



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO. 8 OF 2011

REPUBLICPROSECUTOR

VERSUS

PETER MUSAU MUTUAACCUSED

JUDGMENT

INTRODUCTION:-

1. The accused **PETER MUSAU MUTUA** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on the night of 30th December, 2010 at Karen Brooks in Langata District within Nairobi County murdered **PAULINE WANJIKU KIMANI**.

2. On 20/1/2011 he pleaded not guilty to the said charges and on 26/9/2011 his trial commenced before Hon. Justice Ombija now retired who heard the evidence of eleven prosecution witnesses and put the accused on his defence who opted to give unsworn evidence upon which the judgment was set for 29/7/2015 which for some reasons was not delivered.

3. On 3/2/2010 the matter came up before the Judge who stated that the judgment was ready but had not been proofread and deferred the same to 18/2/2016 at 11.30 a.m. On 21/4/2016 the Judge indicated that he could not deliver the judgment since the vetting Board's verdict had retired him from the judiciary.

4. On 28/7/2016 the Presiding Judge of the Criminal Division issued directions under the provision of Sections 201 (i) and 200 of the Criminal Procedure Code and directed that this judgment be written and delivered by me based on the typed copies of the proceedings before Justice Ombija.

5. During the course of writing this judgment, it came to my notice that one page in respect of the accused defence before the judge was missing and I therefore directed that the accused person tendered his defence afresh before me which has now been done and therefore for record purposes it must be stated that I did not have the advantage of hearing and seeing the demeanor of the prosecution witnesses but has taken time to read and analyze their recorded testimony for purposes of this judgment.

PROSECUTION CASE

6. To prove its case the prosecution called a total of eleven witnesses whose testimony was as follows:-

PW1 PETER MACHARIA MAMWANGI

Stated that he was the employer of the accused and at the time of the alleged commission of the offence he was working in Papua New Guinea while his wife PW3 was staying at Karen Brooke House No. 740 with their daughter, the accused as a houseboy and **PW6 JOSEPH MWIKYA MUOKI** as a shamba boy. It was his evidence that he travelled back to Kenya on 24th December, 2010 and found the accused and PW6 in the compound since they were residing thereat up to 1st January, 2011 when he had invited his close friends for new year celebration and that he did not notice any unusual thing and neither did the Accused talk to him about any personal problem during that period until he left for Papua New Guinea on 9th January, 2011. On 11th January, 2011 PW3 called him and informed him that the body of the deceased had been buried in the compound and was subsequently exhumed by the police and the accused arrested.

7. PW2 KENNEDY MUREGI KARANJA a taxi driver at Karen Shopping Centre testified that the deceased who was his cousin had been reported missing from her house on Bogona Road and that they tried to look for her everywhere to no avail. On 29/12/2010 someone who was not known to him but who turned out to be PW6 went looking for him and told him that he was a friend to the deceased boyfriend whom he was working together with. He informed them that the deceased was dead and buried in the compound of his employer under the jiko for roasting meat. Based on this information together with his brother they reported to Karen Police Station who referred them to Hardy Police Station who went to the said compound where the accused allegedly confessed that he had killed and buried the deceased.

8. It was his further evidence that the Accused showed them where the body had been buried and in the presence of the police and the accused they dug up the grave and was able to identify the body of the deceased which was tied with a tape at the mouth, the hands and the legs. It was his evidence that he had not known the accused whom he identified at the dock before the date when the body of the deceased was exhumed and that when he was arrested the accused stated that the deceased had told him that her aunt had disapproved of her intended marriage to a Kamba and further that the deceased wanted to poison him.

9. PW3 FRANCISCA NJERI MACHARIA corroborated the evidence of PW1 and confirmed that the Accused started working for them from 1996 and had been given accommodation in the servant quarters. It was her evidence that the Accused never used to bring visitors in the compound but one day a young girl who introduced herself to her as Wanjiku came into the compound and went to the servant quarters but never saw her again. It was her further evidence that the accused was in the compound on 27th December, 2010 up to 1st January, 2011 when they had visitors for lunch. On 9th January, 2011 between 2.03 p.m. he had asked the accused to make for her a cup of tea when his phone rang and he walked back to the kitchen making her to become suspicious. When she inquired from him who had called him he said that it was a Karanja who had called him and she requested to speak to the said Karanja whom she spoke to and who informed her that he wanted the Accused because he was a boyfriend of his relative who was lost and wanted to find out if he had seen the girl.

10. It was her further evidence that she told the Accused to go to Karanja and sort out the problem and he left the compound up to evening when he came back and reported that he had not met Karanja since he was busy. The following day she again allowed him to go and sort out the problem and on 11th November, 2012 when she asked him whether he had heard from the deceased, the accused told her that she was “mteja” that the last time he had spoken to her the deceased had said that her family had rejected her intention to marry him. Subsequently the police came to her compound and recovered the body.

11. PW4 ALEXANDER JOHN HUNNS the employer of the deceased since 2009 testified that he last saw her on 29th December, 2010 at 6.00 p.m. when she was given leave and was supposed to resume duties on 6th January, 2011. **PW5 MICHAEL GACHIE NGANGA** testified that he had known the accused as an employee of PW1 and PW3 and was called by PW3 on 15th January, 2011 who told him that a dead body had been buried in her compound and later help in filling the grave with soil.

12. PW6 JOSEPH MWANIKI MUOKI testified that he was a co-worker with the Accused since 31st

June, 2008. It was his evidence that he knew the deceased as a girlfriend of the Accused who used to visit him since September, 2009. It was his evidence that the deceased had stayed with the accused in the compound from 25th December, 2010 – 30th December, 2010. On 31st December, 2010 the Accused went to him and told him that he had killed the deceased and took him to his room where he saw the body of the deceased on the floor next to the bed with blood oozing from the body. He left the room and thereafter heard the sound of digging and found the Accused burying the body. He did not report to anybody until 9th January, 2011 when he met the accused in Karen who told him that someone called Karanja had called him. On 11th January, 2011 he went to Karen shopping Centre and met the said Karanja whom he gave the information and subsequently the accused was arrested and in his house the following items were recovered.

- 1) Maasai rungu
- 2) Kikoi which the deceased used to wrap herself with.
- 3) Toy pistol.

13. Under cross examination he stated that he had known the Accused since school days and it is him who assisted him get the job. It was his evidence that the accused did not tell him of any problems with the deceased and that when he saw the body of the deceased he was in shock and that is why he did not inform anybody. **PW7 RETIRED POLICE CONSTABLE BEATRICE KIVINYA PETER** stated that on 11th January, 2011 she received information from PW2 on the deceased and proceeded to the home of PW1 and PW3 and arrested the accused who confirmed that he was a lover of the deceased and that they had intended to marry. He further told her that he last saw the deceased on 27th December, 2010. She stated that they conducted a search in the accused house and recovered a mobile phone which was identified as belonging to the deceased and a meko gas cylinder also identified as belonging to the deceased.

14. It was her further evidence that upon identifying the spot where the deceased had been buried, the accused told her that he had a quarrel with the deceased on 30th December, 2010 since her aunt had objected to him marrying her and had gotten for her a suitor who she was supposed to meet. In the process he got annoyed and tied her mouth, hands and legs and went to the kitchen for a piece of wood and hit her on the head and subsequently buried her, having cleaned the floor.

15. **PW8 ANTHONY NGANGA KARANJA** stated that on 6th January, 2011 he got a call from the mother of the deceased who informed him to trace her since her mobile phone was off. On 8th January, 2011 he found a man who knew the boyfriend of the deceased as Peter Musau whom he called and recorded the conversation, they agreed to meet on 9th but he did not appear. He corroborated the evidence of PW6. He confirmed that he knew the accused as a boyfriend of the deceased having been told by her sister which information was confirmed by the deceased when they spoke on phone. **PW9 CHIEF INSPECTOR ISAAC MUYA** visited the scene and joined other police officers at the same. He called the scene of crime personnel when the body was exhumed.

16. **PW10 NORA MUNGAI** conducted post mortem examination on the body of the deceased on 18th January, 2011 at city mortuary and confirmed that the cause of death was strangulation or asphyxia and that she recommended toxicology on some organs but did not know whether it was done. **PW11 CPL DAVIES MUTISYA** testified that he was the investigation officer in this matter and that he took the accused for mental assessment and the same was found to be mentally fit to stand trial. He further stated that he was given a confession statement taken on 13th January, 2011 from the accused by Inspector Johanne Libese and under cross examination testified that he received a small bottle of liquid suspected to be wine but did not see its relevance to the case.

17. When put on his defence the accused testified that the deceased was his lover. On 31st December, 2010 they woke up at 6.30 a.m. and took breakfast. The deceased then said that she was going to

Nakumatt - Karen to make some purchases. She returned at 12.30 with a bottle of wine which she said was his Christmas gift. He then left for his employer's house and when he came back he found that she had opened the bottle and poured the content thereof in a glass. When he drunk the said wine, it was very bitter, so he went for milk as the content was burning his stomach. When he inquired what she had put in the bottle she did not answer and when he looked at the floor he saw a packet of rat and rat poison which she told him she had decided to put in the drink since her parents had refused to consent to their intended marriage.

18. He further testified that he told the deceased that there was no need for her to put poison in his drink and that they should have just separated. Shortly thereafter he took a broom stick and aimed at the deceased back but she moved her head causing him to hit her on the head and she fell down upon which he called PW6 JOSEPH MWIKYA MUOKI to help him in assisting the deceased but the same did not do so only to go and inform the cousin of the deceased.

19. It was his evidence that he tried to assist the deceased but unfortunately she died. He stated that he was in shock since he did not intend to kill her. He therefore decided to bury her in the compound of his employer. He was subsequently arrested and that he gave the wine to an officer called Beatrice to be examined which results have not been given. It was his evidence that for the last two years in prison he has as a result of the said poisoning developed stomach and chest pains and produced in support thereof. Defence exhibit No.1 X-ray request and report form dated 27/11/2014. It was his evidence that he did not intend to kill the deceased.

SUBMISSIONS

20. At the close of the case Mr. Kibanga for the accused submitted that the fact that the accused committed the offence was not denied but submitted that the content of the liquid/wine which the accused in his defence stated had been mixed with some poison and given to him by the deceased had not been produced in court and that had it been produced it would have been adverse to the prosecution case. It was submitted that the action by the deceased in trying to poison the accused constituted provocation under Section 207 and 208 of the Penal Code and therefore the charge should be reduced to manslaughter.

21. On behalf of the State it was submitted that the deceased was assaulted and strangled by the accused and that there was no evidence that the accused was poisoned. It was submitted that when PW3 enquired about the whereabouts of the deceased, the accused said that he did not know and that nothing would have been easier than to own up to PW3 and that the accused never presented the rat and rat poison paper which he said was found on the floor.

DETERMINATION

22. Section 203 of the Penal Code defines murder as follows:-

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

To therefore prove a charge of murder the following ingredients of the offence are material:-

- a) Malice aforethought
- b) An unlawful act or omission on the part of the accused.

It is therefore upon the prosecution to prove beyond reasonable doubt the following element.

- (i) The death of the deceased
- (ii) That the accused committed the unlawful act that caused the death of the deceased with malice aforethought.

23. The fact of the death of the deceased is not in dispute, PW2 identified the body of the deceased, PW6 saw the dead body of the deceased in the house of the accused with blood oozing from the same, heard the accused digging and bury the body and later on participated in the exhumation of the body together with PW7, PW8 and PW10. **Dr. NORA MUNGAI** who performed the post mortem confirmed the fact of death and the cause thereof.

24. From the evidence tendered it is also clear that the death of the deceased was caused by the act of the accused. **PW6 JOSEPH MWIKYA MUOKI** who was staying with the accused in the same compound confirmed that the deceased was staying with the accused in the same room between 25th December, 2010 to 30th December, 2010 and that on 31st December, 2010 at about 1.30 p.m. the Accused informed him that he had killed the deceased. The accused also offered to **PW9 Chief Inspector ISAAC MUYA** the explanation of why he had killed the deceased. In his unsworn defence before the court the accused admitted having killed the deceased but offered the defence of provocation.

25. This therefore leaves the court with the only issue to determine whether the accused had any justifiable reason to kill the deceased that is to say whether the defence of provocation is available to the accused herein. Sections 207 and 208 of the Penal Code provides the following definition:-

Section 207

When a person who unlawfully kills another under circumstance which, but for the provision of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as herein the defined **before there is time for this person to cool** is guilty of manslaughter only. (Emphasis added.)

26. **Section 208** defines provocation thus:-

- 1) The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation to master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
- 2) When such an act or insult is done or offered by one person to another or in the presence of another to a person who is under the immediate care of that other or to whom the latter stands. In any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
- 3) A lawful act is not provocation to any person for an assault.

27. In this case the facts upon which the accused bases the defence of provocation is that the deceased attempted to poison him by putting rat and rat poison in the wine she had allegedly brought for him as a Christmas present and that when he drunk the same he found that it was very bitter. He then went for milk as it was burning his stomach and that when he asked her why she had done so she stated that it was because her parents had refused to consent to their intended marriage. I am not persuaded with this line of argument and in any event even if the deceased had allegedly poisoned the accused which has not been proved as she had no reason to do so, the accused had time to cool down when he allegedly went to the main house to get milk and had time to talk to the deceased who offered an explanation for her alleged action.

28. Since the dead tells no tale, it is clear from the evidence tendered and the accused defence that the accused had motive to kill the deceased so as to stop her from marrying the alleged suitor who had been identified by her aunt. From the state of the body when it was exhumed as per the evidence of PW1 which was tied with tape and cloth at the mouth, the hands tied at the back and the legs tied and from the post mortem report and the cause of death as per PW10 I find and hold that the accused had the intention and succeeded in killing the deceased with malice aforethought.

29. The accused account of what happened leading to the alleged cause of death by allegedly hitting the deceased with wood is rebutted by the evidence of PW10 and PW6. The conduct of the accused after the commission of the act herein including giving false information to PW3 his employer shows a guilty mind. Having taken into account the totality of the prosecution evidence against the accused defence which I hereby dismiss as unbelievable, I am satisfied and find that the prosecution has proved its case against the Accused beyond reasonable doubt and therefrom find the same guilty and convict him of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code of the murder of **PAULINE WANJIKU KIMANI.**

30. It must be stated that the accused had no right or justifiable reason whatsoever to kill the deceased who was only his girlfriend so as to stop her from marrying somebody else. No man has any proprietary right or interest on any other human being and more so a girlfriend. It has also remained a mystery to the court what the accused was doing with the items which were taken from the house of the deceased and a toy pistol and that if the accused only hit the deceased on the head as stated then why was the same tied with tape at the mouth and hand, tied at the back as well as the legs.

31. In the final analysis find and hold that the prosecution has proved beyond reasonable doubt that the accused killed the deceased with malice aforethought and I find and convict the same of murder of **PAULINE WANJIKU KIMANI** contrary to **Section 203 as read with Section 204** of the **Penal Code** and it is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 24th day of November, 2016.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Kemo for Miss Mwaniki For the State

Mr. Mogire for Kibanga for the Accused

Accused present

Tabitha court clerk