



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO.92 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD MWENGA WILSON.....ACCUSED

JUDGMENT

The Accused, Bernard Mwenga Wilson, was charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 28th October 2007 at Mlolongo Market within Nairobi County, the Accused murdered Catherine Mbete (hereinafter referred to as the deceased). When the Accused was arraigned before this court, he pleaded not guilty to the charge. Trial commenced before Ochieng J. He heard three (3) witnesses before he was transferred from Nairobi. When the matter came up for hearing before Muchemi J, the Accused indicated that he was desirous of the trial to start *de novo*. The request by the Accused was granted by the court. A mistrial was declared. In the second hearing, Muchemi J heard three (3) witnesses before she too was transferred. The matter was placed before this court for further hearing. The parties indicated to the court that they had no objection to the court taking over proceedings from where it had reached. This court heard the respective testimonies of PW4 and PW5 before the prosecution closed its case. The court found that the prosecution had established a case to enable it to place the Accused on his defence. He was duly put on his own defence. He gave sworn evidence in his defence. After the close of both the prosecution's and the defence's respective cases, both parties made closing submissions. This court has considered the evidence adduced and the submission made. Before giving reasons for its determination, it is important that the facts of this case be set out.

According to the prosecution, the Accused and the deceased were at the material time, husband and wife. From the testimony of PW1 Francisca Mukei Ndeke and PW2 Charles Munyao Ngonza, it emerged that the marital relationship of the Accused and the deceased was not good. The deceased complained to her brother PW2 that the Accused used to beat her. PW2 testified that the beatings caused the deceased to separate from the Accused for a period of about two months. The couple later reconciled and resumed cohabitation. At the time of the incident, the Accused had lost his job. He was unemployed at the time. PW1, at the time, owned a salon business at Mlolongo called Beauty Point Salon. At the material time, she had employed the deceased as a beautician in the salon. She told the court that the deceased had worked for her for three months prior to the incident.

PW1 recalled that on 25th October 2007, the deceased came to work with a swollen face. She inquired

from her what had happened. The deceased told her that the Accused had beaten her. PW2, the brother of the deceased confirmed that the Accused had indeed beaten the deceased due to differences over the use of a mobile phone. The deceased told PW1 that she had been reconciled with the Accused after her brother (PW2) had intervened. The deceased worked well until the 27th October 2007. On the following day, PW1 assigned the deceased the duty to open the salon. As instructed, the deceased opened the salon on the morning of 28th October 2007. PW1 called the deceased and confirmed that indeed the deceased had opened the salon. She was attending to some customers. PW1 went to church and returned to her place of business at about 12.45 p.m. The deceased told her that she lacked some hairpieces which she required for her work.

PW1 decided to go and purchase the same in a nearby building. When she returned to the salon, she found many people milling around the salon. The front door of the salon was locked. She decided to go round the building to access the salon through a rear door. The door was locked. She peeped through the glass above the door. This was her testimony in-chief:

“I peeped and saw Catherine lying on the floor and a man top of her stabbing her with a knife. The front door had been locked and people were peeping through the window. The rear door was locked and I was also peeping through the glass window. The Accused is the one who was stabbing Catherine with a knife. The other workers were not in the salon. He stabbed Catherine on the neck and chest several times. ...people wanted to enter and save Catherine but it was not possible. They broke glass windows from the front but could not enter because of the grills. After Accused stabbed Catherine many times she looked lifeless and he took driers and other objects inside the salon and continued hitting her with them. He made many things fall down from the shelves. The Accused then licked the knife which he was using. It was full of blood. The Accused used the same knife to stab himself on the hip.”

PW1 further testified that after killing the deceased, the Accused opened the door. He was confronted by a crowd of people. He was beaten senselessly until he lost consciousness. The mob thought that he was dead. The police were called to the scene. According to PW1, the police collected the body of the deceased and took it to the mortuary. They also collected the Accused. As he was being picked from the ground where he lay, it was realized that he was alive. He was rushed to Kenyatta National Hospital where he was admitted for treatment.

PW2 testified that he was notified at about 5.00 p.m. on 28th October 2007 on what had transpired. He travelled from his house at Umoja Estate to Mlolongo. He arrived at Mlolongo at about 6.00 p.m. He found the deceased still lying at the scene of crime. She saw that the deceased had sustained several stab wounds on her neck and torso. He also had injuries on her face. She told the court that prior to the material day, the deceased had complained to her on several occasions that the Accused used to beat her. About three days prior to the fateful day, the deceased had called him and informed him that the Accused had beaten her. The dispute was over the use of a mobile phone which the Accused had given the deceased. The Accused did not want the deceased to receive calls using the phone. He confirmed that the marriage between the Accused and the deceased was not a happy one due to the Accused's violent behaviour towards the deceased.

The case was assigned to PW5 PC Francis Mukara to investigate. At the time, PW5 was based at Embakasi Police Station. He told the court that after the incident, the police visited the scene of crime and collected the body of the deceased. They took it to City Mortuary. The Accused was beaten by members of public and seriously injured. He was taken to hospital where he was admitted for some time before he sufficiently recovered and was arrested and charged with the present offence. The Accused was discharged from the hospital on 14th November 2007. He was examined on 27th November 2007 by PW3 Dr. Zephaniah Kamau based at the Police Surgery. On examination, PW3 noted that the Accused had a right side facial paralysis, had scars with stitches on the right parietal scalp, had scars on the lateral side of the forehead and bruises on the right forehead. The Accused complained of pain on the right jaw. He had a scar on the right knuckle, right aspect lower ? of the right forearm and anterior aspect of the right wrist. He had a scar on the right aspect of the right anterior ? of the right thigh. The doctor noted that the injuries were about one month old and were caused by both blunt and sharp objects. Nevertheless, he was

of the opinion that the Accused was mentally fit to stand trial. The P3 form was produced as ***Prosecution's Exhibit No.1.***

PW5 testified that there was no indication that the Accused was drunk at the time of the incident. He could not rule out that the Accused was drunk at the time. He testified that the Accused used two knives to stab the deceased. The two knives were taken to the Government Analyst for assessment but were not returned to him. He could not therefore produce the knives into evidence.

PW4 Dr. Peter Muriuki Ndegwa conducted post mortem on the body of the deceased on 6th November 2007. On external examination, he noted the following: the deceased had defensive stab wounds on the left hand between the 1st and 2nd fingers, four stab wounds on the left upper arm, four stab wounds on the left lower arm, three stab wounds on the back, two stab wounds on the left shoulder, seven stab wounds on the anterior chest wall, one stab wound on the abdomen and two stab wounds on the left cheek. On internal examination, he observed that both lungs had been stabbed. Blood in both chest cavities was about 1.5 litres each. The heart was perforated. There was blood in the pericardial sac - about half a litre. He formed the opinion that the cause of death of the deceased was excessive hemorrhage due to multiple organ injuries due to multiple stab wounds. The post mortem report was produced as ***Prosecution's Exhibit No.2.***

When the Accused was put on his defence, he denied causing the death of the deceased. He told the court that he got married to the deceased in 1998. They were blessed with three (3) children. The children were currently living with their maternal relatives. He told the court that on the day prior to the material day of the incident, he went out with his friends to have a drink. He drank Kenya Cane. It is a spirit. He went home and slept. On the following day, his wife left him to go to work. When he got up, he again met with his friends and took alcohol, in particular Kenya Cane. He drank the alcohol upto midday. He decided to go home. He did not reach home. He lost track of time. He found himself two weeks later while admitted at Kenyatta National Hospital. It was then that he was informed by his mother what had transpired on 28th October 2007. It was his evidence that he was not aware what had happened on account of his drunkenness. He only heard later that he had killed his wife. He does not remember killing his wife because he did not have any grudge or ill-will against her. In his submission before court, the Accused argued that on account of his intoxication, his criminal culpability should be diminished.

In all criminal cases, it is the duty of the prosecution to establish the guilt of an accused person to the required standard of proof beyond any reasonable doubt. The prosecution has a legal burden to adduce evidence to establish its case. The Accused has no legal obligation to establish his innocence. In the present case, the prosecution relied on eye witness account in a bid to establish its case on the charge of murder that was against the Accused. The prosecution essentially relied on the testimony of PW1. She testified that on the material day of the incident, she saw the Accused stab the deceased severally while inside the salon. PW1 peeped through the window and saw the Accused stab the deceased using a knife. Although the knives were recovered and given to the police, the same were not produced into evidence. PW5 explained that the knife was not produced because the same was not retrieved from the Government Analyst. PW1 gave a graphic description on how he saw the Accused stab the deceased severally before he used other items in the salon to hit the deceased as she was lying helpless and prone on the ground. The post mortem report presented to court by PW4 confirmed that indeed the deceased died from the stab wounds that were inflicted on her. That the deceased had defensive stab wounds on her hands was sufficient proof that she did all that she could to defend her life. It was not to be. According to PW4, in total the deceased sustained 23 stab wounds. The cause of death of the deceased was assessed by the doctor to be multiple organ failure due to multiple stab wounds. In his defence, the Accused told the court that he did not remember attacking the deceased. In fact he does not remember if he killed the deceased as claimed by the prosecution witnesses. He told the court that he was dead drunk at the time of the incident. However, none of the prosecution witnesses testified as to whether or not the Accused was drunk at the time of the incident.

Having carefully evaluated the evidence adduced by the prosecution witnesses, and taking into account the defence of the Accused, this court holds that the prosecution did indeed prove to the required standard of proof beyond any reasonable doubt that the Accused stabbed the deceased and thereby caused her

death. The eye witness account by PW1 was not challenged by the Accused during cross-examination. PW1 offered her testimony twice before the court: once in the vitiated trial and secondly, before Lady Justice Muchemi. In both instances, PW1's testimony was consistent. This court has no reason to doubt that PW1 was telling the truth. She had no reason to embellish her evidence. She had no grudge against the Accused. She had barely known the deceased for three months before the incident. She had not had any disagreement with the Accused. It cannot therefore be said that the evidence adduced by PW1 was tainted with any ill will or motive. This court holds that PW1 indeed saw the Accused stab the deceased severally while she was lying helpless and prone on the floor of the salon. *Actus reus* was established to the required standard of proof beyond any reasonable doubt.

As regard *mens rea*, whereas it was the prosecution's case that the Accused killed the deceased with malice aforethought, it was the Accused's case that he lacked the requisite mental capacity to form malice aforethought due to intoxication. The Accused relied on **Section 13** of the **Penal Code** which provides that:

“(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the Act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

(a) The state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) The person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) ...

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”

The Accused relied on the Court of Appeal decisions of **Charles Heho Ndirangu –Vs- Republic [2009] eKLR** and **Moses Murithi Ikamati [2015] eKLR**. In the first case, prosecution witness had adduced evidence to the effect that the Accused and the deceased had taken copious amounts of alcohol during a ceremony in the course of which the deceased was fatally stabbed. The court held in that case that *mens rea* had not been established on account of the Accused's intoxication. In the second case, the court held in paragraph 16 of the judgment thus:

“The trial court correctly stated that when intoxication or drunkenness on the part of an accused is revealed by evidence, it is the duty of the court to consider the same and evaluate the entire evidence on record and satisfy itself if the ingredients of the offence as charged have been established and proved. “

On its part, the prosecution submitted that it is not in all cases where the Accused pleads intoxication that the court upholds the defence of intoxication. In **Republic –Vs- Samson Waweru Wakagwa [2004] eKLR**, Khamoni J held that for an accused to rely on the defence of intoxication evidence must be laid before the court. It will not do for the accused to ask the court to make assumptions as to the accused's alleged intoxication.

In the present case, the prosecution adduced evidence which was to the effect that prior to the fateful day, the Accused had physically assaulted the deceased on several occasions. In fact, three days prior to the material day, the Accused had beaten the deceased to the extent that she had a swollen face. The deceased told PW1 and PW2 of the assault. PW1 saw the injuries that the deceased had sustained. The deceased

told PW1 that she had been assaulted by the Accused. She also told PW2 of the assault. From evaluation of the evidence adduced by the prosecution witnesses, it was clear to this court that the marital relationship of the Accused and the deceased was precarious. The Accused and the deceased had even separated for a period of two months just prior to the incident. They had recently resumed cohabitation. According to PW2, the deceased had complained to her of the beatings that she had been subjected to by the deceased. Prior to the incident, the Accused had lost his job. On the day before the incident, he picked up a quarrel with the deceased over the use of a mobile phone that he had given her. The Accused was not happy that the deceased was receiving calls from her customers through the particular mobile phone. He warned her to desist from using the phone in the said manner.

This court's evaluation of the evidence points to the fact that the Accused was not satisfied that the deceased had complied with his directions. He followed her to her place of work. He stabbed her 23 times. He hit her using blunt objects he found in the salon. The Accused's actions clearly showed a person who was extremely angry. He was out of control. The fact that he armed himself with knives clearly showed that he had the intention to harm the deceased. No witness testified as to the Accused's alleged intoxication. Even if he was intoxicated, this court is unable to agree with the thrust of his defence that he was so intoxicated that he did not know what he was doing or what was taking place. It is highly improbable that an intoxicated person would have the mind to pick a knife, walk some distance to the place where the deceased worked, lock the door and then stab the deceased in such a frenzied manner that he caused her death. The Accused even attempted to kill himself by stabbing himself with the same knife.

This court is of the considered view that the actions of the Accused were not of a person who was intoxicated to such an extent that he did not know what he was doing. The Accused did not have a good relationship with his wife. He must have realized that, that the deceased, having secured employment, there was a high chance she would leave him for good. The Accused could not stand this hence his decision to kills the deceased. This court holds that the Accused had the intention to kill the deceased. This case is an example of the worst form of domestic violence. A human life was needlessly lost. The prosecution proved malice aforethought and *mens rea* to the required standard of proof beyond any reasonable doubt. The defence of intoxication was not established by the Accused. It is disallowed.

In the premises therefore, this court holds that the prosecution did establish the charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The Accused is accordingly convicted as charged. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2015

L. KIMARU

JUDGE