



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO. 1 OF 2011
FORMERLY HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 100 OF 2010

REPUBLICPROSECUTOR

VERSUS

STEPHEN WEKESA WASIKE.....ACCUSED

JUDGEMENT

The charge

Stephen Wekesa Wasike, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on 21st November 2010 at Mororo Shopping Centre in Mororo Location in Bura Tana River District within Tana River County murdered Rhoda Ikumba.

Facts

The case for the prosecution was supported by evidence of seven witnesses. From their evidence it emerges that Rhoda Ikumba, deceased, and the accused person were friends and lived as man and wife. They had a baby girl together. Agnes Nzambi Kavangi (PW4) was their friend and neighbour. She lived near them at Mororo and sometimes the deceased and PW4 used to cook and eat together. The deceased and the accused developed problems when the baby was about four months old and PW4 used to advise the deceased to leave the accused because he used to beat her.

On 21st November 2010 at around 1.00am PW4 found the accused hitting the door of deceased's house by force. He entered into the house and held the deceased. PW4 pleaded with him to leave the deceased and he let go of her. The deceased picked the baby and went out of the house. PW4 followed her out of the house. The accused attacked PW4 with a Somali knife and cut her on the right hand. He then turned on the deceased and started stabbing her on the chest and back. She fell down. The baby fell down next to the mother. PW4 ran towards the road screaming for help. She was assisted to hospital at Garissa Provincial General Hospital where she was admitted for three days and her injuries stitched. Before PW4 was taken to the ward, she saw the deceased brought to hospital. The deceased could not talk. PW4 learned the following day that the deceased had died.

The deceased was assisted to hospital by Corporal Alex Wambua, PW1, from Mororo Administration Police Post. PW1 received a telephone call from one Mwangi that there was a woman lying down at

Mororo Market asking for help. In company of Administration Police Officer Albert, PW1 went to the scene and found the deceased lying on the ground with a small baby of about one year next to her. PW1 noted that the deceased was injured and unable to talk and could only manage to say 'help, help'. PW1 called Chief Inspector Robert Aboki PW2, the then OCS Madogo Police Station, and informed him of the matter and asked for help. The baby was picked by Mumbe Kithome, PW6 who was a neighbour to the deceased. She stayed with the baby until she was picked by the relatives.

With the help of the police officers manning the Tana River Bridge, PW1 took the deceased to hospital in a taxi.

The accused was arrested on 3rd December 2010 at 7.00pm at Bura Market by Johnson Njuguna a police officer attached at Bura East Administration Police Camp with help of members of the public. He was later handed over to Madogo Police Station where he was charged with this offence.

Defence

The accused advanced an alibi defence. He testified under oath and told the court that on 21st November 2010 he travelled to Dadaab to deliver building stones; that they reached Dadaab at 1.00am; that they off-loaded stones in the morning and left at 8.00am to Garissa where they reached at 2.00pm; that he went home and found that Rhoda had died. He said he used to be deceased's friend but by the time she died they had separated and each was living alone. He said he found the deceased's house locked and went home. He denied stabbing her and said they had lived together for one year and six months and all that time they had not disagreed. The accused further told the court that he knew Agnes Nzambi, PW4 and that PW4 lied in court.

Issues

The ingredients of murder are to be found in section 203 of the Penal Code. This section defines for murder as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

The prosecution is tasked with the onus of proving beyond reasonable doubt that:

- i. The deceased person has died.
- ii. The death of the deceased was caused by the accused person before the court by an unlawful act or omission.
- iii. The accused person, at the time of causing that death, possessed malice aforethought.

Proof of death

Dr. John Mwangi, PW5, conducted the post mortem examination on the body of the deceased on 29th November 2010 at 11.40am, seven days after the death. He observed four cut wounds on the left side of the chest with two of them under the breast. The body had four other deep cut wounds on the left upper back and a bruise at the back of the left ear. The body was not examined internally following request by relatives. The doctor formed the opinion that death was caused by **“Hypovolemic shock secondary to massive hemorrhage due to deep stab wounds on the chest and the heart region”**.

I find the death of the deceased proved beyond reasonable doubt

Proof that the accused caused the death

PW4 is the sole key witness on what happened. A Mr. Mwangi who called PW1 and informed him that the deceased needed help was not a witness. Other witnesses found the deceased already wounded. Mumbe Kithome, PW6, testified that she was woken from her sleep by the cries of a baby.

She did not state the date or the time this happened. She testified that when she went out she found the deceased lying on the ground with the baby next to her. That there was no other person at the scene and the deceased could not talk; that she picked the baby and went to the nearby Administration Police Post to report; that police told her to take the baby home with her; that she took the baby home and went to sleep; that the baby was picked the following day by relatives.

I noted that PW6 was uncomfortable as she testified and was of the view that she may have known more than she told the court. I am not able to reconcile her evidence that she picked the baby and reported the matter at the AP Camp with that of PW1 who said that he found the baby next to the deceased when he reached the scene. It is not clear who, between PW1 and PW6, reached the scene before the other.

Back to the evidence of PW4, this witness knew the accused and the deceased before and knew that both lived as husband and wife. She said that at the scene, outside deceased's house, there was electricity light from a chemist nearby and she could not mistake the accused. PW6 denied presence of electric light near the scene.

On cross examination PW4 said that she found accused and deceased arguing and she asked the accused why they were disagreeing. At the time, the deceased and the accused were at the door with deceased carrying the baby; that the accused did not respond to her question; that

he hit the deceased; that Mwangi went to the scene after hearing screams but did not talk to the accused. She further testified on cross examination that the deceased and the accused had taken *makole*, a traditional brew, but were not drunk and that he told the deceased 'I told you I would kill you'. She said that is not the first time the accused had threatened the deceased and that they had reported earlier threats at the AP Camp and the accused had been warned. She said that the accused ran away after stabbing deceased and cutting her on the hand and that Mwangi called Police Officer known as Wambua. She denied she used to assist the deceased to sell the *makole* brew.

The evidence on identification of the accused as the person who stabbed the deceased and also cut PW4 is evidence of a single witness. The general principle on the evidence on identification was set out in the case of Cleophas Otieno Wamunga v. Republic (1989) KLR 424. The court stated that:

“Evidence of visual identification in criminal cases can bring about miscarriage 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 identification 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”.

The approach taken by the court on the evidence of visual identification as stated by Widgery, C.J. in R vs Turnbull (1976) 3 ALL ER 549 at page 552 is that:

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

In Abdalla Bin Wendo & Anotehr v. Republic (1953) EACA 166, the court said as follows in regard to the same issue:

“There was a need for treating with the greatest care the evidence of a single witness respecting identification, especially when it was known that the conditions favouring a correct identification were difficult. In such circumstances what is needed was other evidence, whether it be circumstantial or direct, pointing guilt, from which a Judge or Jury could reasonably conclude that the evidence of identification, although based on the testimony of a single witnesses, can safely be accepted as free from the possibility of

error.”

It is with great caution that I approach the evidence of PW4. I have taken into account that the accused was known to her. I observed her testify. She was injured in the attack and her right hand had a healed scar below the elbow. She told the court the hand is weak and she cannot use it for heavy chores. Her demeanor impressed me. I find during cross examination, her evidence differs slightly with what she stated during examination in chief especially where she states that she asked the accused why he was disagreeing with the deceased but he did not respond to her question. However, her evidence that the accused stabbed the deceased at the back and on the chest remained unchallenged.

Bearing in mind the dangers of relying on the evidence on identification of a single witness and having cautioned myself of these dangers, it is my finding that PW4 positively identified the accused as the person who cut her and stabbed the deceased. I have taken into account that the accused was known to PW4 and the incident took some time. I am convinced having taken into account all the circumstances surrounding the commission of this crime including the demeanour of PW4 that there is prove beyond reasonable doubt that the accused stabbed the deceased four times on the chest and four times at the back and also injured PW4 on the hand.

Proof of malice aforethought

The motive for this murder is not known. There is evidence from PW4 that the accused and the deceased used to quarrel and the accused used to threaten the deceased. There is evidence that both used to consume the local brew *makole* but PW4 said that night though they had taken the brew, the accused and the deceased did not look drunk. The injuries were extensive, four stab wounds on the chest and four extensive deep stab wounds at the back. That was not all. The accused cut PW4. Although the hospital, Garissa Provincial General Hospital, refused to release PW4’s P3 Form after she failed to pay for it, the scar on her right hand below the elbow is evident of a serious cut wound. She said she could not use that hand to do heavy work.

Malice aforethought is deemed to have been established in accordance with section 206 Penal Code if there is evidence to prove that the accused had:

- 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.

Having regard to all the circumstances of the this case, I find malice aforethought proofed beyond reasonable doubt.

Defence of alibi

The accused said he was not at the scene of the crime at the time it was committed but at Dadaab delivering building stones and only came home to find the deceased dead.

The law has been settled that an accused person who raises the defence of alibi does not thereby assume the burden of proving it. It is sufficient if the alibi raises reasonable doubt as to whether or not the accused was at the scene of the crime, (**see Kiarie vs. Republic [1984] KLR 739**). This means that the burden always remains with the prosecution to proof that the accused committed the crime under trial.

In this case the accused did not give notice of his intention to give alibi defence in order for the prosecution to call evidence in rebuttal. The prosecution did not seek leave of the court to call for evidence in rebuttal. This leaves the court with the task of comparing the alibi defence with the prosecution evidence.

As I have stated elsewhere in this judgement, I am convinced by the evidence of PW4 that the accused attacked the deceased causing her fatal wounds on her chest and back. It cannot be true therefore that he was at Dadaab when the crime was committed. He was represented by counsel and there was no cross examination touching on the accused's alibi defence. To my mind, it seems like an afterthought for the accused to claim that he was not at the scene when the crime was committed. The alibi does not raise any doubts in my mind.

After duly considering his defence and the prosecution evidence, specifically evidence of PW4, I am convinced beyond reasonable doubt that the accused was at the scene and he attacked both the deceased and PW4.

Conclusion

After careful evaluation and analysis of the evidence in this case, I am convinced beyond reasonable doubt that the accused caused the death of the deceased by fatally wounding her on the night of 21st November 2010; that he was not at Dadaab as he claims; that his act of stabbing the deceased four times at the back and four times on the chest is an unlawful act and that he knew his action would cause the death of or grievous bodily harm to the deceased. I find all the ingredients of murder proved. I hereby enter conviction against the accused for the offence of murder contrary to section 203 of the Penal Code. I make orders accordingly.

Dated, signed and delivered this 28th January 2014.

S.N.MUTUKU

JUDGE

Sentence

The accused was sentenced to serve 20 years imprisonment.

S.N.MUTUKU

JUDGE