



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO.112 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

CHRISTINE MORAA NYABANDO.....ACCUSED

JUDGMENT

The Accused, Christine Moraa Nyabando 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 12th September 2003 in Dandora Phase 4 within Nairobi County, the Accused jointly with another not before court, murdered Jackson Manoti Seme (*hereinafter referred to as the deceased*). When the Accused was arraigned before this court, she pleaded not guilty to the charge. Trial commenced before Muchemi J. She heard three (3) witnesses before she was transferred to another court station. This court took over proceedings in the case. Both the Accused and the prosecution did not have any objection to this court proceeding with the case from where proceedings had reached. This court heard three (3) other prosecution witnesses before the prosecution closed its case. After the close of the prosecution's case, the Accused was put on her defence. She gave sworn evidence. She denied committing the offence. Learned counsel for the Accused and the prosecutor made closing submission urging their respective cases. This court will give its verdict after setting out the facts of this case.

According to the prosecution witnesses, the Accused and the deceased were husband and wife. They were married for about four (4) years prior to the incident that led to the death of the deceased. The couple was blessed with one child. At the time of the incident, the Accused and the deceased lived together in a rental house at Dandora Phase 4. Within the compound where they lived, there were ten (10) other rental houses. PW1 Caroline Mukami was one of their neighbours in the compound. In her testimony before the court, she recalled that on the evening of 12th September 2013 at about 8.30 p.m., as she was closing her shop, she was called through her mobile phone by the Accused. PW1 knew the Accused as her neighbour. According to PW1, the Accused told her that her cousin, one Purity Mukami was having an affair with the deceased. At the time, Purity Mukami lived with PW1. PW1 was surprised by this information. Being a good neighbour, she requested the Accused to meet her with Purity so that they could discuss and resolve the issue. She went to her house and met the Accused standing outside her house.

At that moment, the deceased walked into the compound. He passed the Accused and went to his house. The Accused followed him. They started quarrelling. The Accused asked the deceased to give back her

money. From the conversation, it was apparent that the deceased did not accede to the demand. PW1 testified that the Accused got annoyed. She picked a stone and threw it at the deceased. She picked a second stone and again attempted to hit the deceased. PW1 rushed to where the Accused was, got hold of her hand, and snatched the stone from her. She recalled that the deceased came out of the house and got hold of the Accused. They started fighting. PW1 pleaded with them to stop fighting. They did not heed her plea. The Accused was overpowered. She ran out of the compound.

After a short while, the Accused returned with her brother by the name Onyancha. He was armed with a knife. At the time, the deceased had walked out of the compound. PW1 saw Onyancha hold the deceased by his collar before knocking him down to the ground. The Accused assaulted the deceased as he was lying on the ground. She was using her fists. PW1 saw Onyancha lift up the knife with the intention to stab the deceased. PW1 got hold of the knife. However, Onyancha wrested the knife from her. In the course of removing the knife from her possession, her left hand and inner fingers were cut. PW1 showed the court the scars from the healed injury. When she realized that she had been injured and was bleeding, she rushed to the nearby ODM office to seek assistance. She did not find anyone. When she returned to the compound, she found the deceased lying on the ground about 20 metres from the gate of the compound. The Accused and her brother Onyancha were not at the scene. There were people milling around where the deceased lay on the ground. She attempted to talk to the deceased. He was not responding.

PW1 decided to go to the house of PW2 Fred Omosa Bichang'a, a relative of the deceased. He lived in a nearby plot. She informed him what had transpired. PW2 rushed to the scene. He found the deceased lying on the ground. He attempted to speak to him. The deceased did not respond. He immediately organized for a taxi to ferry the deceased to Kenyatta National Hospital. Before they reached the hospital, PW2 realized that the deceased was no longer breathing. At the hospital, it was confirmed indeed that the deceased had died. PW2 was instructed to take the body of the deceased to the City Mortuary. After delivering the body to the mortuary, PW2 returned home. As it was late, he decided to sleep. On the following day *i.e.* 13th September 2013, he reported the incident to Dandora Police Station.

The case was assigned to PW4 Corporal Kenneth Okello to investigate. He visited the scene. He was able to piece together the events that took place before the deceased was fatally injured. According to his evidence, the deceased was killed by the Accused with the assistance of his brother Onyancha after a domestic quarrel. The dispute between the deceased and the Accused was over a sum of Kshs.10,000/- which the Accused claimed the deceased had refused to refund her. PW4 testified that a quarrel ensued when the Accused realized that the deceased would not pay her the money. The quarrel escalated into a fight resulting in the Accused seeking the help of her brother Onyancha. The said Onyancha confronted the deceased while armed with a knife. PW1 testified that she did not see the person who actually stabbed the deceased. This was because, at the time, she had gone to seek assistance from the injuries that she had sustained when she was cut with a knife. PW4 testified that although no one saw, as between the Accused and Onyancha, who stabbed the deceased, it was clear from his investigations that the two of them acted in concert to cause the death of the deceased. He confirmed that the murder weapon was not recovered despite his best effort.

PW5 Supt Stephen Kemboi, the Officer in-charge of the Crime Scenes Support Service Nairobi testified that he was requested by PW4 to visit the mortuary and take photographs of the body of the deceased. As requested, he visited the City Mortuary and took six photographs of the body of the deceased. The photographs clearly saw that the deceased had sustained a cut wound on the left side of the chest. The six photographs together with the certificate confirming that PW5 had supervised the processing of the said photographs were produced as **Prosecution's Exhibit No.1(a) and 2**. Post mortem was performed on the body of the deceased by PW6 Dr. Peter Muriuki Ndegwa. He testified that on 18th September 2013, he performed a post mortem on the body of the deceased. The body of the deceased was identified by PW3 Lawrence Nyamoko Seme and PW2 Fred Omosa Bichang'a. On external examination of the body, he saw a stab wound on the left chest measuring 6 cm long. The wound was below the clavicle. There was laceration on the right temporal-parietal region. The body was very pale. On internal examination, he saw that the chest cavity had been penetrated between the 2nd and 3rd ribs anteriorly on the left side. The pericardial of the heart had been penetrated. The aorta and the pulmonary artery had been severed. There

was left sided haemothorax. There was 3 litres of blood on the left side of the chest cavity. He formed the opinion that the cause of death of the deceased was excessive blood loss due to a penetrating stab wound on the chest. The post mortem report was produced as **Prosecution's Exhibit No.3**.

When the Accused was put on her defence, she denied the charge. She testified that prior to the material night, she had a disagreement with the deceased. She had decided to separate from the deceased. On the material day, she took away her personal belongings. She took them to her relative who lived nearby. She asked the Accused to refund the sum of Kshs.10,000/- which she had loaned him. The deceased told her to come back later that evening when he would be in a position to give her back the money. The Accused went back in the evening and met the deceased. The deceased told her that he would not refund the entire sum because he had used part of the money to pay for her maternity confinement. The Accused insisted on full re-payment. The deceased assaulted her. She screamed. PW1, among others, rescued her.

The accused escaped to her brother's house. She was called later that evening by a lady called Evelyne (the wife of PW2) and told that the deceased had died. She was shocked. In her confusion, she decided to leave for her rural home. She was arrested two months later and charged with the present offence. She denied any knowledge of the person who stabbed the deceased and caused him to sustain fatal injuries. She reiterated that prior to the material day, she had a good relationship with the deceased. She denied that she fought with the deceased or that she summoned her brother to assist her assault the deceased. She denied seeing any knife being wielded on the material night. She insisted that when she was rescued by the neighbours, she left the deceased being held by the neighbours. The deceased was alive. She feared to go back to inquire what had transpired. She told the court that she had attended the funeral of the deceased.

In all criminal cases, it is the duty, nay, burden of the prosecution to establish the guilt of an accused person to the required standard of proof beyond any reasonable doubt. This burden does not shift to an accused person. An accused person is not required to establish her innocence. The burden always remains with the prosecution. In the present case, it was evident from the evidence adduced by the prosecution witnesses that the prosecution relied on circumstantial evidence to establish the guilt of the accused. Circumstantial evidence was defined by the Court of Appeal in **Sawe –Vs- Republic [2003] KLR 364** at page 372. The court explained the threshold that the prosecution evidence must meet before the court can convict an accused person on reliance on circumstantial evidence:

“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.”

The prosecution in this case relied on the testimony of PW1. PW1 knew the Accused and the deceased prior to the incident that led to the death of the deceased. She was a neighbour. She testified that on the material night, she saw the Accused fight with the deceased. From their conversation, it was evident they had disagreed over money. The deceased and the Accused fought for some time before the Accused went out of the compound. PW1 testified that she saw the Accused return with her brother after a short while. At that time, the deceased had walked towards the gate of the compound. PW1 knew the brother of the deceased. She referred him by his name, Onyancha. She testified that Onyancha confronted the deceased before shoving him to the ground. The Accused assaulted the deceased using her fists when he was lying prone on the ground.

PW1 saw Onyancha wield a knife. He was attempting to stab the deceased. She intervened and wrested the knife from Onyancha. Onyancha managed to get back the knife from her. In the process, PW1 was cut on the inner side of her hand and fingers. She left the scene to seek assistance. She was bleeding from the inflicted injury. When she returned, she found the deceased lying on the ground. He had a stab wound on his chest. He was not talking. She sought help from PW2. PW2 arrived at the scene and secured a taxi to

take the deceased to hospital. The deceased succumbed to his injuries before he reached the hospital. He was taken to the City Mortuary. The post mortem confirmed that the deceased had indeed died due to the stab injury on his chest. The stab had caused his aorta and pulmonary artery to be severed. He died due to excessive bleeding into his chest cavity. PW2 in his testimony confirmed that indeed the deceased and the Accused had disagreed on the day prior to the incident. In her defence, the Accused denied stabbing the deceased or procuring his brother Onyancha to stab the deceased.

This court has evaluated the evidence adduced by the prosecution witnesses. It has also considered the defence put forward by the Accused. It was clear to this court that it was the Accused and her brother who caused the death of the deceased. The Accused and the deceased, then, husband and wife had disagreed. They had lived together for four years prior to the disagreement. It was apparent that the disagreement was caused by money issues. The Accused was aggrieved that the deceased had failed to pay back the sum of Kshs.10,000/- which she had advanced him. This disagreement degenerated into a quarrel. The quarrel resulted in the separation of the two. The Accused packed her belongings and moved out of the house. She came back to her former matrimonial home to demand payment from the deceased.

It was obvious that the deceased either had no intention of paying back the money or did not have the money at the time. According to the evidence adduced, the deceased worked as a hawker at the time. It was probable that the deceased did not have such kind of money to pay to the Accused in one lumpsum. The Accused was annoyed by this development. She provoked the quarrel which resulted in the fight. According to PW1, it was the Accused who started the fight when she threw stones at the deceased. The deceased reacted by assaulting the Accused. The Accused rushed out of the compound and sought help from her brother Onyancha. The said Onyancha returned to the compound where the deceased lived armed with a knife. It was clear to this court that pursuant to **Section 206(b)** of the **Penal Code** that the Accused and her brother knew that by assaulting the deceased with a knife, it was more probable than not that the deceased would sustain a fatal injury.

Although no one actually saw the Accused and her brother Onyancha stab the deceased, it was clear to this court that the prosecution had adduced sufficient culpatory circumstantial evidence to connect the Accused and her brother Onyancha with the death of the deceased. The chain of events from the quarrel to the fatal stabbing of the deceased was not broken and can be attributed to only the Accused and his brother Onyancha and no one else. PW1 clearly saw that the Accused and her brother were intent on causing grievous harm to the deceased. PW1 left the scene where the deceased was lying prone on the ground while being assaulted by the Accused and her brother. No one else would have come to the scene and stabbed the deceased. The explanation given by the Accused in her defence does not displace the strong culpatory evidence that was adduced by the prosecution witnesses which was to the effect that she provoked the situation before she and her brother fatally stabbed the deceased.

In the premises therefore, this court holds that the prosecution did establish both *mens rea* and *actus reus* on the charge of **murder**. It was clear that the Accused went to the house of the deceased, and with *malice aforethought*, provoked him into assaulting her so that she could have cause to kill him. The fact that the prosecution did not adduce any evidence as to who exactly, as between the Accused and her brother delivered the fatal blow on the deceased, this court finds as a fact that the Accused and her brother had formed a common intention to prosecute an unlawful act. Under **Section 21** of the **Penal Code**:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

In the present case, the Accused is deemed to have committed the offence as if she was the one who actually wielded the knife. This court therefore holds that the prosecution proved to the required standard of proof beyond any reasonable doubt the charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The Accused is accordingly convicted. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2015

L. KIMARU

JUDGE