



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 63 of 2011

REPUBLICPROSECUTOR

V E R S U S

JOHNSON KIRIMA GITUMA.....ACCUSED

JUDGMENT

John Kirima Gituma faces a charge of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the charge are that on 19/11/2011 at Mulathankari Village, Imenti North, murdered **Kathambi Munyua**. He denied the offence and the case proceeded to full trial wherein the prosecution called a total of five witnesses. When called upon to defend himself, the accused testified on oath but did not call any other witness. The prosecution was led by Learned Counsel Mr. Mungai, while the accused was represented by Mrs. Ntarangwi.

PW2 Dorothy Kinya Munyua, is the sister of the deceased, Kathambi Munyua, (Evelyn). PW2 recalled that on 19/11/2011, she was with her deceased sister on their way home; that the deceased worked at a hotel in Meru town. She went to get her from work because the accused who was the deceased's husband had gone to the deceased's workplace and threatened to kill her. By then, accused and the deceased had separated and the deceased had gone back to live at her parent's home together with her two children. PW2 said that before they set off, they entered Uchumi Supermarket and when she was waiting outside, she saw accused looking at the deceased and then left; that the deceased told her that accused had been to deceased's work place that morning but when she called police, he escaped. They walked to the bus stage but found the vehicle to the home full and they decided to walk home. They finished walking on the tarmac and branched off to a rough road and when near a place called Kirung'a, they found some water on the road and her sister used a torch to enable her see the road. It had rained that day. PW2 was walking ahead of deceased and she saw a shadow ahead of her. She stopped and the sister flashed the torch from the mobile phone and they saw Gituma (accused), ahead of them. PW2 told accused not to harm the sister but he told her to be quiet, accused pushed her and she fell in the water; that the accused had something in both hands, got hold of her sister and she heard her sister screaming that she had been killed. By the time PW2 got up, the accused had ran off and she called her brother and mother. Her uncle arrived first and they took the sister to Hospital. After a short while, Gituma was bought to the hospital for allegedly taking poison. Her sister died on Tuesday while Gituma continued with treatment. PW2 told the court that when still walking on tarmac, they had seen Gituma walking behind them but he disappeared. She further said that there are shortcuts to the place they found him. She denied that there was any struggle at the scene in an attempt to arrest accused.

PW3 Jason Mutuma, a brother to the deceased recalled that he received a call from PW2 on 19/11/2011 about 6.30 p.m. and was told to rush to take the sister to hospital but on arrival at the scene, found that the uncle had arrived and the sister had been placed in his vehicle and he followed them to the hospital. He observed that the sister was injured on the stomach and intestines were exposed, and other injuries on the ribs and buttocks. He knew the accused as the deceased's husband and that they did not live in peace; that he had once gone for the deceased from her matrimonial home and lived with her for 6 months. He denied having had any relationship with the accused and did not like him because of the way he treated his deceased sister; that he had only talked to accused once in the 12 years the sister was married to accused. He denied that the accused had been denied access to his children by deceased's family.

PW4 Steven Muguna, told the court that he was coming from work about 7.00 a.m. on 19/11/2011, when he arrived at the scene where the deceased had been injured near Kirung'a. He found her injured and crying but was able to talk. PW4 said that he had seen accused crossing the road running away from the scene before he reached where deceased was. He said that he saw accused because a passing vehicle shown its lights on him. He is the one who removed the deceased from the water where she had fallen and escorted her to hospital; that deceased was admitted, and later he saw accused being brought to hospital for having taken poison. PW4 knew both accused and deceased. PW4 said deceased said that Gituma stabbed her.

PW5 PC Martin Kingi was the Investigation Officer in this case. He learned of deceased's death on 22/11/2011 at the Main Hospital, where accused was also admitted for having taken poison. He produced accused's discharge summary as an Exhibit No. 2 and he charged accused after he was discharged from Hospital.

The post mortem was conducted by **Dr. Makandi** and the report produced in Court by **Dr. Belinda of Meru Level 5 Hospital (PW1)**. The Doctor was of the view that the deceased died due to cardio pulmonary arrest secondary to penetrating stab wounds. The deceased sustained multiple stab wounds to the liver, spleen, the buttocks, and penetrating wound to the stomach, lower chest, 5 stab wounds and the buttocks.

When called upon to enter his defence, the accused stated on oath that indeed, the deceased was his wife; that in January 2011, his father-in-law took his children to his home and that the wife followed them; that he used to visit them but they disagreed with deceased's brother, PW3 and he was barred from entering their home. Since he had not disagreed with the wife, they used to meet and he invited the elders to intervene. That on 19/11/2011, he talked to deceased on phone and they agreed to meet that evening; that the deceased came with PW2 Dorothy; that when near the brother's home, PW2 got hold of him and started shouting; he struggled to get away; that deceased joined PW2 and held his hands; that PW2 fell as deceased continued to hold him and both of them fell; that PW2 rose before them and he heard deceased say she had been stabbed; that PW2 had something in the hand; that the deceased released him after she said she was injured and he ran; that when he reached his house, he lost interest in living and took some medicine, drunk it and came to when in hospital. He denied having inflicted the fatal injuries on the deceased and that he was also injured in the struggle.

After close of the defence case, Mrs. Ntarangwi submitted that the prosecution had failed to prove its case to the required standard. She urged that the court should weigh the evidence of PW2 as against the accused's defence; that though PW2 went to get her sister because of alleged threats to deceased, there is no evidence of the threats; that PW2 claimed that at one time, the accused was behind them but did not demonstrate how he came to be ahead of them and that PW2 was therefore not truthful; that the scene was dark and the accused's explanation is reasonable; that PW3, the deceased's brother was against the deceased's marriage and talked of the incident having been at 6.30 p.m. instead of 7.00 p.m. and therefore, he expected it to occur; that the injuries to deceased were spontaneous and were caused during the struggle and the ingredients of the offence were not proved; that accused's conduct of trying to commit suicide should not be taken against him because he was overwhelmed. Counsel urged that if accused is found guilty he should be convicted of manslaughter, but not murder.

Mr. Mungai, Learned State Counsel on the other hand, submitted that the offence of murder was proved;

that the court should take into account the relationship between accused and deceased, they were separated; that accused's intention in following deceased infers malice aforethought; that the injuries on deceased are not commensurate with the struggle and that they are in themselves evidence of malice aforethought. Counsel also urged that accused's conduct after he ran from the scene speaks for itself; he did not report to Police but instead tried to take his life because of what he had done.

To prove a charge of murder, the prosecution is under a duty to prove the following:

1. **The death of the deceased and cause of death;**
2. **That the accused committed the unlawful act that caused the death of the deceased;**
3. **That the accused had the malice aforethought.**

See *Nyambura and Others v Rep (2001) KLR 355*. Malice aforethought is defined under **Section 206 of Penal Code** as:

“206. Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances –

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the persona 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) an intent to commit a felony;*
- (d) 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.”*

In the instant case, the death of the deceased is not in doubt. The post mortem (PEX No.1) disclosed that the deceased sustained several stab wounds on the body, and the cause of death was cardio respiratory arrest secondary to penetrating stab wounds. The deceased did not die immediately but died in Hospital on 22/11/2011.

There is no doubt that accused was at the scene where the deceased was injured. He admitted that he was present. The only other person at the scene was PW2, Dorothy, a sister to deceased, who was walking home with the deceased. We have the word of PW1 against that of the accused as regards what happened on the fateful night.

It is not in doubt that accused and deceased had been married but had separated with the deceased and were no longer living together as man and wife. PW2 and her brother, PW3 did confirm that fact. Deceased's children were also living with deceased's parents. Both PW2 and 3 told the court that it had been a troubled marriage with the deceased going to her matrimonial home and back to her parents.

PW2 vividly explained to the court why she had gone to get her sister from work that evening. It was because the deceased feared accused who had threatened her because she had refused to go back to him. To the contrary, accused claims that he was in good terms with the deceased and that it is his family, father and brother who were interfering with their relationship. However, having heard the testimony of PW2 and 3, I am convinced that accused and deceased had disagreed and that is why she was back at the parent's home and that is why PW2 had gone to keep her sister company on that fateful evening.

I have considered PW2's evidence as against the accused's defence on how the deceased sustained the fatal injuries. No doubt, the incident occurred about 7.00 p.m. when it was dark; PW2 said that they used torches from the mobile to see that accused was ahead of them and is the person who attacked deceased.

The accused was suggesting that deceased's family had planned to attack him but that cannot be true because they would not have known that he was escorting the deceased on that day. Further, accused said that PW2 got hold of him and screamed when they reached near their home. It was never suggested during the testimony of PW2, 3 and 4 that the scene was near PW2's home. Even if they were near deceased's home and had planned to attack, once PW2 screamed, her family would have been on alert and would have come to their aid immediately. That did not happen because PW4 was the first to arrive at the scene and he found nobody else there except PW2 and deceased. Nobody else from deceased's family had arrived there.

To confirm that accused was not in good terms with deceased, he claimed that after PW2 held him, the deceased also got hold of him so that he could not get away and he struggled to free himself from both PW2 and deceased. Why would the deceased attack him and get hold of him if they were on good terms? That allegation did not make sense. If accused and deceased were on good terms the deceased would have ensured he got away. The accused's defence that he was on good terms with deceased was not truthful at all and the allegation that there was a plan to trap him was not truthful.

PW2 had told the court that she had seen accused at Uchumi Supermarket before they set off, then he disappeared. Later, they saw him behind them as they walked home and he disappeared only for him to emerge from their front before the attack. There is no doubt that this is the home area of both accused and deceased. PW2 explained that there are many short cuts to their home and accused must have used one of them to get ahead of them. PW2's explanation that the accused emerged from the front is therefore plausible and I have no reason to doubt her.

According to PW2, the accused attacked the deceased after he pushed her into a pool of water on the road. PW2 denied there having been any struggle at the scene between them; that accused attacked the deceased, injuring her on the stomach exposing her intestines. To the contrary, accused talked of having been held by PW2 who was joined by deceased and that he struggled to free himself and they fell; that PW2 rose before him only to hear deceased scream that she was injured. Accused went on to allege that he saw PW2 holding something in her hands. He was insinuating that it is PW2 who stabbed her own sister. If PW2 had stabbed the sister by mistake, it may have been one or two stab wounds. Accused's description of the events leading to deceased's injuries does not add up. There is no reason why PW2 would injure her own sister when she had gone to protect her from accused. PW2 denied there having been a struggle at the scene. The other insinuation is that the deceased may have been injured in the struggle. The stab wounds found on the deceased are inconsistent with accused's version of events. The injuries must have been inflicted by somebody else and were deliberately inflicted to different parts of the body. The injuries were as follows:

- 1. Stab wound on left lumbar hip penetrating to the abdomen 6 cm long;**
- 2. Stab wound to the iliac fossa near hip penetrating to the abdomen 7.5 cm.;**
- 3. Stab wound to left gluteal region (buttock) 4 cm.;**
- 4. Stab wound to the back at the level of T 10 umbilical cord 5 cm.;**
- 5. Stab wound to the back – at the level of T 8 – above level 4 cm.;** and cut on right index finger.

The said injuries were deep – injury to the diaphragm, 2 cuts on the stomach, the liver, spleen, colon and kidney. These wounds could not have been sustained in a struggle. In a struggle, one may have got one or two injuries but that is not the case here. They were inflicted deliberately. I find that the accused must have inflicted the injuries on deceased when PW2 fell in water whereafter he fled from the scene.

To cement my belief that the defence was not credible, accused heard that his wife the deceased was injured, yet he fled the scene and never sought help for her from anywhere not even the Police. He did not do so because he was the perpetrator of the offence. After accused fled from the scene, he went and

took poison and came to while in hospital. He admitted that fact. His reason for attempting suicide was that he had lost interest in living because the dispute had disturbed him. From what had transpired, I do not believe that is the reason for trying to end his life. Accused tried to end his life because of what he had just done, he had just fatally injured deceased. His conduct clearly points to his guilt.

I have considered the authorities cited by accused's Counsel but they are not relevant herein in *Veronica Onyango Okumu v Rep. CRA 11/2003*. In that case there was no proof of malice and the deceased sustained only one stab wound and there was evidence that the victim and accused struggled over a kitchen knife.

In *Johson Njue Peter v Rep. CRA 85/2014*, the appellant was drunk at the time of commission of the offence and no malice was proved.

In *Mungathia v Rep. Court of Appeal 121/2006*, a defence of self defence was raised and the appellant too had suffered some injuries during the commotion between him and deceased. In the instant case, the accused was not acting in self defence. Accused was not injured anywhere.

In *Maurice M. Kenyatta v Rep. CRA 144/2000*, the attack was sudden without any premeditation. In the instant case, there is no evidence that the accused acted in self defence. His conduct which I have considered above is clear: he trailed the deceased in the dark, caught up with her and inflicted fatal injuries. It was all premeditated.

Whether accused was framed; that is far from the truth. PW2 had no prior dispute with accused and none was alluded to. PW3 told the court that he did not like or talk to accused because of the manner in which he treated the sister and that is why he never used to talk to him. Under the prevailing circumstances, the ill feelings were not abnormal. I believe PW3 was just being truthful and it was no frame up.

The defence contended that the fact that PW3 alluded to the incident having occurred at 6.30 p.m. instead of 7.00 p.m., there was a plan by deceased's family to trap him. The fact that PW3 said he was called at 6.30 p.m. instead of 7.00 p.m. does not mean he had planned to trap accused as alleged. As stated earlier, if there had been a plan to trap accused, then once PW1 and deceased screamed, PW1 would have been the first at the scene but that was not the case. PW4, a passerby arrived at the scene first, then deceased's uncle. Besides, I believe it was an estimate of time because nobody would have been waiting for such an incident to occur to know the exact time of occurrence.

Having found that it is accused who fatally injured the deceased, his conduct of trailing the deceased in the dark, attacking her and inflicting multiple injuries on her body is clear evidence that his intention was to do grievous harm to the deceased or end her life. After he knew that he had ended her life, he tried to take his own. I find that malice aforethought flows from accused's action; he planned and put his intention in action when he trailed PW2 and deceased and injured the deceased. It all arose from the matrimonial problems that had resulted in the deceased going back to her parents and refusing to go back to accused.

Having considered all the evidence in its totality, I am satisfied that the prosecution has proved beyond any reasonable doubt that it is the accused who trailed, intercepted and fatally injured the deceased.

I find accused guilty as charged and he is convicted Under **Section 322 of CPC**.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF DECEMBER, 2015.

R.P.V. WENDOH

JUDGE

17/12/2015

PRESENT:

Mr. Mulochi for State

Ms. Ntarangwi for Accused

Present, Accused

Ibrahim/Peninah, Court Assistants