



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 33 OF 2011

REPUBLIC.....RESPONDENT

VERSUS

EVERLYNE M. SUA.....ACCUSED

JUDGMENT

The accused **EVERLYNE MARGARET SUA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were given as follows:

“On the night of 16th and 17th December, 2011 at Bamburi Mwisho in Mombasa County within the Coast Province murdered JONNES MJOMBA MWASHUMA.”

The accused who was represented by **MR. ATANCHA** advocate entered a plea of ‘*Not Guilty*’ to the charge. The prosecution led by learned state counsel **MR. GIOCHE** called a total of ten (10) witnesses in support of their case. The brief facts of the case were as follows.

PW2 JOYCE MUTHONI an aunt to the deceased and her husband **PW3 DANIEL KAHURO KAMERI** told the court that on 16th December, 2011 at about 11.00 p.m. they were in bed at their home in Bamburi. At about 11.00 p.m. **PW2** received a call from a man she names ‘*Peter Njoroge*’ who informed her that her nephew (the deceased herein) had been killed. Both **PW2** and **PW3** rushed to the plot where the deceased lived at Bamburi Mwisho. Inside the house they found the body of the deceased lying in a pool of blood on the floor. The two witnesses both state that they saw stab wounds on the head, face and chest of the deceased. Police who had been called in removed the body to the mortuary for an autopsy examination.

PW8 MERCY KAWIRA told the court that on 16th December, 2011 at about 11.00 p.m. the accused who was her friend came and knocked on her door. **PW3** let her in. Accused asked **PW8** to lend her money as she wished to go and report an incident to the police station. The accused also requested **PW8** to give her a ‘*lesso*’ and a phone. **PW8** complied and gave the accused money, a phone and a ‘*lesso*’ after which the accused left. The following morning as **PW8** was washing utensils outside her house she saw a bloody knife dropped outside her door. She took the knife to the police station.

PW6 WINFRED KANINI KIOKO told the court that on the morning of 17th December, 2011 the accused who was also her friend phoned and asked to meet her. The two met at 10.00 a.m. at Makali stage. The accused told **PW6** that she had killed a man. **PW6** advised her friend to go and report to

police. Accused showed **PW6** a bundle of her (accused's) clothes full of blood wrapped in a lesso. The accused washed the bloodied clothes and threw them into a nearby dumpsite. **PW10 SERGEANT CLEMENSIA MUNOKO** who was the investigating officer told the court that on 17th December, 2011 at 11.40 a.m. the accused did arrive at Bamburi police station to report the incident. Police arrested the accused. Upon completion of police investigations the accused was arraigned in court and charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto her defence. She told the court that she knew the deceased as he was a friend to her younger brother. The accused admitted that on the material night she had been involved in an altercation with the deceased which resulted in his death. It is now the duty of this court to analyze the evidence adduced by the prosecution and determine whether the charge of murder has been proved beyond a reasonable doubt.

The offence of murder is defined thus by section 203 of the Penal Code:

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

From this definition can be derived the four crucial ingredients of the offence of murder, all four of which the prosecution is required to prove beyond a reasonable doubt.

1. The fact of the death of the deceased.
2. The cause of that death.
3. Proof that the death of the deceased was caused by an unlawful act or omission on the part of the accused.
4. Proof that said unlawful act or omission was done with malice aforethought.

The fact of the death of the deceased is not in any doubt. **PW2** and **PW3** who were both relatives of the deceased confirmed that on 16th December, 2011 at about 11.00 p.m. they saw the dead body of their kin whom they identify as 'Jones Mjomba Mwashuma'. **PW4 SAMUEL MJOMBA** a cousin to the deceased told the court that it was he who identified the body of the deceased for post mortem to be done. **PW5 CORPORAL HARRISON MUGIRI** is a gazetted Scenes of Crime officer who on 17th December, 2011 at 2.00 a.m. attended the scene in Bamburi and took photographs of the body of the deceased. The said photographs were produced as exhibits in court **Pexb1**. They depict the body of a young male of African descent lying on the floor in a pool of blood. There can therefore be no doubt whatsoever about the fact of the death.

Similarly on the question of the cause of death there can be no controversy. **PW2** and **PW3** both testify that they saw deep stab wounds to the upper torso and face of the deceased. These wounds are clearly visible in the photographs produced by **PW4**. Concrete evidence on the cause of death was tendered by **PW9 DR. NGALI MBUUKO** the pathologist attached to the Provincial Coast General Hospital, who conducted the autopsy examination on the body of the deceased. **PW8** said that upon examination of the body he noted the following:

- 4 stab wounds on chest
- Perforation of left lung
- Collapsed left lung

His medical opinion was that the cause of death was 'severe haemorrhage due to stab wounds to the left lung.' **PW9** filled and signed the post mortem report which he produced in court as an exhibit **Pexb3**. I therefore find that the cause of the death of the deceased has been sufficiently proved.

The next question is whether it was the accused who committed the unlawful act of fatally stabbing the deceased. There was no eye-witness to the incident. It is said that neighbours heard the two quarrelling. However not a single neighbour has testified in court that he or she heard or saw the accused and the deceased quarrel or fight. **PW8 'Mercy Kawira'** merely told the court that the accused came and told her

that she needed to report an incident to the police. Accused did not tell **PW8** the nature of this incident which she wished to report. **PW8** states that the next morning she recovered a bloody knife outside her door. Under cross-examination **PW8** admitted that she never saw a knife in the accused's possession and she is unable to state with certainty who dropped the knife outside her door.

PW6 'Winfred Kanini' who was also a friend to the accused told the court that the accused similarly came to her and told her of an incident which she (accused) needed to report to the police. In the case of **PW6** the accused went further and confided in her that she had killed a man inside her house – this was the nature of the incident which she wished to report to the police. I am quite aware that the accused's statement to **PW6** amounts to a confession. I am also fully aware of section 25A of the Evidence Act Cap 80, Laws of Kenya which sets out the conditions upon which a confession may be deemed admissible in evidence. However as subsequent events will show that the evidence of **PW6** cannot be totally discarded. Firstly there is evidence from **PW10** that the accused did eventually voluntarily present herself at Bamburi police and made a report of the incident (the details of the report which she made were not revealed to the court). In her unsworn statement to the court the accused did admit that she was involved in a struggle with the deceased, the result of which was the death of the deceased.

In this defence the accused alleges that the deceased came to her house to look for her younger brother. When the accused told him that the brother was not in the deceased stated his intention to sleep with her. The accused declined to oblige. The deceased pounced on the accused and tried to subdue her in an attempt to rape her. A struggle ensued. In the course of the struggle the deceased got hold of a knife. The two struggled over the knife and according to the accused the deceased fell onto the knife and it stabbed him. The accused then ran away.

I am not inclined to believe this narration of events as given by the accused for one main reason. If as she claims the deceased accidentally stabbed himself during the course of a struggle with her then he would most probably have suffered only one stab wound. As it was the evidence from the witnesses who saw the body, the doctor and my own observation from the photographs produced in court is that the deceased suffered multiple stab wounds to his chest, and head. The deceased could not have accidentally fallen onto the knife repeatedly. The nature and number of stab wounds suffered by the deceased are more consistent with a person having deliberately stabbed him several times. The deceased was found lying on his back face upwards. If he had 'fallen' onto the knife as accused claims then the knife would have penetrated his back. As it was the wounds were to the front of his chest. The existence of wounds to his chest indicates that the deceased was stabbed as he lay on his back. For these reasons I reject the accused's defence that the deceased was 'accidentally' stabbed by the knife as they struggled. The evidence points to a deliberate stabbing of the deceased in the chest. The accused has already admitted that she was involved in a struggle with the deceased on the material day and she also admits that a knife was involved. The deceased could not have stabbed himself nor does accused allege that he did so. Since accused was the only other person present in the room the only conclusion is that it was she who stabbed and fatally wounded the deceased. I therefore find that the *actus reus* of the offence of murder has been proved against the accused.

The final element of the charge of murder revolves around the *mens rea* which in law is described as "malice aforethought". In stabbing the deceased was the accused possessed of the malice aforethought necessary to establish a charge of murder. As stated earlier there was no other person present when this incident occurred. The accused was alone with the deceased in the room. The accused claims that the deceased attempted to rape her and she fought back. Various witnesses including **PW2** and **PW3** told the court that they were informed by neighbours in the plot that the accused and deceased were friends (lovers) and often visited each other. This if proved may negate this allegation of rape. However no single neighbour who knew the couple has testified to the fact of their friendship in court. In other words this court has no tangible evidence upon which it can conclude that the two were lovers or indeed what the nature of their relationship was. There is therefore no evidence to discount the accused's claim that the deceased was trying to rape her nor does this court have any reason to doubt that allegation. If that was the case then the accused could be said to have been acting in self defence under provocation. Section 208(1) of the Penal Code defines provocation thus:

“The term ‘provocation’ means and includes except as hereinafter stated any wrongful act or insult of such a nature as to be likely, when done to an ordinary person in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

Undoubtedly a man attempting to rape a woman would provoke such a woman to a degree as to deprive her of power of self control and to induce her to do any act including committing an assault in order to protect herself. In such a situation one cannot be held to have been possessed of the requisite malice aforethought to prove murder. However despite this lack of requisite *mens rea* the fact remains that the accused did stab and kill the deceased.

The fact that the accused may not have intended to kill the deceased is also shown by her actions after the incident. The accused went and informed two friends that there was a matter she needed to report to police. The accused even revealed to **PW6** that she had killed a man. It is very unlikely that a person who set out to deliberately kill another would inform others about the act. The accused voluntarily surrendered herself to police. Again if her intention had been to kill the deceased then it is unlikely that the accused would have turned herself into the police. Her actions suggest remorse or sorrow for what happened. Section 207 of the Penal Code provides:

“Where a person who unlawfully kills another under circumstances which but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool, is guilty of manslaughter only.”

On the basis of the foregoing therefore, I acquit the accused of the charge of murder and instead substitute a conviction for the offence of manslaughter.

Dated and Delivered in Mombasa this 28th day of November, 2014.

M. ODERO

JUDGE

In the presence of:

Ms. Ngugi holding brief Mr. Atancha for Accused

Court Clerk Mutisya

M. ODERO

JUDGE

28TH NOVEMBER, 2014

Court:

Mention 3rd December, 2014 for mitigation.

M.ODERO

JUDGE