



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 30 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**S W M.....ACCUSED**

**JUDGEMENT**

**Background**

S W M, the accused, is facing a charge of murder contrary to section 203 read with section 204 of the Penal Code (Cap. 63 Laws of Kenya). It is alleged that the accused murdered B M M, the deceased, on 24<sup>th</sup> February 2013 [particulars withheld] in Kasarani Nairobi. The Director of Public Prosecutions (DPP) called nine (9) witnesses in total in support of the case. The accused testified as the only witness for the defence. I took over the hearing of this case after two witnesses had already testified before Hon. Lady Justice Florence Muchemi following her transfer to another station. I have heard seven (7) prosecution witnesses and one witness for the defence. It was agreed by the parties that the case proceed from where Justice Muchemi had reached.

**Facts of the case**

The facts of this case as can be drawn from the evidence are not clear. The reason for this is that there was no direct evidence on the circumstances leading to the death of the deceased. What this court was able to gather from the evidence is that the deceased was married to the accused or they used to live together as husband and wife. They had three children. Each of them had a daughter before they started living together. They got the third child together.

On the morning of 24<sup>th</sup> February 2013 E K who testified as PW8 (E) found the accused and the deceased at their home as she went to the shop. The deceased was related to her as a brother in law. He sent E to the shop to buy milk and airtime for him and gave her Kshs 100. She did not find the milk. She bought airtime worth twenty shillings and gave the same together with the balance to deceased on her way back to her house.

After a short while one young girl identified as G (not a witness) went to E house running and informed her that she had seen the accused outside her house with bloodstained clothes. E went out and confirmed what G had told her. The accused told her to go into her (accused's) house but E was afraid and decided not to enter into accused's house. E however gained courage to go into the house after other members of public joined her. Inside the house she saw the deceased lying on the floor facing up. He was bloodstained and according to her, the deceased looked dead. E telephoned relatives including C K who testified as PW1 (C) her sister in law. C travelled from Tala to Nairobi and on arriving at accused's house

she found his body lying on the floor inside the house.

The matter was reported at Santon Police Post to No. 35582 Senior Sergeant Joseph Mwali who testified as PW4 (SGT Mwali). SGT Mwali visited the scene and found the body of the deceased inside the house. He also found the accused inside a bedroom where she had locked herself. SGT Mwali rescued the accused from the room and handed her over to his colleague one Police Constable Mulatya (not a witness) to take her to the Police Station while SGT Mwali was left at the scene to await the scenes of crime personnel to arrive. The accused was later charged with this offence.

### **The charge of murder**

Section 203 of the Penal Code defines murder as the unlawful causing of the death of another person with malice aforethought. The penalty for murder is death as provided under section 204 of the Penal Code. The burden of proof lies with the prosecution. The standard of proof is beyond reasonable doubt.

For a murder trial to result in a conviction, the prosecution has to prove the death of the deceased occurred in the case under trial; the cause of that death; the identity of the person who caused that death, that is the accused person under trial is the person who caused the death of the deceased in that trial; the unlawful act or omission by that person resulting in the death of the deceased and malice aforethought, the intention to cause the death, on the part of the person causing that death.

In determining this matter therefore this court must address and find answers to the following questions:

- i. Did the deceased die?
- ii. If so what caused that death?
- iii. Who caused that death or is the accused the person who caused that death?
- iv. Did the person who caused that death possess malice aforethought? Did he/she have the intention to cause that death?

It is the duty of the prosecution to adduce evidence to convince the court and facilitate it in finding the answers to the above questions. This is no mean task since the law requires that the standard of proof is that of beyond reasonable doubt.

In her defence given without taking the oath, the accused narrated to the court how she met the deceased and their life together as husband and wife, which life was not without domestic problems. If her evidence is to be taken as face value they used to quarrel often and she claimed to have been physically assaulted by the deceased. She also claimed to have left him at one time after he beat her and that they later reconciled. She stated that in January 2013 he forced her to give him Kshs 14,000 she had received from her merry-go-round group.

The accused told the court that on the fateful day, 24<sup>th</sup> February 2013, they disagreed when the deceased found her asking A.M, deceased's daughter, why they were packing and where were they (daughter and deceased) planning to go. She said the deceased told her that that particular day was her day of reckoning and she was to remove her household belongings from the house. She told the court that the deceased was drunk and she did not want trouble with him; that as she was removing the window curtains the deceased held her and hit her on the head causing her to fall down. She started crying. She testified that the deceased hit the thermos flask and she saw him holding a knife which he used to cut her on the hand and he also hit her on the lip. They started fighting and after a while she heard him say he had been injured. She screamed and went out of the gate where she met a girl called G whom she sent to call E. In the meantime she called for a taxi to assist her take the deceased to hospital but many people gathered after her screams attracted them. The police who also came prevented her from taking the deceased to hospital saying they would handle the situation. She denied stabbing the deceased.

### **Analysis and determination**

Evidence has been adduced to confirm to this court that the death of the deceased occurred. C said that on

24<sup>th</sup> February 2013 she saw the body of the deceased lying on the floor inside the house the deceased shared with the accused at [particulars withheld] in Kasarani Nairobi. G M who testified as PW2 (G) said he is one of the relatives who identified the body of the deceased to the doctor at City Mortuary on 1<sup>st</sup> March 2013 for post mortem. SGT Mwali told the court that on visiting the scene of murder on 24<sup>th</sup> February 2013 he found the body of the deceased lying on the floor which he caused to be photographed by Japheth Mugambi (Japheth) from the scenes of crime office who testified as PW6.

Dr. Dorothy Njeru, PW5 (Dr. Njeru), the pathologist who performed the post mortem on the body of the deceased on 1<sup>st</sup> March 2013 testified that on examining the body she found a stab wound on the left side of the chest and a penetrating wound on the chest wall that caused injuries on the left side of the heart. Her opinion is that the cause of death was due to chest injuries as a result of the stab wound. Dr. Njeru produced as an exhibit the post mortem report confirming her findings.

Before concluding on this issue I wish to state that the evidence of Dr. Njeru on her findings after examining the body differs from that of other witnesses and also from the photos exhibited in court (exhibits 4(a)-4(i)) in respect to the number of injuries on the body of the deceased. SGT Mwali told the court that he found the body lying on the floor inside the house and that on turning it over he saw two stab wounds, one on the left side of the stomach near the waist and the second on the left side of the chest. Photographs Nos. 7 and 8 as produced by Japheth show close-up views of the body clearly displaying injuries on the left chest (photograph No. 7) and on the left abdomen near the waist (photograph No. 8).

Dr. Njeru both in her evidence in court and in the findings in the post mortem report said there was one injury only, the one on the left chest. She told the court that:

**“On external examination I found a stab wound on the left side of the chest. Internally I found a wound penetrating chest wall and injured heart, left side of the heart. The rest of the body had no other abnormalities.”**

The same findings are captured in the post mortem report.

This anomaly was not discovered by the prosecution or the defence. Or if it was discovered the prosecution chose to keep quiet about it and the defence did not cross examine on it!

After careful analysis of this evidence it is my finding that this court does not doubt that the death of the deceased occurred. This court does not doubt that the cause of that death was due to penetrating chest injuries resulting from stab wounds. It is not clear how Dr. Njeru could have failed to notice the stab wound on the stomach and to examine it to determine whether it also contributed to the cause of death. However it is clear that the chest injuries that penetrated the left ventricle of the heart were fatal wounds and caused the death of the deceased.

The evidence so far analyzed above proves without doubt that the deceased died and points to the penetrating chest wounds as the cause of that death. This settles the first and second questions posed above in regard to whether the deceased died and what caused that death.

This court will now turn to the issue in regard to who caused the death of the deceased or in other words whether the accused is the person who caused the death of the deceased. As stated above no other person was inside the house where it is believed that the deceased met his death. The evidence of C mentions the deceased's five year old daughter known as A. M who she found near the body of the deceased. This little girl was not called to testify. There is also the little girl G mentioned by E who informed her of having seen the accused with bloodstained clothes. In short no witness came forward to state that she/he witnessed what happened inside that house. This leaves the court with circumstantial evidence.

Circumstantial evidence, according to the Black's Law Dictionary 9<sup>th</sup> Edition, is that which is applied to the principal fact, indirectly, or through the medium of other facts, by establishing certain circumstances or minor facts, already described as evidentiary, from which the principal fact is extracted and gathered

by a process of special inference.

What are the circumstances in this case and do they point to the accused as the guilty party in this case? In **Teper v. R [1952] AC at p. 489** it was stated that:

**“Circumstantial evidence must always be examined, if only because evidence of this kind may be fabricated to cast suspicion on another.... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken the inference.”**

The circumstances of this case are that the accused and the deceased were in their house together with little A.M. In the morning hours on 24<sup>th</sup> February 2013 E saw both as she went to the shops. The deceased sent her to buy milk and airtime for him. E saw both of them as she came back from the shops. She gave the deceased the credit and balance of the money since she did not find milk. She returned to her house. After a short while, G went to E running and told her that she had seen the accused outside her house with bloodstained clothes. E went out and confirmed this. The accused called her and told her to enter inside her (accused’s) house but E was scared to do so until other people joined her. Inside the house the deceased was lying on the floor with stab wounds. He was dead. It was later confirmed that he had stab wounds on the abdomen and the chest. The chest wound was deep and penetrated the left ventricle. This wound was fatal according to the doctor.

The accused admitted having fought with the deceased on that day. She however denied stabbing him. Her evidence is that the deceased was holding a knife which he used to cut her on the hand. She further stated that in the cause of the fight the deceased was injured.

Does this evidence meet the standard set by the Court of Appeal for East Africa in **R. v. Kipkering Arap Koske & Another 16 EACA 135** where the Court stated that:

**“In order to justify 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.”**

In an old English case **Regina v. Exall & Others [1866] 176 ER 850**, Pollock CB stated as follows:

**“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fail. It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction , or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.”**

This is the standard to be used to gauge this case.

I have considered the circumstances of this case inferred from both the evidence of the prosecution and the defence of the accused. The accused told the court that the deceased was the one who had the knife and in the course of their fight she did not know how he got injured. There are only two ways that the fatal stab wounds could have been inflicted on the deceased: either that he stabbed himself to death whether accidentally or not or that he was stabbed to death by the accused. There is no evidence to show presence of another person in that house. There is no evidence to show where little A.M. was at the time of the fight.

I have considered the accused’s evidence that she was cut on the hand and hit on the lip. E said she saw accused with an injury on the lip and her teeth were bleeding but all of them were intact. She did not see any other injury on the accused. Dr. Joseph Maundu (PW7) who examined the accused three days after

the event on 27<sup>th</sup> February 2013 told the court that he did not notice any injury on her. Other than her evidence that she was cut on the hand there is no other evidence on the matter.

In my analysis of this evidence I am not able to understand how the accused and the deceased could fight while deceased was armed with a knife a lethal weapon and the accused without any weapon, according to accused's evidence, and the deceased fails to inflict any injury on the accused. Secondly, I fail to understand how the deceased could stab himself on his abdomen and on the chest. The chest wound was deep and penetrated the left ventricle. These facts are incompatible with the innocence of the accused. They are incapable of explanation upon any other reasonable hypothesis than that the accused must have inflicted the fatal wounds on the deceased. There is evidence from Anne Wangechi Nderitu who testified as PW3 (Anne) that confirms that the bloodstains found on accused's clothes and on the knife were from the deceased's blood.

My conclusion on this issue after careful analysis is that all evidence, though indirect, point to the accused as culpable. I find no other possible explanation on how the deceased sustained stab wounds on the abdomen and the chest having discounted the theory that the deceased stabbed himself. All the circumstances of this case as narrated in this judgement combined lead me to the inescapable conclusion that the accused stabbed the deceased.

Did the accused possess malice aforethought? Did she intent to kill the deceased or to inflict fatal wounds on him?

Under Section 206 of the Penal Code malice aforethought is proved if any one or more of the following is established:

- 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. **an intent to commit a felony;**
- d. **an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

Upon my careful analysis of the evidence before me, I come to a conclusion that the prosecution has failed to prove beyond reasonable doubt that the accused in stabbing the deceased possessed malice aforethought as defined above. I am alive to the fact that a knife is a lethal weapon and anyone using it must know that it may cause the death or grievous bodily harm. The prosecution has no evidence to prove malice aforethought or to counter the defence evidence though not tested on cross examination. The law does not place the responsibility of proving a criminal case on the accused person. The law accords an accused the right to remain silent and not give any incriminatory evidence. Even where an accused exercises this right and opts to remain silent, this cannot be taken against him/her.

Where any person causes the death of another person by an unlawful act or omission and the element of malice aforethought is absent, the offence committed is manslaughter and not murder. Having concluded that the accused is the person who stabbed the deceased resulting in his death and in the absence of proof that the accused possessed the intention to kill the deceased, this court finds the accused person, S W M, not guilty of murder as defined under section 203 read with section 204 of the Penal Code. Instead, this court finds that the offence proved against the accused is manslaughter. Consequently I find the accused guilty of manslaughter as defined under section 202 (1) of the Penal Code and convict her accordingly. I make orders accordingly.

**Dated, signed and delivered this 16<sup>th</sup> day of April 2015 in the presence of:**

Miss Ikol for State

Miss Omungala for accused

Accused S W M

**S.N. Mutuku**

**Judge**