



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

**CRIMINAL CASE NO. 4 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**P K M.....ACCUSED**

**JUDGEMENT**

P K M, the accused, is charged with the murder of M K K contrary to section 203 read with section 204 of the Penal Code. The offence is alleged to have been committed on 5<sup>th</sup> day of January 2013 at [particulars withheld] in Nairobi. The accused denied committing this offence necessitating full hearing of this case. The accused is represented by Mr. Omollo, advocate. The prosecution was conducted by Mr. Konga and Miss Florence Magoma.

The prosecution case is supported by evidence of ten (10) witnesses while the accused was the only defence witnesses. An attempt was made by the defence to call Johana Kingori, PW1, as a defence witness but after being reminded by the court that this witness had testified for the prosecution and was cross examined exhaustively by the defence, the idea to call him as a defence witness was abandoned.

**Prosecution Case**

The prosecution case as testified by the ten witnesses is that on 5<sup>th</sup> January 2013 the accused P K M found his wife M K K in bed with one P W, a neighbour at [particulars withheld] in Kariombagi Nairobi. The accused stabbed her inflicting serious wounds that led to her death. Johana Kingori, PW1, told the court that on 5<sup>th</sup> January 2013 around 7.45pm he was in his house at [particulars withheld] Village when a group of people informed him that someone in the neighbourhood had been killed. He went to the house belonging to a neighbour of the deceased. He found the deceased M K K lying on bed facing up. She was dead. PW1 said that he knew the deceased and her husband the accused before the court. He said the owner of the house had escaped. PW1 telephoned the OCS Buruburu Police Station, one CIP Johnstone Matoke, PW5, and reported the matter. He also telephoned the area Chief who sent administration police officers to the scene.

In the meantime the accused, who had escaped after the incident, surrendered to the Buruburu Police Station in the same evening. He surrendered to PC Omari (not a witness) who informed PW5. At the time PW5 received the report of the accused at the station, he had already received the report of the murder and was preparing to visit the scene in the company of PC Chege, PW2, and PC Stanley Rono, PW3. They arrested the accused and put him in the vehicle they were using to go to the scene and went with him. The accused told the police that he had stabbed his wife to death after he found her having sex with a neighbour.

At the scene, the officers confirmed that the deceased, who was found lying on a bed in the neighbour's house, was dead. Court was told that the house belonged to one P W. It was a single roomed house with the bed separated from the sitting area by a curtain. It was in disarray, evidence of a struggle. The body was photographed by scenes of crime personnel before it was removed by the police and taken to the City Mortuary.

The accused led police to Umoja Phase 3 to a construction site. He showed police the knife he had used to stab the deceased. The knife was recovered and later produced in court as exhibit 4. It was said to have had blood stains on it. The accused was detained by the police and charged with this offence. The knife was later examined by Elizabeth Waithera Oyiego, PW7, together with a white jacket heavily stained with blood and blood samples from the accused and the deceased. PW7 found that the blood on the knife and the jacket belonged to the deceased.

### **The defence**

The accused testified under oath. He narrated a very long winding story on how he spent 5<sup>th</sup> January 2013 and what happened on that day. The summary of his evidence is that he did not go to work on that day as he and his wife the deceased intended to move houses. He said he intended to look for transport to move the household items to their new residence. He said the deceased went to see her friend named as Nduta who lived at Umoja Inner Core while he wanted to see his friend named as Mburu. The accused said he spent the day either with various friends or acquaintances and when he returned to his house he found the door locked and that when he finally accessed his house he found it empty and all household items removed. He said this was not unusual since his wife has moved house before. He said his phone battery was low and he decided to go to the house of P W, a neighbour. He said that P W opened for him and he borrowed P phone to call one Hussein, that he asked P to charge the phone for him; that after placing the call to Hussein, the latter told him to call again after 15 minutes; that he decided to go to buy cigarettes which he decided to smoke outside P house; that he went back into P house which he found open; that he saw his wife in bed with P having sex; that P dressed up quickly on seeing the accused and picked a coffee table intending to hit the accused with it. A struggle ensued.

The accused further testified that P picked a knife and as they struggled over it the deceased, who remained in bed all the time, was stabbed; that P escaped after this and the accused pulled the knife from the deceased's chest and went out with it to Umoja Phase 3 to his friend Mburu's house; that he told his friend Mburu what had happened and asked him to accompany him to Buruburu Police Station to report but Mburu refused to go with him; that he decided to leave the knife at some construction site and went to Buruburu Police Station where reported that in the course of a struggle he had stabbed his wife who had died.

### **Murder charge**

Murder is committed when **any person with malice aforethought causes death of another person by an unlawful act or omission**. The prosecution bears the burden of proving that death has occurred through an unlawful act or omission; that the accused person before the court is the one who caused that death and he/she possessed malice aforethought. That is to say that the death was intended. Malice aforethought is deemed to be proved in the following circumstances:

- a. Evidence proving 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. Evidence proving 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. Evidence proving intent to commit a felony.
- d. Evidence proving 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.

It is the duty of this court to determine if the prosecution has discharged its duty in this case by leading evidence to prove the above ingredients for murder beyond reasonable doubt.

### **Determination**

On the issue of the death of the deceased, I have considered the available evidence culminating in the evidence of Dr. Kizzy Shako, PW10, who testified on behalf of Dr. Johansen Oduor. Dr. Kizzy, while relying on the post mortem report prepared by Dr. Oduor who examined the body of the deceased testified that the deceased had sustained a stab wound across the left cheek; stab wound on right elbow; stab wound on right side of the chest measuring 4cm long with penetration of the right side of the chest and puncture of the right lobe of the lungs leading to collapse of the lung; penetration of the heart and blood had accumulation on the right hand side of the chest. The doctor formed an opinion that the cause of death was chest injury due to penetrating trauma.

I have considered this evidence and make a finding that there is no doubt that the deceased died as a result of fatal wounds inflicted on her. The evidence proves beyond reasonable doubt that the death of the deceased occurred. It was unlawful death and it was brutal.

The involvement of the accused in causing the death of the deceased is not in dispute in my view. He has admitted causing it. The only issue in dispute is whether it was intentional or it was accidental as he says it was.

While alive to the fact that the accused does not bear the onus of proving his innocence, I have examined his testimony carefully. In my view he is economical with the truth. Court was told that the house of P W was a single room. The area used as the bedroom and the area used as the sitting room were separated by a cloth curtain. Although the size of the house is not clear it is doubtful that the deceased would be in bed across the curtain and the accused on the other side watching television and he does not detect presence of the deceased; secondly it is doubtful that the deceased would remain lying on her back in bed while the two men fought it out around and over her. If she was found in bed with PW and P started attacking the accused, the logical thing for her to do would have been to try to escape and not remain in bed in the same position as the accused said she did. Thirdly, the accused described the injuries on his wife as accidental as he tried to struggle to snatch the knife from PW. He stated that:

**“I saw M in bed with P having sex. M saw me. P had not seen me. I called him and he quickly wore his trousers and picked a coffee table and started hitting me. M was not talking. We struggled and I sat on the chair he had sat on first. I held the coffee table. I saw P pick something. I realized it was a knife. He aimed it at me. I shielded myself with the coffee table. I jumped on the other side of the bed. P aimed the knife at me. M still in bed started saying we stop waving her hands. The second time I jumped and held P hand holding the knife. The knife struck deceased as we struggled for it. Deceased was stabbed on the chest.”**

It is unbelievable that someone found in a compromising situation as PW was could have time to put his trousers on before picking a coffee table to attack the accused. It is also unbelievable that the deceased could remain in bed as the fighting raged on. It is also noteworthy that the accused described only one stab wound on the chest of the deceased. The doctor who examined her body found a stab wound across the left cheek; a stab wound on the right elbow and a stab wound on the right side of the chest. The latter injury penetrated the right lung and punctured it leading to its collapse. There was also penetration of the heart. To my mind this does not look like wounds that were inflicted accidentally as the two men fought it out. These wounds seem to have been deliberately inflicted by someone who intended to cause the death of or grievous harm to the victim.

I have considered that the accused surrendered to the police and informed them that he had killed his wife. The surrender to the police was not direct. The accused left the scene and went to Umoja first. He hid the knife at a construction site. According to him he went to his friend Mburu and told him what had happened. He said he asked Mburu to accompany him to the police station to report but Mburu refused.

Why did the accused hide the knife? Why did he not carry it with him as he went to surrender to the police? Mind you the accused told the court that the deceased had been stabbed accidentally. The logical thing to do would have been to surrender the knife to the police and explain what had happened if indeed the stabbing was accidental.

My view on this matter after careful analysis of all the evidence is that the accused did not tell the truth. The impact of this is that he has not dislodged the evidence by the prosecution that he, with malice aforethought, stabbed his wife to death. His explanation does not cast any doubts in my mind that his wife the deceased was stabbed accidentally as the accused and PW struggled over the knife. By stabbing his wife on several parts of her body with one stab penetrating the lungs and heart there must have been one intention, to either cause her death of the deceased or cause grievous harm to her. My conclusion of the issue is that the accused possessed malice aforethought when he stabbed his wife.

My careful review of the entire evidence from the prosecution and that of the defence leads me to the conclusion that the prosecution has proved all the ingredients of murder beyond reasonable doubt as required by law. It is my finding therefore that the accused with malice aforethought caused the death of his wife MKK by stabbing her using a knife. I find the circumstances of this crime do no leave any doubt in my mind nor do they persuade me that the offence committed was other than murder. I therefore convict the accused for the offence of murder under section 203 as read with section 204 of the Penal Code. I make orders accordingly.

**Dated, signed and delivered in open court this 22<sup>nd</sup> day of September 2015.**

**S. N. Mutuku**

**Judge**

**In the presence of**

Ms Magoma, Prosecution counsel for the State

Mr. Omollo, defence counsel for the accused

Mr. Pharis Kabaiku Mbuthia, the accused person

Mr. Daniel Ngumbi, Court Clerk