**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CRIMINAL CASE NO. 36 OF 2015**

**REPUBLIC……..……..…PROSECUTOR**

**VERSUS**

**PETER NGUGI MWAURA…….....ACCUSED**

**JUDGEMENT**

**PETER NGUGI MWAURA** hereinafter referred as the accused person was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The brief facts for the prosecution are that accused person on the 11/5/2011 at Loitokitok Township unlawfully murdered **Mary Waithera** hereafter referred as the deceased.

The accused denied the offence resulting in the case being set down for hearing. Initially the accused was represented by Mr. Konya advocate who withdrew representation and his place Ms Moinket was retained as the defence counsel for the accused. The state was represented by Mr. Akula Senior Prosecution Counsel. The prosecution availed a total of eight (8) witnesses in support of the charge against the accused.

**The Prosecution Case:**

**PW1 MONICA NJOKI** and her husband **PW3 DANIEL SADIQUE** told this court that on 10/6/2008 while in their house they heard some noise from her sister Mary Waithera who is the deceased in this case. According to their evidence the deceased was the one screaming. They both rushed to the house and found the accused fighting with the deceased. The deceased and accused lived together as husband and wife. PW1 and PW3 further testified that on noticing the conflict they decided to intervene by separating them from continuing with the fight. PW1 and PW3 parted ways with the accused and deceased by each going back to their respective houses. It was further the testimony of PW1 that the following day he received a call from one Kyalo to go and search for her sister, the deceased. The search by PW1 took her to Loitokitok Hospital where the deceased was undergoing treatment. PW1 told this court that she observed the deceased and noticed some bleeding from her mouth which she decided to look for water and clean it out. However within a short period PW1 returning back to the ward found the deceased had passed on.

**PW2 VIRGINIA NJERI KAMAU** a neighbour and cousin to the deceased testified that on 11/5/2011 she witnessed a quarrel between accused and his wife the deceased. PW2 further testified that the deceased called for help from PW1, PW3 who rushed and took some action of separating the two. In the course of separating the two a quarrel between PW3 and accused was triggered. There was a struggle and accused fell down on the ground. PW2 further testified that the deceased went for a motorbike to assist in transporting the accused to the hospital. According to PW2 both the deceased and accused left for the hospital but in a little while only accused came back to the house. PW2 further stated that the following

day she went to the hospital and found deceased in bad condition. PW2 added in her testimony that the deceased incidentally passed on while undergoing treatment at Loitokitok Hospital.

**PW4 PETER KUNGU** brother to the deceased confirmed the death by identifying the body to the pathologist who conducted the postmortem at Loitokitok District Hospital Mortuary and gave evidence as PW8. **PW5 DIANA MBUGUA** a sister to PW4 and the deceased corroborated the testimony of PW5 on identification of the body at the mortuary.

**PW6 CPL RICHARD KATAYI** testified on the level of investigations conducted by in respect of the murder report made at Loitokitok Police Station. PW6 further testified that the body of the deceased was preserved at the Loitokitok District Mortuary as investigator commenced by recording of statement from neighbours and relatives. According to the family of PW6 the investigations revealed that accused and deceased fought on 11/5/2011. During the fight PW3 intervened to separate them resulting in another fight between PW3 and the accused person. PW6 further testified that the deceased was taken to Loitokitok Hospital for treatment where she was admitted until her death on 13/5/2011. It was then arrangements were made to have a postmortem conducted on 17/5/2011 by Dr. Brian Ochieng PW8. PW7 Cpl Brian Nyakundi testified on how he effected arrest against the accused person being sought as a murder suspect which occurred on 13/5/2011.

At the close of the prosecution case, the accused gave a sworn statement and denied the charge that he killed his wife as alleged by the prosecution witnesses. The accused in his testimony gave a chronology of events on what transpired between his family and that of PW1 and PW3. The gist of the matter being he had been sent by the deceased to go and procure kerosene from the kiosk to be used in preparing super for the day. The deceased at the same time was at a grocery shop when she asked accused to wait so that they could walk home together.

The accused further told this court that on their way home they decided to pass through the house of PW2. They spent about thirty minutes and left for their respective house. The accused further testified that while at home deceased started to cook the evening meal but stopped midway leaving the house for about forty minutes. On her return they exchanged a bit because of her long stay while knowing it was time to prepare the meal for them. According to the accused, that inquiry generated into an argument which forced the deceased to call on PW1 and PW3 to intervene in de-escalating the tension. On arrival a fight occurred between PW3 and the accused person. The neighbours were attracted to the disturbance as a result of the fight. The accused alleged that he sustained physical injuries inflicted by PW3. This necessitated the deceased to make arrangements for a motorcycle which ferried them to Loitokitok hospital. As the accused was being treated the deceased notified the doctor that she also required to be examined due to the injuries sustained when she separated them. The accused proceeded to tell the court that the deceased died a few days later while undergoing treatment. He denied that the death was occasioned due to the injuries inflicted by him as alleged by PW1 and PW3.

Ms Moinket learned counsel for the accused made final submissions urging this court to find that the prosecution failed to discharge the burden of prove beyond reasonable doubt. Learned counsel contended that the prosecution failed to proof the cause of death. She relied on the testimony of PW4, PW5 and PW8, the postmortem report which shows the cause of death being internal bleeding secondary to blunt thoracic injury. Third learned counsel submitted that the prosecution failed to adduce crucial evidence on how the deceased was admitted at Loitokitok Hospital. There was no evidence from the said good Samaritan who took her to the hospital. Learned counsel further contended that failure to call the good Samaritan as a witness occasioned gaps in the prosecution case as to which location deceased was picked from to be taken to the hospital. In order to support her arguments to demonstrate the failure on the part of the prosecution to discharge the duty case upon them. Learned counsel relied on the cases of **Abanga alias Onyango v Republic Cr. Appeal No. 3 of 1990** for the proposition on the principles which should be applied in order to test circumstantial evidence before it can be accepted as basis to find an accused guilty and convict him of the offence.

On the part of the prosecution Mr. Akula Senior Prosecution Counsel submitted that the testimony of PW1, PW2, PW3 lays the foundation on how the deceased was injured and subsequently found herself at

the hospital. It was his submissions that the death of the deceased can be deduced from the evidence of PW4, PW5 and PW8 the medical doctor who conducted the autopsy on the body of the deceased. Regarding malice aforethought learned prosecution counsel invited this court to evaluate the evidence tendered by PW1, PW2 and PW3 on the events that occurred on 11/5/2011 between the accused and deceased. Mr. Akula in support of his submissions relied on the case of **Libambula v Republic [2003] KLR 683** on the proposition and relevance of motive in this particular case. The learned prosecution counsel contended that there is adequate evidence to connect the accused with the offence of causing death of the deceased beyond reasonable doubt.

**Analysis and Determination:**

I have considered the evidence by the prosecution, the defence testimony and submissions placed before me by Mr. Akula for the prosecution and Ms. Moinket counsel for the accused. It is my singular duty to weigh and scrutinize the evidence in totality to determine whether the prosecution has discharged its burden of proof in respect of the provisions of Section 203 with 204 of the Penal Code. Under Section 203 of the Penal Code (Cap 63) the law sets out four key elements which the prosecution ought to prove beyond reasonable doubt for an accused person to be found guilty and be convicted of murder. These are:

(a) Death of the deceased and how the accused caused it.

(b) Unlawful commissions or omission on the part of the accused that led to the death.

(c) That in causing death of the deceased there was malice aforethought on the part of the accused.

(d) That the accused was positively identified as the perpetrator of the crime.

**(1) Death of the deceased:**

On this element the prosecution adduced evidence from PW4 and PW5 being a brother and a sister to the deceased respectively. They received information of the death. They travelled to Loitokitok and did identify the deceased positively during the autopsy conducted by PW8. PW8 Dr. Ochieng examined the deceased of good nutritional status prior to her death. According to Dr. Ochieng the deceased had external or internal injuries some blood around the heart 2 x 2 cm injury on the right ventricle, and injuries on sternum area facing the heart. The cause of death was opined to be complications arising from internal bleeding secondary to the blunt thoracic injury. The postmortem report was produced as exhibit 1. Besides the testimony of PW4, PW5, PW8, the other prosecution witnesses PW1, PW2, PW3, PW6, PW7 and PW8 alluded to the fact that the deceased died while undergoing treatment at Loitokitok Hospital. The accused person also confirmed the deceased death.

The death of the deceased was therefore proved beyond reasonable doubt.

**(2) The second ingredient – unlawful death of the deceased.**

The general legal principle is stated in the case of **Gusambizi Wesunga v Republic [1948] 15EACA 65:**

> **"Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property."**

The offence of murder revolves around the acts or omissions whose consequences result in the death of a person. The prosecution has a duty to present evidence to show that the acts or omissions on the part of the accused occasioned the unlawful death of the deceased on 13th May 2011.

The law under this ingredient is very clear that the death of a deceased person need not to be caused by the immediate act of the accused person. This aspect of the case is well stated by **William J** in his book **Criminal Law (Reprint 2016) at pg 304 – 305**. Under section 213 of the Penal Code defines causing

death to include acts which are not the immediate or sole cause of the death when the accused would be held responsible for another person's death although his act is not the immediate sole cause under the following circumstances:

(a) He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death.

(b) He inflicts injury on another person which would not have caused death if the injured person had submitted to proper medical surgical treatment or had proper precautions to his mode of living.

(c) He by actual or threatened violent causes such person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused.

(d) He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death.

(e) His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

(ii) when an accused person inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes surgery or treatment which causes his death the accused would still be liable for the death regardless of whether the treatment was proper or mistaken as long as it was done in good faith and with common knowledge and skill.

(iii) Act of accused person forces deceased to take evasive action which results in his death.

(iv) Acts of accused hastens death of the deceased.

In the case of **Republic v Mwagambo S/O Gishodi [1941] EACA 28** and **Muli v Republic Cr. Appeal No. 96 of 1999** the court held interalia that, "***the accused who inflicts injury upon another person and as a result the victim succumb, death while undergoing treatment. The accused will be held liable regardless whether the treatment was proper or not***."

In applying these legal principles to the facts of the case I am of the following conceded view:

It is clear from the testimony of PW1, PW2 and PW3 that the deceased received injuries on 11/5/2011 at their house from the accused person. The deceased was the one who screamed calling for help from PW1, PW2 and PW3. In their testimony each confirmed responding to distress call by the deceased. The testimony of PW1 and PW3 is categorical that on arrival the deceased was on the ground and accused on top of her continuing with acts of inflicting injuries. The testimony by PW1, PW2 and PW3 is therefore direct evidence on the accused assaulting the deceased and action taken to separate him from continuing with the unlawful acts against the deceased.

The second version which emerged from the evidence of PW1, PW2 and PW3 is in respect of the struggle between the accused and PW3. This happened when accused resisted the intervention to stop acts of physical violence against the deceased. The aftermath was accused sustained some injuries in the process of being restrained not to beat his wife, the deceased in this case. It is also on record from the evidence of PW1, PW2 and PW3 that deceased called for a motorcycle which took both of them to the hospital at Loitokitok. The accused was treated but left the deceased at the same venue to be examined by the doctor. The last person to be seen with the deceased alive was no other than the accused.

In view of the evidence on how the deceased got to Loitokitok Hospital it is astonishing to say the least that there were no beatings or injuries inflicted on her when PW1, PW2 and PW3 separated them. The question is where is the evidence to contradict the prosecution case that deceased death is attributable to the internal injuries inflicted on 11/5/2011. The accused on leaving the deceased at the hospital never

bothered to follow up on the outcome of the examination and treatment prescribed. The relatives and neighbours PW1, PW2 and PW3 commenced a search and find mission on the whereabouts of the deceased. She was discovered lying in the hospital at Loitokitok in a coma. The postmortem report by PW8 confirmed blunt thoracic injury primarily resulted in internal bleeding.

The last seen theory as presented by the prosecution completes the chain of circumstances that is consistent with the hypothesis that accused had the opportunity to continue inflicting harm to the deceased. I am in agreement with the principle of law on circumstantial evidence in the case of **Republic v Kipkemong Arap Koskei & Another [1949] 16 EACA 135** where the court held interalia that, ***"where a case rests entirely on circumstantial evidence the inference of guilt can be justified only when the incriminating facts and are found to be incompatible with the innocence of the accused."***

It is trite that even in circumstantial evidence the prosecution bears the responsibility to prove the case beyond reasonable doubt. From the available material, I am satisfied that the prosecution has proved the ingredient of unlawful death of the deceased through acts of commission and omission on the part of the accused. The testimony by the accused did not rebutt the cogent evidence by the prosecution witnesses. The blame worthiness cannot be shifted from the accused on causation of the deceased death.

**(3) Malice aforethought**

Turning to the ingredient of ***'malice aforethought'***, it is the mensrea or mental element of the offence of murder. In order to prove malice aforethought the court is required to infer from the circumstances and peculiar facts of each case. It can also be established from the statement of facts of the accused admitting the offence. Malice aforethought has been defined in Section 206 of the Penal Code – malice aforethought shall be deemed to be established by evidence providing any one or more of the following circumstances:

(a) An intention to cause the death of another.

(b) An intention to cause grievious harm to another.

(c) Knowledge that the act or omission causing death will probably cause death or grievious harm to some person, whether that person is the person killed or not, accompanied by indiffence whether death or grievious injury occurs or not or by a wish that it may not be caused.

(d) An intention to commit a felony……"

Malice aforethought is now settled under case law that it can be inferred from set of circumstances of the offence constituting the following as stated in case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63:**

(a) The nature of the weapon used.

(b) The part of the body targeted whether vulnerable or not.

(c) The manner in which the weapon is used (whether repeatedly or not).

(d) The conduct of the accused before, during and after the attack (whether acts with impunity).

This in order to establish malice aforethought and seek a conviction for murder the prosecution must prove the intention or knowledge on the part of the accused as provided for under Section 206 of the Penal Code. In the event the test specified under Section 206 of the Penal Code is not met, the accused will be liable to be convicted of the offence of manslaughter provided there is proof of an unlawful and intentional act that resulted in the death. The Penal Code under Section 207 also provides situations where an accused person acting under provocation at the time of the killing can be convicted of a lesser charge of manslaughter.

As far as this case is concerned PW1, PW2 and PW3 are on record that on the material day there was a commotion at the deceased house. They confirmed that their houses are located next to each other with a difference of a few metres. The deceased screamed and called for help. It was in their testimony they rushed to the house to establish what was happening. On arrival they confirmed accused beating the deceased while on the ground. It was further the testimony of PW1, PW2 and PW3 that they managed to separate them from continuing to fight. It is not disputed that the accused left together with the deceased from their house to the hospital. The initial assault was witnessed by PW1, PW2 and PW3. The witnesses arrived soon thereafter when deceased had already received some beatings from the accused. During the separation by PW3 the accused was on top of the deceased.

It is also clear from the testimony of PW1, PW2 and PW3 that the accused motive of beating the deceased can be traced to her drinking of alcohol and coming home late drunk. What the prosecution established are unbreakable chain of events from the 11/5/2011 until the admission of the deceased at Loitokitok Hospital where she passed on.

I have no doubt that the injuries suffered by the deceased were of an internal nature that could only be confirmed through medical examination. There is evidence that the accused and deceased triggered the events of the fateful through a misunderstanding and quarrel which turned violence as the accused beat the deceased and later joined by her relatives who came to separate them. This court can infer aspect of diminished responsibility under Section 207 of the Penal Code. The requisite malice aforethought could not be gathered.

In the circumstances of this case the accused in this case assaulted the deceased particularly when he hit her while on top of her in the presence of PW1, PW2 and PW3 without taking precaution that the thoracic cavity is the home of the heart that part of the body is a vulnerable area. The clenched fist applied with force upon a young lady aged 25 years, without due and attention to the consequences places the accused person within the threshold of the offence of culpable homicide. The medical evidence tendered proved the deceased sustained internal bleeding secondary to blunt thoracic injury. The grievious harm was inflicted none other the accused. What lacked in this case is evidence by the prosecution to conclude that there was malice aforethought on the part of the accused under the test specified in **Republic v Tubere Case (Supra).**

It has been said more than one occasion by the Court of Appeal how courts should approach inference of acts which are said to constitute malice aforethought for a decision to convict an accused for murder is contemplated. In the case of **Nzuki v Republic [1993] KLR 171** the court stated that malice aforethought is a term of art and emphasized that:

> **"Before an act can be murder it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subject to the actual accused:**
>
> > **(i) The intention to cause death.**
> >
> > **(ii) The intention to cause grievious harm.**
> >
> > **(iii) Where the accused knows that there is a serious risk that death or grievious bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as a result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in more of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievious harm is likely or highly likely to ensue from his conduct it is not by itself enough to convert a homicide into a crime of murder. (See also Hyman v DPP [1975] AC 55."**

The other dimentio on this matter can be deduced from the case of **Republic v Shampal Sigh S/O**

**Pritam Singh [1962] EA** where the East African Court of Appeal set out as follows:

> **"There was complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievious harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."**

Consequently applying the principles in the cases referred to in this analysis I am equally satisfied the evidence brought by the prosecution has not shown the acts of the accused were accompanied with malice aforethought. The offence proved against accused is that of manslaughter. It suffices to state that in this case the evidence of PW1, PW2 and PW3 places the accused at the scene of the assault. I find that the circumstantial evidence taken together with direct evidence gives rise to the conclusion that the inculpatory facts are incompatible with the innocence of the accused and incapable of any explanation upon any other hypothesis than that of guilt. (See **Abanga alias Onyango (Supra)**.

I need to state clearly that the prosecution evidence against the accused was not wholly circumstantial but one also supported with direct testimonies of PW1, PW2 and PW3. In a nutshell that combination established the case against the accused person beyond reasonable doubt. In conclusion and for the reasons advanced in this judgement i am satisfied that the offence of murder under Section 203 as read with Section 204 has not been proved. However the evidence firmly grounds the charge of manslaughter contrary to Section 202 as read with section 205 of the Penal Code. I substitute the charge of manslaughter to that of murder as against the accused. As a result I enter a verdict of guilty for the offence of manslaughter and do convict him accordingly.

**Dated, delivered and signed in open court at Kajiado on 21st day of December, 2016.**

**…….**

**R. NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Akula for Director of Public Prosecution

Mr. Mateli Court Assistant

Accused present

Ms Moinket for accused present