



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 17 OF 2010

LESIIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

FESTUS NGUGI NJAGIACCUSED

JUDGEMENT

1. The accused **FESTUS NGUGI NJAGI** is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 11th day of September 2006 at Mugutuni Market Magutuni Sub-Location Kiera Location in Maara District within Eastern Province murdered Stella Gacheri.
2. The prosecution called four witnesses. The facts of the prosecution case are that on the 11th September 2006 the deceased was within Magutuni area when she came under an attack. PW2 Jane, a retired nurse heard people chasing someone at around 1 pm that day. She first locked herself in the house then she heard people talking and a girl saying "please help me." She then opened the door and saw the deceased lying near the door to her kitchen she was bleeding from the neck her first reaction was to rush to a police post nearby where she reported and then returned to her home and organized young men who prepared a stretcher and carried the deceased to the nearby Mungutuni Hospital. PW2 accompanied the deceased to the hospital and she heard her talking to her brother on the phone informing him that he had been stabbed by her husband.
3. PW3 was Ashford Mbae and had gone to Magutuni Market when he heard some people discussing that a girl from Kiera had been stabbed. PW3 testified that since he came from Kiera he got curious and decided to check who it was only to find it was the deceased who he knew very well. He said he called her brother and informed him of what he had seen.
4. PW1 was the mother of the deceased. She told the court that she received information from her son on the night of the day in question informing her that he had been to take his sister to hospital because she had been stabbed. PW1 visited her daughter the following day and spent that night, and the following morning with her. She said that her daughter had a stab wound from one side of the neck through to the other side of the neck. The site of the wound was oozing some fluid. She also had a wound on the left shoulder. During the time that PW1 spend with her daughter she told her that it was the accused who stabbed her when they left because she had resisted to go back to him and that she had made it very clear to the accused that she would only return to him if he asked for hand in marriage from her parents. PW1 stated that the deceased informed her that when she resisted going with the accused the accused wrestled with her and then stabbed her. PW1 testified that on the 3rd day after the incident the doctor informed her that the deceased had

to be transferred to Kenyatta National Hospital for further treatment. PW1 stated that she accompanied the doctor and deceased in the ambulance but just when they were nearing Nairobi City the deceased passed away.

5. The Investigating Officer was PW4 his evidence was that on the 29th March, 2010 he received a signal from Mikinduri Police Station informing him of the arrest of the accused. PW4 stated that the accused was required by Magutuni Police Station where PW4 worked for murder in this case. He therefore collected the accused from Mikunduri Police Station and charged him with this offence.
6. PW4 produced the post mortem form signed by Dr. Ngugi whose whereabouts was not known due to the lapse of time. The cause of death according to that report was cardio pulmonary arrest due to stab wound on posterior side of neck due to hemorrhage and probable involvement of phrenic nerve. From the report itself both externally and internally the doctor saw a wound on the neck on the right side which was transverse about 4 cm long stretched with nylon exposing deep cut wound extending to the cervical vertebrae. There was longitudinal wound 4 cm long on the left side.
7. The accused gave an alibi defence and stated on the 11th of September 2006 the date in question he was at Mikinduri buying tomatoes and unions for purposes of sale. He said that he was not aware who harmed the deceased. He said that he had no grudge against the deceased and that he was not the one who injured him. The accused stated that he married the deceased in 2003 and that in 2006 May the deceased left him leaving behind their child. The accused stated that he agreed with PW1 the mother of the deceased that she keeps their child and that he would provide for it. He said that he moved to Mikinduri between 2006 and 2010 when he was arrested for robbery. In his defence the accused claimed that since PW2 testified that the deceased was not speaking there is no way she could have spoken to her mother concerning the incident in which she was stabbed and in which it is alleged she implicated the accused. The accused was obviously wrong because PW2 said that she heard the deceased talking asking for help at the door to her kitchen. PW2 also said that she heard the deceased talking on the phone to her brother to whom she told that her husband had stabbed her
8. The accused person is charged with murder contrary to section 203 of the Penal Code. Under that section murder is defined as:

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

9. Malice aforethought is an important ingredient to a charge of murder. The circumstances which constitute malice aforethought are set out under section 206 of the Penal Code. For purposes of the facts of this case the relevant provisions of that section are as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one 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 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) ...”

10. The prosecution must adduce the evidence which establishes that the accused person stabbed the

deceased and that at the time he committed that offence he had formed the necessary intention to either cause death or grievous harm to the deceased. Under section 206 of the Penal Code the knowledge that stabbing the deceased as he did as a result of which he died will probably cause the death or grievous harm to the deceased accompanied by an indifference whether death or grievous harm was caused is sufficient to prove malice aforethought.

11. The prosecution case in this case relies on a dying declaration by the deceased. The only witness who testified of having been given that information by the deceased as to the cause of her injury leading to death was her mother PW1. The other witness PW2 heard the deceased informing a third party identified as the brother of the deceased concerning the person who caused the injury to her.

12. The issue is whether the statement made to PW1 by the deceased qualifies as a dying declaration. In **CHOGE -V- REP [1985] KLR 1** the court of Appeal discussing the principal on which dying declaration is admitted in evidence observed as follows:

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person. See CHOGE –V- R [1985] KLR 1.”

13. The incident in question took place at 1 pm. It was in broad day light. The accused and the deceased had a relationship in which the deceased got a child by him. When PW1 testified in court she said that that child was living with her even before the deceased was stabbed leading to her death. The accused himself does not contest those facts but admitted that he had lived with the deceased as his wife for 3 years between 2003 and 2006 May when she left him. The incident in question took place slightly over 3 months since the accused and the deceased separated. There is no possibility that the deceased could have mistaken the identity of the person who stabbed her seeing that the incident happened in broad day light. The deceased called her brother and in the hearing of PW2 who was among the first people to rescue the deceased, the deceased was heard saying that it was her husband who had stabbed her. One day after the incident the deceased told her mother PW1, the same thing that it was her husband who had stabbed her.

14. There is a need for caution when admitting a dying declaration of a person and the need to weigh the probative value of such a statement carefully. The Court of Appeal in the case of **MICHAEL KURIA KAHIRI -V- REP CRIMINAL APPEAL NO.45 OF 1991 (NRB)** observed,

“There is no doubt that the appellant’s conviction by the superior court was dependent on the deceased’s statements as to her cause of death. The law relating to the weight to be attached to such statements was correctly stated in PIUS JASUNGA s/o AKUMU –V- REGINA [1954] 21 EACA 331. In that case the Court of Appeal for Eastern Africa said that although it is not a rule of law that, in order to support a conviction; and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused, it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration.

And in MIGEZO MIBINGA –V- UGANDA [1965] E.A. 71 the same Court pointed out that:

‘It is not always appreciated that the probative force of a statement as to the cause of his death by a person since deceased is not enhanced by its being made in the presence of the accused unless by his conduct, demeanor, etc., the accused has acknowledged its truth. Consequently, it is advisable that a trial judge should expressly state whether he is satisfied or not that there was such acknowledgement.’

In this regard therefore, it is instructive to take note of Lord Atkinson's observation in REX V CHRISTIE [1914] A.C. 545 at page 554:

'The rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanor, and it is function of the jury which tries the case to determine whether his words, action, conduct or demeanor at the time when a statement is made amounts to an acceptance of it in whole or in part.'

As was observed in PIUS JASUNGA s/o AKUMU –V- REGINA, supra,

“The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case; it is no guarantee of accuracy.

15. I have carefully considered the dying declaration by the deceased in this case. The statement was made in the absence of the accused. It was made to PW1 and also to a brother of the deceased who was not called as a witness for reasons not explained. However at the time the deceased told her brother about the culprit to her stabbing, it was heard by PW2. According to PW1 the deceased explained to her the circumstances leading to the stabbing. PW1 stated that the deceased had told her that the accused stabbed when she resisted returning to him. The accused does not contest those facts and in his defence he stated that the deceased walked out on him. Therefore the deceased statement that she was stabbed because of resisting taking back the accused as her husband was not farfetched and had a firm foundation which the accused also admits that the two had parted ways and the deceased had returned to her parents.

16. There is a clear motive for the attack on the deceased by the accused. The fact that the deceased declined to return to the accused is a clear motive for the accused to have committed this offence.

17. I have also considered the accused own conduct after this incident. The evidence is that the offence was committed on 11thSeptember, 2006. The accused then disappeared from that area for four years and could not be found until his arrest for a different offence in 2010. The accused conduct was clearly that of a person with a guilty mind and also of one who was trying to escape liability for his actions.

18. The accused raised the defence of alibi. I am aware that once such a defence is raised, an accused person has no burden to prove that his alibi is true. All that is required is for the alibi defence to raise a doubt in the prosecution case. In **KIARIE V. REPUBLIC (1984) KLR 739**it was held:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.

19. I am guided by the above case. I find the alibi defence by the accused did not raise any doubt in the prosecution case. If anything I find that the accused person told obvious lies about his whereabouts on the date of the alleged offence to the date of his arrest. While he tried to say that he was supporting the child by taking money to the mother in law every three days he contradicted himself when he said that he left his home area in June 2006 until 2010 when he was arrested. In **ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990**,the court of appeal observed:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial

evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent evidence available”.

20 . I am guided by the above case. The accused person gave obvious lies that he had been supporting the child of the deceased by taking money to PW1 every 3 days while at the same time he said that he was unable to keep up the supply when he left the area in 2006 and kept away until the day of his arrest. It is very obvious that the accused had no intentions of supporting the child because for 4 years he did not provide for it. More importantly is the fact that what the 1st accused actually did was to ran away from the area after committing this offence in order to avoid arrest. That was conduct of a person with a guilty mind.

21. I noted in cross examination of PW1 that there were other incidences where the accused had been violent to the deceased. Even though this evidence does not relate to the happenings of 11th September 2006, I find it *res gestae*. It shows that the accused person had attacked the deceased in the past over his relationship with her and therefore the incident of the material day was not in itself an isolated incident.

22. In the incident related by PW1 the accused cut four fingers of the left hand of the deceased until all of them were hanging and she stayed with PW1 for one and half months during which time PW1 nursed the deceased back to health.

23. PW1 also in cross examination related an incident that took place on the 10th September 2006, one day before the date of this attack. PW1 testified that she saw the accused person carrying a knife within her home area and when she called him he declined to go. Taking into account that the very next day the accused person attacked and seriously injured the deceased I find that the accused person had been stalking the deceased. The intention was definitely to either cause her death or grievous harm. The incident of 10th September, one day before the attack proves that the accused person had already formed the necessary malice aforethought to commit this offence.

24. There are witnesses who were not called and who could have assisted in this case. This includes one Mwenda the brother of the deceased. He was called by PW3 and informed of the injury caused on the deceased. He also took her to the hospital where she was admitted. He is also the one who informed his mother PW1 about the attack on the deceased. I do not find the failure to call this person as a witness affects the prosecution case as he did not witness the attack on the deceased. The prosecution also explained why he was not called as a witness was because he was so sick that he could not attend court.

25. Having carefully considered the evidence adduced by both sides I am satisfied for reasons explained in this judgment that the accused person stabbed the deceased causing her injuries which led to her death 3 days after the attack. The accused person had stalked the deceased before the day of the incident. He also escaped from the area for a period of almost four years which is further evidence of a conduct of a person with a guilty mind. I find that the accused person had formed the necessary malice aforethought to commit this offence. The prosecution has therefore proved the case against the accused person beyond any reasonable doubt and therefore find the accused guilty of the offence charged and convict him under section 322 of the Criminal Procedure Code.

DATED SIGNED AND DELIVERED AT MERU THIS 9th DAY OF APRIL 2014.

LESIIT,J.

JUDGE