



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL NO. 16 OF 2006

JOHN WAIGWA MUMBIAPPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGEMENT

John Waigwa Mumbi (the accused) is charged with murder contrary to section 203 of the Penal Code as read with section 204 of the Penal Code that on 2nd July 2006 at Sunpark area, Malindi Township within Malindi District of the Coast Province, murdered Domittilah Kanini Mackenzie.

The accused denied the charge. He was represented by Mr. Mwarandu advocate. This matter begun before Hon. Justice Ouko on 23-1-06 and at the time Mr. Ogoti acted on behalf of the State. Judge Ouko heard PW1, thereafter the Honourable Judge was transferred from Malindi and Hon. Justice Ombija took over on 7th February 2007 and begun the matter afresh (DE NOVO). Hon. Justice Ombija heard eight (8) witnesses, after which the Malindi Bar boycotted all pauper briefs due to some contentious directions which had been issued by the Honourable The Chief Justice, regarding Judicial Review applications. Miss Amenge conducted prosecution. By the time the stalemate ended in June 2009, Hon. Justice Ombija had been transferred from Malindi High Court to Kitale, and I took over the hearing of the ninth and tenth prosecution witnesses and the defence. Mr. Ogoti, the State Attorney had also been transferred from Malindi, and Mr. Naulikha took over and conducted the proceedings. By the date the accused was making his defence, Mr. Kemo who is a Senior Principal Prosecutor took over and completed the hearing at the defence stage.

Rhoda Kalunde (PW3) informed the trial court how the deceased went to her house on 1st July 2006 at about 9.00pm and informed her that her husband, John, wanted to beat her. The deceased (Domittilah) spent the night at Rhoda's house and in the morning they went together to the deceased's house. Accused was not at home but he later got home just as the deceased was dressing. The deceased told accused to collect his belongings and go way, but accused said he would do so later. The deceased, accused and PW3, then left together and went to Maweni Bar where the deceased was going to see a man named Mambo. Accused and deceased consumed some alcohol. However they did not find Mambo, and one Daudi told them he had moved to Shella. Deceased then left a message with one John Matabani to inform Mambo that she wanted to see him. The four (i.e accused, deceased, PW3 and Daudi) then went to see one Koro who was to read to the deceased, a letter which was written in a language deceased did not understand.

On cross-examination PW3 stated that deceased and accused had lived together as husband and wife for three years and when deceased went to her house the previous night before the incident she said she had

been beaten by John (accused) and she had an injury on the finger. The deceased did not tell PW3 why she and the accused were fighting. However, by the time accused joined them inside the house, there was no hostile exchange between him and the deceased.

Fredrick David (PW2) confirmed that on 2nd July 2006, the accused, deceased and Kalunde went to his house and collected him and together they went to an area near the DC's office so as to arrange and buy curios. Thereafter they went to the deceased's house, and accused. Deceased left to go and look for food, returning three hours later. All this time PW2 was alone watching videos. The couple returned three hours later, and the deceased went inside her bedroom and threw a shirt belonging to the accused on the table, while telling the accused to leave. According to PW2, it seemed they had revisited the quarrel they had the previous day. Accused did not respond – the two went inside the bedroom – PW2 did not follow them. After a lapse of about 30 minutes (thirty), PW2 (who thought that the couple were having a siesta) decided to go to the bedroom door and knock. No one responded. PW2 looked through the window and saw blood. He rushed to call David Wambua and upon return, the accused charged at Wambua with a knife, so the latter ran away. PW2 struggled with the accused who threatened to kill him, as he made attempts to disarm the accused. In the process PW2 sustained injuries in his hands and ran to the shop, bleeding. When he got around Paradise Bar, he met Wambua with police and they returned to the scene. The police broke down the balcony door and proceeded to the bedroom but found the door locked. They eventually got into the bedroom only to find the deceased lying in a pool of blood while accused was hanging on an electric cable. The police cut the cable and rescued the accused. Domitillah died on the way to hospital while accused was rushed to hospital. In court, PW2 identified the knife and the cable.

On cross-examination PW2 stated that once the pair retreated to the bedroom, he did not hear them quarrel nor did he see anything because the bedroom door was locked. PW2 refuted the suggestion by the defence counsel that he was the one who stabbed the deceased then hanged the accused.

David Wambua Kiteme (PW1) a brother-in-law to the deceased confirmed that Daudi (Pw2) went to him at the shop and requested him to accompany him to the deceased's house. On arrival he found the door half way open and people were gathered there. Accused had a knife in his hands and upon seeing PW1, he looked at him, so PW1 ran out and returned with police. He confirmed meeting PW2 bleeding from the hands and upon entering the house after police had broken down the balcony door, they found deceased lying in a pool of blood while accused hang from an electric cable. He too identified the knife and cable and that upon getting to hospital, deceased was pronounced dead.

He confirmed on cross-examination that he had been inside the house in the company of deceased, accused, PW2 but left to go and read a newspaper at a place which was about 100 metres away from deceased's house.

Bakari Amin Abubakar alias Koro (PW4) is the one who was given a letter to translate for the deceased – the letter was written in German. He confirmed that he sat with the couple, David and Daudi at Members Bar at about 3.00pm, and confirms that both accused and deceased were drinking alcohol but again he too did not disclose the quantity.

Paul Nthenge Mackenzie (PW5) is a brother to the deceased who identified her body to the doctor for purposes of carrying out a postmortem.

Cpl. Winstone Mwashu (PW6) who received the report about the incident clarified that the reportee said there were people who were fighting inside a house at Sun Park, Malindi. His evidence corroborates that of PW1 and PW2 regarding the bedroom scene – only he is more detailed, describing the deceased as lying in a pool of blood on the bed, and accused also lay on the bed. The beddings were soaked in blood. Cpl. Robinson Maina took photos of the scene – the photos produced, confirmed the state of the scene as described by the prosecution witnesses. Pc Thomas Mulagori (PW8) who was in the team of police officers how visited the scene gave evidence regarding the state in the bedroom – confirming that accused was hanging from the roof with a cable around his neck. They borrowed a knife from the neighbours and cut the cable and accused fell onto the bed.

He recovered a blood stained kitchen knife plus the cable and bed sheets which were soaked in blood. He confirmed that on the way to the scene he met PW2 who was bleeding and who disclosed to them that he had been attacked by accused.

Dr. Marilyn Omondi (PW9) who produced the postmortem report described the deceased's body as being soaked with blood and it had cut wound on the right hand measuring 4cm long, a cut wound on the left wrist joint, a cut wound between the middle finger and ring finger on the left hand. She had multiple stab wounds i.e on the right lower back area measuring about 5cm long communicating with the abdominal cavity, below the right breast, there was a cut wound about 4cm long, at the spinal region at the back was a cut wound about 3.1cm long and the bone could be felt at the bottom of the wound.

The left knee back area had a wound measuring about 5cm long communicating with the abdominal cavity.

Internally, the cardiovascular system had problems as the abdominal aorta was perforated and there was about 50cc of blood in the abdominal cavity. The cause of death was hemorrhage due to perforation to a sharp object injury. The items collected from the scene were taken to the government chemist for examination and analysis – these were a white stained t-shirt (which had been worn by the accused), a stained white bed sheet, a knife, blood samples of the deceased and blood samples of the accused. The Government Senior Principal Chemist Ali Gakweli (PW 10) made the following findings: Accused was of blood group A, deceased was of blood group O. The knife, bed sheet and T-shirt had human blood of type O and he formed the opinion that the blood stains on the knife, bedsheet and T-shirt, would have originated from the deceased. The report was produced as exhibit 7.

In his sworn defence, accused told this court that he woke up on 1st July 2006 in the morning, and proceeded to work, leaving his wife in the house. At 2.00pm he received a call that the chairman of their association one Daudi Kenga had died. So he closed business and proceeded to Kenga's home in Majengo where he joined colleagues and relatives.

They agreed to regroup at 8.00pm at the home for funeral arrangements. So accused went home and informed his wife (Domitilla Kanini) – now deceased. She gave him her contribution and left. Accused remained at Kenga's home until the morning – drinking liquor the whole night. When he got home he realized that his wife had just arrived too, having spent the night at Rhoda's place – he confirmed that deceased was accompanied by Rhoda and that the three of them left to go and find Mr. Mambo who usually supplied them with carvings. They got to Maweni but missed him, so they moved on to a local mnazi den and eventually to Members Bar where they had drinks. They had drinks until 9.00am when they left and went to Rafiki Bar and consumed more alcoholic drinks until 11.30am. At Rafiki Bar, they were joined by David Wambua. Accused left with the deceased and moved to Karumaindo Bar – by which time he was completely drunk. From that point, he does not recall what happened because when he came to his senses, he was in hospital and the date was 5h July 2006. He was surprised to find himself in hospital and he did not even know why he was there.

It was accused's evidence that he did not have any problems with the deceased nor had he disagreed with her to the level of killing her and he maintains that he did not commit the offence.

On cross-examination he insisted that he and the deceased lived in peace and had never quarreled terming the alleged quarrels by prosecution witnesses as lies. He denies attempting to kill himself using a cable which was found around his neck.

The upshot of his defence is that he had been drinking for two consecutive days such that by the time of the incident, he wasn't in a frame of mind to even know what he was doing as he was too intoxicated – to the extent that he does not remember what happened after leaving Karumaindo Bar.

This matter begun with three assessors but in the course of the proceedings only two consisting attended i.e Wilson Kazungu and Joseph Irungu. The issue for consideration is whether prosecution has sufficiently demonstrated that the death of the deceased was as a result of an unlawful act or omission by

the accused, and whether there was malice aforethought i.e that there was an intention to cause death of or do grievous harm to the deceased or that accused knew that his actions would probably cause the death or grievous harm to the deceased.

From the evidence of Rhoda, accused and deceased had a disagreement, which was played out when deceased told the accused to take his property and leave her house. This is confirmed by PW2 Fred David, that the deceased threw a shirt at the accused and told accused to leave the house. However it seems accused played down things by not reacting in a violent manner – so that to the casual eye he didn't show any negative emotion. However when they went to the bedroom i.e accused and deceased – the next scene was deceased lying in a pool of blood with multiple stab wounds all over her body and PW1 and PW2 who immediately encountered the accused, saw him holding a knife, and how he was in a raging mood, charging at them and threatening to kill them. In fact Pw2 had to struggle to disarm the accused and he ended up with cuts on his hands as confirmed by PW1 and the police officer, Thomas Mulagori (PW8).

When police finally got into the bedroom the accused had a cable around his neck (probably in an attempt to finish himself off) and the knife which was blood stained, was also in the bedroom. The white T-shirt which accused wore was stained with blood – the Government Analyst confirmed the blood was from the deceased. There is no evidence to suggest that someone else could have entered into the bedroom and stabbed the deceased several times, then hanged the accused because:

(a) PW2 was present all along and did not see anyone else come into the house saying if anyone entered into the house he would have seen.

(b) The manner in which the house is constructed, and the location of the bedroom was such that no other person could have had access to the bedroom as PW2 explained that one could not have gained access to the bedroom through the window.

In any case if there had been an intruder, then why would accused have charged at PW1 and PW2 who were known to him, and who would then have been the rescuers? Why would he then have preferred to hang himself from the roof using the cable, after chasing away the very people who would have saved the situation. I make a finding that accused's action demonstrated a guilty mind.

But did the accused have the intention of killing deceased? He says he had no major problems that would warrant him to take such fatal steps. Yet there is the evidence of Rhodah which remains unchallenged, to the effect that deceased sought refuge for the night in her house because the accused had beaten her. And this was confirmed by the actions of deceased when Domittilah accompanied her back to the house and accused walked in – she told him to take his property and leave. Accused said he would leave later – then acted as though nothing significant had happened as he accompanied the deceased to various places. I am persuaded that the disagreements which had resulted in the deceased ordering the accused to leave her house, in the presence of Domittilah and Fredrick injured the feeling of the accused to the extent that he retained it as pent up anger and waited for an opportunity to punish the deceased for humiliating him by demonstrating before their friends that she no longer wanted to live with him and even threw his shirt at him.

There is no evidence that accused had been drinking the previous night, apart from his claiming so. He makes reference to the various bars he and deceased hopped from, all the while, imbibing of the inebriating liquids.

The issue of accused being so intoxicated or having spent his two days drinking was never put to PW1 and PW2 by the defence Counsel. However PW3 (Domittilah) did mention in her evidence that when they went to Urafiki bar, the deceased bought her a bottle of beer, and both deceased and accused ordered for nyama choma, which the two ate, then PW3 left at 10.00 – leaving accused and deceased inside Urafiki Bar – accused drunk a beer but deceased drank a soda.

On cross-examination she discloses that accused and deceased had also drunk some alcohol at Members Club – this is confirmed by Bakari Amin Abubakar who told the trial court that all those in his company

among them being accused, drank beer, although he (PW4) drank soda.

What emerges is that the accused had been drinking beer in the morning, although it is not clear how many bottles of beer he consumed. Indeed even when the police officers released him from the suspended position, PW6 (Cpl. Whinstone Mashi) confirmed that accused was smelling beer. However there is no evidence of levels of alcohol content in the accused's blood, none of the prosecution witnesses testified that accused was so drunk as not to even know what he was doing, his actions suggest that he was well oriented in time and space – he was not staggering or aided to walk, even when deceased ordered him to leave her house, he did not begin a drunken argument or get violent immediately – he exercised self control and said nothing – those are not actions of one who is so drunk as not to know what he was doing – he left the sitting room and went to the bedroom and there is nothing to suggest that he was being aided in his movements because of the effects of drink. I am therefore not persuaded by his line of defence that his responsibility was diminished by the beers he had drunk. Indeed different people react different to intake of alcohol – for some just two beers are enough to get them drunk while others even ten bottles has very slight effect.

As regards his intention, the 1st assessor Wilson Kazungu returned a verdict of guilty, saying there was a murder committed and that accused had planned the act and committed the murder.

The second assessor Joseph Irungu also stated that there was murder committed and the genesis of it was that the couple were not in good terms.

On my part, I consider the multiple stab wounds on the deceased's body, which obviously show repeated stabbing, and some so deep that they created a communication between one organ to another. Then there is the fact that the door to the bedroom was locked – an act calculated to ensure that no one would go to the deceased's rescue.

Ordinarily a knife is kept in the kitchen, there is nothing to suggest that the couple routinely kept a knife in the bedroom, and for accused to have had it there demonstrates a plan to use it to inflict maximum injury

I am persuaded beyond reasonable doubt that it is the accused who murdered the deceased, and having executed his act, he hoped to also exit this world by hanging himself using a cable. His defence is rejected as being improbable in the light of evidence offered by prosecution
Consequently the prosecution has proved its case and accused is convicted as charged.

Delivered and dated this 16th day of **February 2011** at Malindi.

H. A. Omondi
JUDGE

Mr. Kemo for State
Mr. Mwarandu for accused
Accused present
Court clerk - Randu