

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Case 103 of 2009

REPUBLIC.....PROSECUTOR

VERSUS

EDWARD MWANGI NJERI *alias* MWAS.....ACCUSED

RULING

The accused, Edward Mwangi Maina alias Mwas, was charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offences were that on 6th November 2009 at Umoja One Estate in Nairobi, the accused murdered Catherine Wangare Kanyoro (*hereinafter referred to as the deceased*). When the accused was arraigned before this court, he pleaded not guilty to the charge. Although the accused was first arraigned on 30th November 2009, for one reason or the other, trial did not commence until 23rd February 2012 when the hearing commenced before this court. This court heard two (2) prosecution witnesses on that day before the case was again adjourned severally before the case was listed before this court on 27th and 28th June 2012. On 27th June 2012, the prosecution did not have any witness in court. On 28th June 2012, the prosecution called one (1) witness, the doctor who assessed the mental status and age of the accused. The prosecution again applied for adjournment to enable them call the two (2) remaining witnesses. The defence asked the court to mark the adjournment as a last adjournment. This court granted the prosecution adjournment but marked the adjournment as the last one. This court fixed the case for hearing on 6th August 2012. On that day, Mr. Okeyo for prosecution again sought another adjournment. Mr. Muriuki for the accused strongly opposed the application for adjournment. This court taking into consideration that it had previously granted the prosecution a last adjournment, refused to grant any further adjournment. The prosecution's case was then closed.

This ruling is therefore delivered on the basis of the evidence that the prosecution adduced before it was compelled to close its case. According to PW1, Julius Mwangi Watore, on 6th November 2009 at 5.00 a.m., while he was at his house between Umoja and Dandora Estates, he received a call on his phone. The call was from PW2 Ann Njeri Njoroge. He told the court that PW2 informed him that the accused had fought with his wife (*the deceased*). PW1 is related to the accused by the fact that he is the accused's maternal uncle. He stated that immediately after he received the call, he decided to go to the house of the accused. While on his way, he again received a call from PW2 and was informed that things were not okay. PW1 testified that he was requested by PW2 to hire a vehicle to take him to the house of the accused. PW1 recalled that when he reached the accused's house, he found the deceased in a kneeling position. It was not clear from his evidence where in the house in particular the deceased was kneeling. The deceased requested PW1 to lift her. PW1 was not able to lift the deceased. The deceased told PW1 that she had been assaulted by the accused. PW1 saw that the deceased has cut injuries all over her body. Her fingers appeared fractured. PW1 sought assistance from the driver of the taxi to put the deceased in the car. PW1 then passed by Buruburu Police Station. He was advised to take the deceased to hospital. PW1 told he court that he then took the deceased to Kenyatta National Hospital where she was admitted. Three (3) days after her admission, she succumbed to her injuries. PW1 identified the body of the deceased before the post-mortem was done.

PW2, on her part, testified that on 6th November 2009 at about 5.00 a.m. while she was asleep in her house at Makadara Estate Nairobi, she was woken up by a telephone call. She noted that the call was from the deceased. However, when she picked the call, she heard the voice of the accused. PW2 knew the accused and the deceased prior to the material day. Infact PW2 testified that the accused's mother and her husband were brothers. She told the court that the accused was in a belligerent mood. She asked her in

Kiswahili language as follows;

“Mnanichorea nini na huyu Mwanamke” (meaning- “What are you planning for me with this woman?)”

PW2 did not answer back. PW2 thought that the accused was referring to a bond that she has posted on accused's behalf on account of a criminal offence that he was at the time being tried. PW2 heard the deceased talking from the background. She was asking the accused to ask her (PW2) to tell him who Ibrahim was. PW2 testified that before she could give an answer, the phone was disconnected. PW2 then called PW1 and told him what had transpired. She recalled that PW1 later called and informed her that the deceased had been admitted at Kenyatta National Hospital. She found the deceased in a comma. She did not manage to communicate with the deceased until her death three (3) days after her said admission. PW2 reiterated that she got concerned when she realised that the accused and the deceased were quarreling hence her decision to call PW1. She made a request to him to go and see what the quarrel was all about. She denied the suggestion that she had interfered with the affairs of the family of the accused or that she had had a confrontation with the deceased over the issue of witchcraft. She recalled that the deceased previously informed her that she (the deceased) used to quarrel with the accused but she did not think it was a serious issue.

PW3 Dr. Zephania Kamau, the Police Surgeon, testified that on 28th November 2009, he examined the accused and noted that the accused has no physical injuries and was mentally fit to stand trial.

In all criminal cases, it is the duty of the prosecution to prove the guilt of an accused person to the required standard of proof beyond any reasonable doubt. The burden of proving the guilt of an accused person is on the prosecution and rarely shifts to an accused person. In the present case, it was the prosecution's case that the accused person assaulted the deceased and thus caused him to sustain fatal injuries. The prosecution did not adduce direct evidence. It relied on circumstantial evidence and the evidence of the dying declaration of the deceased. It is now settled that where the prosecution relies on circumstantial evidence, the inculpatory facts connecting the accused person to the offence must be incompatible with his innocence. In Sawe vs Republic [2003] KLR 364 at pg372 the Court of Appeal held as follows;

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution”

In the present case the circumstantial evidence that the prosecution adduced was to the effect that the accused assaulted the deceased after a domestic quarrel. PW2 testified that on 6th November 2009 at about 5.00 a.m., she was woken up by a phone call from the mobile phone of the deceased. When she picked up the call, he realised that the person calling her was not the deceased but rather the accused. PW2 testified that the accused and the deceased were husband and wife. According to PW2, it was apparent from the tone of the voice of the accused that he was quarreled with the deceased. PW2 heard the deceased in the background request the accused to ask her who Ibrahim was. The conversation was cut short when the accused disconnected the call. According to her testimony, PW2 became concerned and decided to inform PW1. PW1 went to the house of the accused. He found the deceased in a bad state. She had injuries all over her body. PW1 testified that the deceased told him that she had been assaulted by the accused. PW1 took the deceased to hospital. She was admitted for three days but succumbed to her injuries.

The prosecution did not adduce medical evidence to establish the cause of death of the deceased. The investigation officer did not testify in the case to explain the steps that he had taken before he reached the decision to charge the accused for the offence of murder. The evidence adduced by the three prosecution witnesses was not sufficient to establish, to the required standard of proof beyond any doubt, that it was

the accused that killed the deceased. PW2's evidence was essentially in regard to how she had a conversation with the accused in the morning before the deceased was found injured. PW2 testified that although the accused and the deceased quarreled, it was normal domestic quarrels. She did not think it would degenerate into a fight. PW1's testimony regarding the dying declaration of the deceased required corroboration. This court is aware that it cannot convict an accused person on the basis of a dying declaration that has not been corroborated. In this case, the prosecution failed to adduce any evidence to corroborate the alleged dying declaration of the deceased.

As stated earlier in this ruling, the prosecution was granted several adjournments with a view to enabling them to avail their witnesses. Despite being granted a last adjournment, the prosecution made no effort to avail the witnesses. The evidence adduced by the three prosecution witnesses is therefore insufficient to prove the charge of murder.

The accused is consequently acquitted of the charge of murder. He has no case to answer. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held.

DATED AT NAIROBI THIS 16TH DAY OF OCTOBER, 2012

L. KIMARU

JUDGE