was Borana. He called their neighbour Saadia (PW3) to come and separate them. He knew that they spoke the same language. According to PW4, Yasmin got into their room and locked it from inside. The accused knocked on the door and tried to force his way in. When he started breaking the door, Mwangi rushed to report to the manager (PW1) and then proceeded to the reception to attend to a customer. It was then that the accused came rushing past them and out of the gate. Mwangi suspected that something was wrong and rushed to the room he found Jasmin lying facing upwards. He rushed to call the manager. All three Mwangi, the manager and Saadia entered the room. Wanjiku(PW1) and Saadia(PW3) administered first aid. Mwangi said in cross-examination that the accused and deceased were fighting hitting each other and that he saw Mohammed (the accused) trying to break the door. In his words "he was pushing and kicking it"

9. Saadia Mohammed Guyo (PW3) told the court that she knew both the deceased and the accused. She met the deceased at Mirangi Lodge while she knew the accused from their home county in Marsabit. She considered the two to be living as husband and wife. She was aware that they used to have what she referred to as "small small family problems". Saadia testified that the watchman (PW4) alerted her of the fight in the deceased's room, that the accused was breaking the door. She went and found the door broken and the deceased partly lying on the bed. She observed that her body was hot and she was not responding when called. She screamed and other people came. In cross-examination, Saadia told the court that she had been with the couple before she went to sleep. They had quarreled and she intervened and that they were talking nicely when she went to sleep. She did not hear any further fracas until she was called by the watchman.

10. Inspector Francis Muthee Gichuhi (PW5) testified that on the material day at about 11.00a.m.he received a call from the OCS Shauri Moyo Police Station one C.I. Muiruri. He instructed him to proceed to the scene at Mirangi Bar. Inspector Gichuhi met Cpl. Kabalo who was then duty officer. He was in the company of a man (now deceased) who had reported that his girlfriend had committed suicide in their lodging room. Inspector Gichuhi told the court that he found the body of a lady of Somali origin lying on the bed. He observed that the deceased had minor tissue injuries suggesting that she might have been strangled.

11. No. 65869 Cpl. Marwa was directed by the Buruburu D.C.I.O. Mr. Kiambati to take over the investigation of the case. He received witness statements from Inspector Gichuhi. He escorted the suspect to Dr. Maundu for mental assessment after which he compiled the file and forwarded to DPP for advice. Cpl. Marwa told the court in cross-examination that the case had earlier been reported at Eastleigh Police Post as a suicide case but that in the course of investigations he formed the opinion that it was not a suicide. He conceded that he did not visit the scene and that he was not aware whether or not photographs

of the scene were taken and produced in court.

The defence

12. After hearing the prosecution case, the court found sufficient evidence to put the accused on his defence. He gave sworn testimony and did not call any witness. The accused admitted that he was living with the deceased in Mirangi Lodge in Eastleigh. He said that she was his girlfriend with whom he had cohabited for 1 ½ years and enjoyed an intimate relationship. He recalled that on 2nd December 2012 at 6p.m. when he returned to the house, he met Yasmine outside the gate and they entered the Lodge together. Before getting to their room they sat and talked at the reception. He said that while there a lady appeared and when he looked at her, Yasmine asked him why he was looking at her. Shortly, a quarrel and a fight ensued between the lady and Yasmine. The lady overpowered Yasmine and knocked her down. It was then that he intervened to separate them. He told the lady to leave. The lady left and Yasmine now turned on him accusing him of letting a prostitute beat her. She held him by the collar and it was then that the watchman (PW4) and Saadia (PW3) arrived and intervened. That thereafter, Yasmine went to the room while he remained at the reception brushing having chewed miraa.

13. The accused said that after about 20 minutes he followed her (Yasmine) to the room. On finding it locked, he knocked. She failed to respond. After about 5 minutes he decided to force the door open by kicking it. The lock gave way and on looking in he saw Yasmine hanging against the wall. She had hung herself using a lasso tied to a protruding metal which hangs over the bed. He quickly removed her and put her on the bed while asking her why she was doing that. It was then that he realized that she was dead. He called his mother and siblings and step father who lived about 100 metres away. When they came, he went with the father to make a report at the police station.

14. In cross-examination, he denied that he was annoyed with the deceased stating that there was no quarrel. He however confirmed that he broke the door. He stated that when he entered the room, he found her having strangled herself. He said that he did not see any one at that time and that he was the only one who saw the deceased hanging. He suggested that she may have committed suicide because of anger.

Submissions

15. In final submissions, the defence submitted that the prosecution witnesses did not show that the accused murdered the deceased. They referred to the testimony of PW3 who said that she heard no commotion and the testimony of PW5 who stated that the room was intact. They submitted that the actions of the accused of going to report to the police did not show a guilty mind. Further, they submitted that no photos of the scene were displayed. On the cause of death, the defence maintained that the deceased could not have been suffocated without putting up a struggle. They urged the court to find that the deceased committed suicide because she was angry with the accused and that there was no bitterness on the part of the accused to have warranted him to continue the fight in the room. That he only broke the door in order to try and save the deceased whom he saw hanging. Finally, the defence submitted that the charge had not been proved beyond reasonable doubt and that any doubt should operate in favour of the accused.

16. The prosecution submitted that the evidence against the accused showed that there was a fight between the accused and deceased and that the accused broke the door and entered the room where the deceased had locked herself. They submitted that no other person was seen entering or leaving the room (No.13) except the accused.

17. The prosecution further submitted that the malice aforethought can be seen from the accused's action of breaking the door. He was angry and wanted to continue the fights. His intention was to continue assaulting the deceased. In further submission, the prosecution stated that it was the accused's explanation that the deceased hung herself was not tenable. The prosecution believed that the accused tied the cloth around the deceased's neck after suffocating her.

18. Analysis of evidence and conclusions

The evidence of PW1, PW2 and PW3 was central to the prosecution case. These are the witnesses who were present at the Mirangi Lodge, the scene of the incident.

However, none of these witnesses saw the accused suffocate the deceased. The case therefore rests partly on circumstantial evidence.

19. Courts have set out in various cases, the guiding principles when circumstantial evidence can be applied as a basis for a conviction. In the case of **Sawe v Republic (Supra)**, the court stated that;-

'In order to justify, on circumstantial evidence, 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. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other 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.'

In the case of *Musili Tulo v Republic* Criminal Appeal No. 30 of 2013 (2014) eKLR the Court reiterated the principles set out in **GMI v. Republic** Criminal Appeal No. 308 of 2011 and **R. v. Kipkering Arap Koske & Another**, 16 EACA 135 as follows:

'(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.'

20. From the evidence and the submissions presented in this trial it is clear that the cause of death as well as who caused the death is disputed. The prosecution strongly believes that the deceased died as a result of being strangled and suffocated by the accused. The defence on the other hand state that the deceased hanged herself. So what was the real cause of death? As stated above, none of the prosecution witnesses saw the accused strangling the deceased. The watchman Simon Mwangi (PW4) witnessed the fight between the accused and deceased and even called their friend Saadia (PW2) to intervene. That was within the corridors of the Lodge but outside the accused's room. PW4 saw the deceased go into the room and the accused trying to break the door. In PW4's words "I saw Mohammed trying to break the door. He was pushing and kicking it." When Mohammed (the accused) dashed past the watchmen at the reception, the watchman suspected there was something wrong and rushed to the room where he says he saw the lady (deceased) lying on the bed face upwards. He rushed to call the manager(PW1) who also told the court that she saw the deceased lying on the bed. Together with Saadia (PW4) tried to administer first aid and realized the lady was not breathing. PW1 told the court that she saw dark marks on the deceased's neck which were visible because the deceased was light skinned. Saadia also told the court that she went into the room and found the deceased lying on the bed with the head hanging over the bed. That she asked the watchman to assist her put her on the bed properly and he declined. She shouted and other people came. Saadia said that she did not see any bruises on the deceased. She said in cross-examination that she did not see any injuries on her body. She however said that she saw that the door was broken.

21. No.68688 Inspector Francis Muthee Gichuhi (PW5) was the OCS Eastleigh Patrol base under Shauri Moyo Station visited the scene (Mirangi Bar in Eastleigh Section 3, 1st Avenue on 2nd December 2012. He went into room 13 and found a body of a lady of Somali origin lying on the bed. She was dead. Inspector Gichuhi testified that the suspect (accused) told him that the deceased had committed suicide using a headscarf tried to a protruding bar on the wall. He told the court that he disbelieved the suicide

theory because he observed that the protruding metal bar was too low. He said that one could not use it to hang oneself whether in a standing or even kneeling position as the same was too low. He estimated it to have been just one metre above the bed. Inspector Gichuhi said that he discounted the suicide theory and interrogated the suspect and the watchman who narrated to him the incident of the fight between the accused and deceased. He also observed that the door to the room was partly damaged with the lower side being damaged completely. With respect to the deceased he said that he observed minor tissue injuries suggesting that she might have been strangled. On cross-examination, he said that he was not trained in medicine and that the injuries around the neck is what showed that she may have been strangled.

22. While testifying on the cause of death, Dr. Ndegwa who performed the post-mortem opined that the deceased died of asphyxiation owing to suffocation. He stated that during post-mortem, he saw bruises around the left cheek and on the inside of the eyelids. He explained that such redness occurs the body lacks oxygen and causes the small capillaries to bleed. Dr. Ndegwa explained in cross-examination that asphyxiation simply means air not going into the lungs and that the same can happen if someone hanged themselves. He further clarified to the court that the deceased died of suffocation and not strangulation. He explained that he ruled out strangulation as there were bruises around the nose and mouth of the deceased.

23. From the evidence above, there is no dispute that there was a disagreement between the deceased and the accused on the material date. While the prosecution witnesses namely the watchman (Simon Mwangi) and the couple's friend (Saadia) PW2 told the court of a fight, the accused admits to a verbal quarrel only. He admits to having broken the door but only to save the deceased whom he says had locked herself in and was committing suicide. I found the evidence of Simon Mwangi (the watchman) credible. His presence at the Lodge at the material time was not disputed. He was going about his normal duties when the accused and the deceased started a quarrel and a fight within the corridor of the Lodge. He tried to intervene but when the accused turned hostile, he quickly thought of seeking the intervention of the couple's friend Saadia. Mwangi says that Saadia and the couple spoke Borana language.

24. Saadia corroborated Mwangi's testimony. She told the court in her testimony that she intervened. She also confirmed that she knew the accused as they came from the same place in Marsabit and were both Borana. She said that she met the deceased at the Lodge. Saadia however told the court that after her intervention she left the couple having cooled down and she went to her room to sleep until the watchman called her to say there was a fight in Room 13.

25. Mwangi's account is that when the couple was separated, the deceased went to their room and locked it and that shortly after the accused followed and he found the door locked, he kicked and punched until the door gave way. Mwangi's evidence respecting the accused having broken the door is sufficiently corroborated by Wanjiku (PW1) who says that Mwangi woke her up to tell her that there was a fight in room 13 and that the accused was breaking the door. She found the door broken when she got there. Inspector Gichuhi (PW5) also testified to having found the door damages.

26. I find from the evidence of Mwangi and Saadia that there was indeed a fight between the accused and the deceased in the corridor of the Lodge. Mwangi and Saadia had absolutely no reason to lie to the court. Mwangi was a watchman going about his normal duties when he witnessed the fight. He acted by calling Saadia to intervene and when he saw further violence, he alerted his boss. Mwangi's testimony was straight forward and was not shaken in cross-examination. Although Saadia appeared keen not to say too much in her testimony, she still confirmed that there was a fight. She only down played the fight by calling it "normal domestic issues" she said she did not see the accused breaking the door as she found it already broken and the deceased lying on the bed not breathing. Both Inspector Gichuhi (PW5) and Cpl. Kabalo (PW6) testified that they found the door broken when they visited the scene.

27. From the testimony of the prosecution witnesses, analyzed above I am convinced that the fight on the corridor extended to room 13 where the deceased locked herself in and the accused broke the door to gain access. They were the only two people in the room.

28. The accused denied that he assaulted the deceased at the corridor at all. He said that the fight was

between the deceased and some other unknown woman and that he only came in to separate them. He admitted that he broke the door but only because he was concerned when the accused did not respond to his knock and call that she opens. That when he forced the door partially open and peeped through, he saw the deceased hanging and it was then that he broke the door open in a bid to save the deceased. I considered the accused's account vis-à-vis that of the prosecution witnesses and found it highly improbable that there was an unknown woman in the scene. Neither the watchman (PW4) nor Saadia (PW3) saw such a woman.

29. I also considered his evidence that the deceased hanged herself vis-à-vis the prosecution evidence disproving the same. Inspector Gichuhi (PW5) told the court that the metal pipe to which the deceased was alleged to have tied the scarf with which she hang herself was too low, so low that she could not have suspended herself even from a sitting position on the bed. Inspector Gichuhi's evidence however was not corroborated. There were no photographs taken to support his observation. Infact the height of the metal bar was challenged at cross-examination. I found however from the evidence of the pathologist that the suicide theory could not stand. The Post-mortem did not disclose any marks around the neck of the deceased which would otherwise have been notable if a noose had been tightened around the deceased's neck. I have therefore concluded that the deceased did not hang herself contrary to the assertion of the accused.

30. It is clearly evident to me that the accused and the deceased were the only persons present in room 13 at the material time. This is because the watchman saw the deceased go into the room. He next heard and saw the accused banging and kicking on the door which apparently was locked from the inside. The watchmen rushed to alert the manager (PW1) that the accused was trying to break the door. He did not see the accused entering after breaking the door but he saw him dash out past him (the watchman) at the reception area. The watchman immediately suspected that something was wrong and on rushing to room 13 found the deceased on the bed. Both Saadia (PW3) and Lucy (PW1) confirmed that they rushed to the room and tried to administer first aid. Indeed the accused confirms that when he broke the door he saw the deceased hanging. He did not see any one else in the room. The question then that remains is, did the accused strangle or suffocate the deceased or did the deceased commit suicide by hanging herself?

31. The prosecution witnesses have variously stated that the deceased was strangled by the accused. This was the testimony of PW1 who also said that she saw marks on the deceased's neck. It was also the testimony of PW5 that he observed tissue injuries around the deceased's neck. Besides the testimony of these witnesses, Dr. Ndegwa observed his testimony that the deceased had various injuries. In the post-mortem report, he noted the injuries as subcutaneous contusion around the left cheek, petechial scleral and conjunctival haemorrhage, and bruise on the upper arm laterally. Dr. Ndegwa explained that conjunctival haemorrhage refers to redness in the conjunctiva tissue around the inside of the eyelid and that the same occurs when the body lacks oxygen causing the small capillaries to bleed. He further explained that asphyxiation refers to air being cut off from the lungs and that the same would happen if one hanged themselves, were strangled or suffocated.

32. Dr. Ndegwa's observations on the injuries suffered by the deceased are consistent with the oral testimony of there having been a fight between the deceased and accused. Although there may be a distinction between strangulation and suffocation, the prosecution witnesses seemed to use the terms interchangeably. What clearly came out of their evidence however is that the deceased had marks around her neck. The question whether the deceased was strangled or suffocated was however put to rest by the expert evidence given by the pathologist.

33. Dr. Ndegwa (pathologist) ruled out strangulation and opined that the deceased had bruises around the nose and mouth. This suggests that the air was cut off by effectively covering the mouth and nose. In my considered view it is highly improbable that a person who is on a suicide mission can seal their nose and mouth and not be tempted to release the seal when they start running short of air. It can only be another person who can sustain the effort to seal the nose and mouth of a person until such person suffocates to death. Since I have already established that it was only the accused and the deceased were the only persons present in the room at the material time, and that the two were in a fight, I can confidently conclude that the accused was the person who suffocated the deceased.

Whether the accused had the requisite *mens rea*

34. I have found in the preceding paragraphs that it is the accused who caused the death of the deceased by suffocating her. For a charge of murder to be sustained however the prosecution must prove that the accused had malice aforethought. Section 206 of the Penal Code gives the circumstances under which malice aforethought can be proved or inferred. It states thus:-

(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) -

It is the duty of the prosecution to prove not only the *actus reus* but *mens rea* in a murder case. Malice aforethought can be inferred from the acts of an accused person. See **Nzuki V. Republic [1993] KLR 171**. It can be express, implied or constructive. Express malice is demonstrated when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous harm. See **Joseph Kimani Njau V. Republic 2014 eKLR**.

35. In the present case it has been proved that the accused and the deceased were in a fight which started in the corridor and continued in their room No. 13. Both of them were shown to have been in a state of agitation. They continued the fight in the room the outcome of which was that the accused suffocated the deceased. Dr. Ndegwa confirmed that the deceased was suffocated from his observation of the marks on the deceased's nose and mouth. The question I ask myself is whether in blocking the deceased's mouth and nose, he accused intended to stop her from screaming or intended to suffocate her to death. The evidence before me does not provide an answer. I do not find the element of *mens rea* proved beyond reasonable doubt. Indeed the evidence creates doubt as to whether the accused had malicious intention to end the life of the deceased whom he acknowledges was his girlfriend. The law dictates that I must resolve this doubt in favour of the accused.

36. In the premises, I find that the case proved by the prosecution is one of manslaughter and not murder. I proceed to convict the accused on the lesser offence of manslaughter contrary to section 202 of the Penal Code.

Sentence, dated and delivered at Nairobi this 30th day of May, 2016

R. LAGAT-KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Accused

.....: For the accused

.....: For the State