



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 43 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

DORIS MWENDWA.....ACCUSED

JUDGEMENT

Background

Doris Mwendwa, the accused before this court, was arrested on 15th May 2011 on allegations of having murdered Doreen Gatwiri Gituma. She was thereafter charged with murder contrary to section 203 as read with section 204 of the Penal Code. The murder is alleged to have been committed on 14th May 2011 at Gachororo Village within Kiambu County.

The accused and one John Michael Bundi Kirimani, PW1, had at one time lived as man and wife. Their marriage developed problems and they separated. Their domestic dispute had been reported to the police at Juja Police Station on 11th May 2011. PW3, CIP Betty Cheruiyot who received this report referred them to the area chief. Three days later, on 14th May 2011 PW3 received information that there was a murder committed within Gachororo Village under the jurisdiction of Juja Police Station. She visited the scene where she found the body of Doreen Gatwiri lying down near the door of a one roomed house. PW3 noticed a stab wound on the right side of the collar bone. Near the body were scatted foodstuffs including maize flour and vegetables. The police collected the body after the scenes of crime had photographed the scene.

Prosecution Case

In support of its case the prosecution called three witnesses: PW1, John Michael Bundi Kirimani; Doctor Stephen Mwangi, PW2 and CIP Betty Cheruiyot, PW3. The other witnesses were not available necessitating the conclusion and closure of the prosecution case. PW1 is the only witness who was present at the time the murder is alleged to have committed. He testified that on 14th May 2011, around 7.00pm he was with the deceased Doreen Gatwiri whom he referred to as his wife and one Judy Karambu. They were returning home from Gachororo Market where they had gone to buy food. On arriving at their one-roomed house, PW1 entered the house first to light a lamp since there was no electricity. His evidence is as follows:

“I opened the door and entered house first leaving Doreen and Judy outside. It was a stone house of one room. It had no electricity and while looking for the lamp to light I heard screams from outside. I had not lit the lamp. I went out and found Doreen down and Judy being chased. I chased the person chasing Judy. I reached where there was electricity. The

person turned and I called the person Doris three times and she turned to look at me. She is the accused in the dock. She responded and entered a bushy area. I went back and found Doreen had died.”

PW1 denied that the accused was his wife. He said the deceased was his wife and that the accused had been his girlfriend but they had separated. On cross examination, PW1 denied that the accused was pregnant at the time of the incident.

The other witnesses, PW2 the doctor and PW3 the Investigating Officer were not at the scene. PW3 found the deceased already dead and PW2 produced a post mortem report. They did not therefore give first hand testimony on the events leading to the death of the deceased.

The defence

The accused was the only witness for the defence. She denied causing the death of the deceased. She told the court that she was arrested and taken to Juja Police Stations without explanation as to the reason for her arrest. She said that she and PW1 her husband had separated and at the time of her arrest she was not living with him. She further told the court that she was placed in police cells at the same time with her husband who was later released.

In his submissions after the close of the defence case, Mr. Muoki for the accused told the court that the prosecution has failed to tender sufficient evidence to warrant the conviction of the accused. He stated that PW1 is the only identifying witness and his evidence must be examined with great care. He submitted that the accused was heavily pregnant at the time of the incident and could not have outrun PW1; that PW1 was not in good terms with the accused at the time and his evidence must be scrutinized carefully. Counsel relied on **Cleophas Otieno Wamunga v Republic[1989]eKLR** and **Shadrack Mbaabu Kinyua v Republic [2013] eKLR** on the issue of identification.

Determination

The prosecution faced serious challenges in tracing and bonding witnesses to attend court. Even after applying and getting witness summons from the court, this did not help matters. Due to the delay and lack of witnesses the prosecution closed its case after calling three witnesses. As stated above in this judgement, out of the three witnesses who testified for the prosecution, it is only PW1 who was at the scene of murder on 14th May 2011.

This court does not doubt that Doreen Gatwiri Gituma died as a result of the fatal wounds she sustained on 14th May 2011. The evidence of Dr. Stephen Mwangi, PW2, confirms this. As shown in Exhibit 1, the post mortem report, the deceased died as a result of a “penetrating chest injury with lung lacerations in keeping with sharp trauma with probable assault”. This finding proves beyond reasonable doubt that the unlawful act causing the death of the deceased occurred. *Actus reus* is proved.

In my view, the disputed facts are: who inflicted the fatal wounds on the deceased and did that person possess malice aforethought? In other words, did the accused inflict the fatal wounds on the deceased and is *mens rea* on the accused’s part proved?

The circumstances surrounding the fatal wounding of the deceased are that it was dark. PW1, the deceased and one Judy Karamba arrived at the home of PW1. There was no electricity and PW1 left the two women outside the house. He entered the house to look for a lamp to light. PW1 heard screaming from outside while he was still inside the house. At the time he had not lit the lamp. He rushed outside and found deceased lying near the door bleeding from a stab wound. Did PW1 have the chance to see who stabbed the deceased? The answer is in the negative. He said he chased someone who was chasing Judy Karamba. The place was dark and as he chased the person he reached a place with street light. He said he called the name Doris and the person turned to look at him. He said he did not manage to catch up with the person.

Were these circumstances conducive to positive identification of the person being chased? The issue of visual identification has been discussed by our courts in numerous decisions. Among these decisions are the two cases the defence counsel has cited above. **In the Wamunga Case above** the court had this to say on the issue:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

Further the court in the same case stated that:

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”

While it is within the law that a fact can be proved by evidence of a single witness, courts are called upon to examine such evidence with great care to avoid miscarriage of justice. On this issue, the Court of Appeal for Eastern Africa in the case of **Abdallah Bin Wendo v R 20 EACA 166 at page 168** thus:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

One fact seemed to have escaped PW1: that the accused was heavily pregnant at the time. The court file record shows this was the state of affairs at the time of her arrest. She delivered while in custody. As submitted by defence, it is incredible that PW1 denied that fact. He told the court on cross examination that:

“Doris was not pregnant at the time. I was able to identify Doris well with help of electricity light. I did not notice she was pregnant.”

In my considered view, PW1 was not being truthful. He actually denied the accused was his wife although his statement, as cross-examined by the defence counsel, showed him referring to the accused as his wife.

In that state of pregnancy, could the accused have outrun PW1? If she actually outran him, it can only mean one thing that the person who stabbed the deceased was far from where PW1 was. If this is the case, then the evidence that PW1 identified the accused cannot be convincing to this court. PW1 did not say how far he was from the source of electricity light and how strong it was.

My view on the matter is that the accused was not positively identified as the person who stabbed the deceased. The evidence of Judy Karambu could have been of help to the prosecution case in regard to the identity of the person who stabbed the deceased and chased Judy.

After careful analysis of the evidence of PW1, I find that it falls short of proving the identity of the person who attacked the deceased. The circumstances under which the deceased was stabbed were difficult for positive identification. The evidence of PW1 required other evidence pointing to guilt of the accused. In

view of this it is my finding that the accused has not been positively identified as the person who stabbed the deceased. With no evidence proving beyond reasonable doubt the identity of the persons who stabbed the deceased this court finds it an exercise in futility to proceed to determine *mens rea*. I find the accused not guilty of the murder of the Doreen Gatwiri Gituma. The accused Doris Mwendwa will benefit from the doubts created by prosecution evidence. I proceed to acquit her of murder forthwith. She shall be at liberty to enjoy her freedom. It is so ordered.

Dated, signed and delivered in open court this 12th November 2015.

S.N. MUTUKU

JUDGE

In the presence of:

Ms Macharia for the prosecution

Mr. Muoki for the accused

Ms Doris Mwendwa, the accused

Mr. Daniel Ngumbi, court clerk