



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 72 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL TEDDY GITAU.....ACCUSED

JUDGEMENT

Introduction

The subject matter of this trial is murder which is an offence under section 203 of the Penal Code (Cap. 63 Laws of Kenya). It is committed when “**any person who of malice aforethought causes death of another person by an unlawful act or omission.**” The penalty for murder is death as prescribed under section 204 of the Penal Code. This is the offence facing Samuel Teddy Gitau. The particulars of the offence state that between 3rd and 4th day of September 2012 at Umoja Road in Ongata Rongai Township within Kajiado County he murdered Mercy Wanjiku Muiruri.

The law places the onus of proving this crime on the prosecution and the standard of proof is proof beyond reasonable doubt. The prosecution must tender evidence before this court to prove that Mercy Wanjiku Muiruri, the deceased, met unlawful death on the date specified in the charge before this court due to an unlawful act or omission by Samuel Teddy Gitau and that Samuel Teddy Gitau possessed malice aforethought in causing that death. Malice aforethought is defined under section 206 of the Penal Code. The prosecution must prove one or more limbs of malice aforethought as specified in that section as shown below for an accused person facing murder to be found guilty:

- 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.
- d.

The prosecution called nine (9) witnesses to testify in support of its case. The accused testified as the sole witness for the defence. I took over this case at witness number nine (9) after my predecessor, Hon. Lady Justice Florence Muchemi, had taken evidence of eight (8) prosecution witnesses.

Brief facts

The accused and the deceased lived as man and wife. They had three children, a boy B. aged about eight

years at the time of the offence and twin girls N and J aged one and half years. The marriage was a troubled one as testified by Risper Kathambi, PW2, a neighbour of the deceased's and Daniel Ngugi Muiruri, PW1, brother to the deceased. B, who testified as PW3, also told the court that the accused used to quarrel the deceased when he (accused) was drunk. They lived along Umoja Road in Ongata Rongai. Their house was a one roomed house in a neighbourhood of other 19 or so houses made of iron sheets. The houses shared a compound with a stone wall surrounding the houses and one gate. On 3rd September 2012 around 4.00pm PW2 saw the deceased washing her clothes outside her house. PW2 lived in House No. 3 while the deceased lived in House No. 1. Afterwards, the deceased entered her house. PW2 heard the deceased arguing with the accused inside their house. PW2 shouted to the deceased to take care of her (PW2's) child as PW2 was going away. When PW2 later returned, she found the deceased's house locked. She could hear the little children crying inside the deceased's house. Later that evening B came home from school and PW2 gave him a place to sleep. In the morning on 4th September 2012 the deceased was found dead inside the house and the matter was reported to the police. The police broke open the door and found the body of the deceased dressed only in a T-shirt lying partly under the bed. The accused was not at the scene. The scene was photographed and the body removed to the City Mortuary. The accused was traced at Kangundo District Hospital where he had been admitted. He was arrested and charged with this offence.

Briefly, the accused told the court in his defence that he left his home at around 2.00pm to go to his work place at Joska near Kangundo. He said he left his wife, the deceased, outside their house washing clothes; that his wife was left with their two small children and the child of a neighbour; that before leaving he gave his wife some money which she claimed was not enough and he promised to send her more money later; that he called his wife the following day but had failed to get her; that he went to drink with his friend and got dizzy in the course of drinking; that he lost consciousness and when he regained it he found himself in hospital from where he was later arrested and taken to Ongata Rongai Police Station and charged with this offence.

Analysis and determination

The evidence on record as I understand it raises two legal issues. Firstly there is the issue of partly circumstantial evidence and partly direct evidence and secondly, there is the issue of unsworn evidence of a minor and the need for corroboration. There is no evidence of an eye witness who saw the deceased being killed. From the evidence of Dr. Peter Muriuki Ndegwa, PW9, the deceased died of asphyxiation due to ligation and manual strangulation. This was not witnessed by anyone. The closest this court has come towards an eye witness account of what happened is through the evidence of PW2 and PW3. All PW2 witnessed was the quarrel between the accused and the deceased. This took place inside the couple's house and therefore PW2 only heard the quarrel. PW3 witnessed more. He told the court that he came back from school around 3.00pm he found their house locked. He went to the rear of the house to peep through an opening where the iron sheet had been partly removed from its support. He saw the accused pick up a stool and hit the deceased with it on the head. He told the court that when the accused saw him peeping he went out of the house through the opening and chased him away. PW3 said he climbed and jumped over the perimeter fence. He then went round the fence and entered the compound again through the gate and went to PW2's house. PW3 said he told PW2 that his father (accused) was killing his mother (deceased) but PW2 did nothing about it.

There is no evidence from the doctor of any head injury although PW3 says the accused hit the deceased with a stool on the head. CI Francis Njue, PW7, also testified that he observed an injury on deceased's forehead and blood oozing from the ears. If such an injury existed, it escaped the doctor's attention but from the doctor's evidence the cause of death was not due to this injury but due to asphyxiation due to ligation and manual strangulation.

For the prosecution to prove a case through circumstantial evidence, that evidence must meet the legal standard as laid down in various authorities including **R. v. Kipkering Arap Koske & Another (1949) 16 EACA 135** where it was stated as follows:

“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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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.”

Further in Abanga alias Onyango V. R. CR. A No.32 of 1990(UR) the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

The death of the deceased occurred. There is no doubt about it. It resulted from asphyxiation due to ligation and manual strangulation. I am therefore satisfied that the unlawful death of the deceased has been proved beyond reasonable doubt. The remaining issues are whether the accused person caused that death and whether he possessed malice aforethought.

The evidence PW2 and PW3 places the accused at the scene. The accused also testified to having been at his home which became the scene of crime although he told the court that he left his home around 2.00pm to go to his work place. I have considered the evidence of these two witnesses in line with the submissions by the defence counsel that the evidence of the two, PW2 and PW3, contradicted each other in that PW2 said that PW3 came home from school and went to her (PW2's) house where PW2 accommodated her while PW3 said that he witnessed the accused hit the deceased with a stool.

I have analysed both the evidence of PW2 and that of PW3 and in my understanding, PW3 said he came home from school at 3.00pm and found the door to their house locked. He went round the back and through an opening in the iron sheets' wall he saw his father hit his mother with a stool; that his father saw him and chased him away; that he jumped over the fence and went round and entered the compound again through the gate and went to PW2's house. I find no contradiction in this evidence. PW2 testified that she returned home around 5.30pm and found the deceased's house locked. She said she could hear the deceased's children crying from inside. She said she picked her child who was outside and went to her house. PW2 said PW3 arrived at about 6.00pm and that at the deceased's house was still locked. PW2 gave him accommodation. PW3 did not place the time he entered the compound a second time after going round the compound after the accused chased him. In my view this evidence is clear on the sequence of events and I find no contradiction. Although the time indicated by the two witnesses may not agree to perfection I find these slight differences may occur where there was no timing of events as they occurred.

What I find unexplained is the conduct of PW2. She told the court that the deceased was her good friend. I find it strange that PW2 who told the court that she knew the opening at the back of deceased's house existed after the deceased had shown it to her prior to this day did not peep through the space to see what was happening inside deceased's house. Evidence shows that the two little children belonging to the deceased were heard crying inside the house which was locked. Any responsible person would be curious enough to want to know what was happening inside and why the children were crying inside a locked house.

Be that as it may, it seems PW2 or any other neighbours did not endeavor to find out what was happening or at the very least to report the matter to the police or even the chief that children were crying from a locked house where the deceased and the accused had been heard quarreling earlier that day.

PW3 was aged about 8 years at the time of the offence. In 2014 he was about 10 years. My predecessor conducted a *voir dire* examination on him to determine if he understood the nature of oath or whether he possessed sufficient intelligent to understand the duty of telling the truth. She made a finding that the child did not understand the nature of oath but was possessed of sufficient intelligence to give rational answers to questions and that he understood the duty of telling the truth. The court ruled that PW3 testifies without taking an oath. I have carefully read his evidence. I find it very clear and understandable. However, the evidence of PW3 requires corroboration as stipulated under section 124 of the Evidence Act. This section stipulates as follows:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

This case does not fall under the proviso to this section. Clearly there is need for corroboration. I have analyzed the evidence on record and the circumstances of this case. The accused and the deceased were heard by PW2 quarreling on 4th September 2012 in the afternoon; on the same day around 3.00pm PW3 came home and finds the door to their house locked; PW3 went round the back through a space in the wall and saw the accused hit the deceased with a stool; PW2 came home and found the deceased's house locked and the little children crying from inside; the following day the deceased is found dead inside the house. The accused has testified to having been home with his wife on 4th September 2012; he testified that the deceased complained to him that the money he had given him was not enough. It may be recalled that the source of their quarrel according to PW3 was non-payment of rent in respect to their house. PW4 their landlord confirmed to this court that the deceased and the husband the accused had not paid rent for several months prior to this date.

Further evidence shows that there was an opening at the back of the deceased's house where an iron sheet had been loosened and the space was big enough for an adult person to pass through. PW2 knew about that opening. PW3 used it to peep inside their house and the police, PW6, scenes of crime officer and PW7 confirmed such an opening existed. Photograph No. 15 clearly shows this opening. All these circumstances in my view point irresistibly to the accused person as the one who killed the deceased following the disagreement.

I have considered that the accused was arrested in Kangundo District Hospital where he was admitted. He told the court he left his home around 2.00pm on 4th September 2012. The impression the accused has created is that he was not present when his wife was killed. When his defence is taken together with the rest of the prosecution evidence it is my considered view that he is not telling the truth. There is the issue of a locked house. Given that there was an outlet from the house through the back there was nothing to stop the accused from committing this offence and sneaking out of the house through this opening. He could have gone anywhere after this. After careful analysis it is my finding that there is in existence other material evidence corroborating the evidence of PW3 and as I have pointed out in this judgement the circumstantial evidence points irresistibly to the accused as the guilty person.

In conclusion I find that the accused has formed the intention to kill the deceased. The offence was committed about the time, or shortly after a quarrel between the two of them. The locked door also strengthens the fact that the accused possessed malice aforethought. The fact that there existed an opening where he could sneak out before the crime was discovered made it possible for him to commit this offence and escape. The cause of death by strangulation means that the offender cannot escape blame that by the time the victim chokes to death there is enough time for anyone without an intention to cause death or grievous harm to come to his/her senses and stop the act. I am convinced beyond reasonable doubt that the accused committed this offence. I reject his defence and convict him of murder contrary to section 203 as charged. It is so ordered.

Dated, signed and delivered in open court this 28th October 2015.

S.N. MUTUKU

JUDGE

In the presence of:

Ms Macharia, prosecution counsel

Ms Abongo, defence counsel

Mr. Samuel Teddy Gitau, accused

Mr. Daniel Ngumbi, court clerk