



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS
Criminal Case 173 of 2003

REPUBLIC **PROSECUTOR**

VERSUS

JOSPHAT KAMAU MAIGUA **ACCUSED**

JUDGMENT

The Accused is charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap. 63 Laws of Kenya).

The information dated 17th September, 2003 gives particulars thereof that the Accused on the night of 31st December, 2002 at Githurai Trading Centre in Thika District within Central Province murdered Beatrice Watetu.

It is not disputed that the Accused and the deceased were living as a husband and wife at Githurai Trading Centre and that the death occurred to the deceased as alleged.

As per the Post Mortem report, (Ex. A) produced by Dr. Jane Wasike (PW.8), she found some postmortem injuries. Ante mortem injuries were bruises, left occipital app. Ex.3 – 5 x 3 cm not deep, Right arm bruise postero-lateral 3x2 cm, Right sheen, subdural-bleeding approximately 50 mls but no fracture. There was no intracerebral bleeding, in the chest both lung showed basal pulmonary oedema.

According to her in short the deceased had multiple bruising, small subdural-haemorrhage and pulmonary oedema.

After her examination she formed an opinion that the cause of death was blunt force injuries awaiting full toxicology. She sent liver, stomach and blood samples for toxicological test, but no further query was received by her from the Department of Government chemist. She agreed that the injuries received by the deceased could cause from a fall but was quick to state in her re-examination that a fall could not result in many injuries which the deceased had. Her injuries are also described by several prosecution witnesses and I shall deal with the same later in the judgment.

It may be appropriate to deal with, at this stage, the evidence of Government Chemist Mr. Simon Nandi (PW.9). He received the exhibit mentioned by Dr. Wasike (PW.8) through Sgt. Wanjohi (PW.3). He was requested to check whether the exhibits contained any poisonous substance. I may safely state that there was some suspicion as regards the deceased having committed suicide by taking poison. The

defence has asked questions to all the material prosecution witnesses in respect of an earlier hospitalization of the accused because of having taken poison.

However, this witness did not help the defence. He testified that the deceased's blood contained alcohol level of 74 mg which was equivalent to 2½ (litre) bottles of beer or four tots of whisky. According to him the alcohol to reach toxic level has to be 300 mg. He also denied to give any firm opinion on whether the deceased could be too drunk as according to him a person to be drunk depends on many factors and that there are different effects of drinks on different people.

It is also not in dispute that on 30th December, 2002 the deceased was taken to Kenyatta National Hospital by Sgt. Wanjohi (PW.3), Mercy Njeri Mungai (PW.2), Serah Njeri Muigai (PW.6) and Robinson Muigai (PW.7). The Accused met them at the hospital and later they were informed that the deceased died at the hospital.

Prosecution relies on circumstantial evidence given by PW.1 to PW.4 to prove its case. Obviously, there is no eye witness to the commission of this offence.

I shall first deal with evidence of PW.1 Nyambari Mugure who is father to the deceased. This witness was an old man and had difficulty in recalling the dates of the events. According to him the deceased and the Accused were married but the Accused had visited his home only once after the birth of their child around the year 2000 and identified a photograph (D MFI 1) taken during that visit. He stated that the deceased had complained that the Accused used to beat her and fight with her. In December, 2002, according to him, the deceased came home and left the child with him informing him that she would return home after collecting her belongings. This was not to happen as he saw her at the mortuary instead. He denied having any knowledge of deceased's hospitalization after taking poison.

I may pause here and note that it is on record that the child of the parties herein was not at home when the deceased was found serious and taken to the hospital. The Accused and his neighbour witness (DW.3) also have confirmed that the deceased was to go to Nyeri and leave the child to her parents' home. PW.4 Nancy Muthoni also has testified that the deceased had come to her with complaints of Accused's unfaithfulness on 27th December, 2002 and had told her that she would leave the child to her parents and then return to decide what to do for herself.

PW.2 Mercy Njeri Mungai resides at Githurai and has given appropriate answers during her cross-examination when questioned on her extent of acquaintance with the deceased since the year 1998.

As per her testimony, on 30th December, 2002 she decided to visit the Deceased, as she had not seen her during Christmas. On reaching the house, she found another lady known as Mama Muriuki (PW.4) who asked her to come in and found the deceased lying on the bed. PW.4 informed that the deceased had not woken up since 7.00 p.m. previous day. During their conversation she was told that the deceased was beaten by her husband. As the deceased was full of urine they both changed her and tried to get in touch with deceased's sister and their pastor. But she could not get any of them.

She then called the Accused who was the deceased's husband who first promised to come but changed his position when he called again on their neighbour's phone after 20 minutes and told her that he was not coming and asked her to leave the deceased alone. She was with PW.4 then.

Then she decided to report to the police, and on the way met Sgt Wanjohi (PW.3) who was also a friend to the Accused. After she narrated what had happened she requested for his help. He went with them (PW.2 and PW.4) and on seeing the deceased's condition went to the house of the Accused's sister and came back with her and her husband. The deceased was taken to Kenyatta National Hospital in their vehicle. She accompanied them. She denied that his sister (PW.6) informed her that she had come because the Accused had telephoned her.

When she entered the house, she saw pieces of broken '**whisky**' bottle in the sitting room. She described injuries on the deceased, viz, a cut on her forehead (not deep) and blood on her private parts.

She also gave details of her conversation with Muthoni (PW.4) which, in my view, corroborates what was testified by PW.4, specifically her visit to the deceased's house on 29th December, 2002 at around 5.00 p.m. and coming back at around 7.00 a.m.

However, she was confronted with her police statement which was produced by Sgt. Wanjohi (PW.3). I note that the said statement was written in English when she was speaking in Kikuyu language. She also stated that it was read back to her in Kiswahili. I also note that she gave her evidence in Kikuyu language. Thus the discrepancies which were shown could not be totally taken against her. She in any event has stated that the Accused told her that he would come afterwards as he was busy in town. She, during her cross-examination, also stated that the deceased was earlier hospitalized due to beating and subsequent miscarriage but she did not know that she was hospitalized on 1st September, 2000 due to intake of poison. I can only observe that her evidence was not challenged due to any animosity or grudge against the Accused. The Accused however stated in his evidence that she used to sell her vegetables and fruits outside his shop and many times he had removed her from hawking in front of his shop.

PW.3 is Sgt. Hiram Wanjohi who is said to be a friend to the Accused. He confirmed that he met the two women on 30th December, 2002 at Progressive Centre and after they told him that the deceased was unconscious in the house he accompanied them. They told him and I quote **“They suspected that she was beaten by her husband the Accused, the previous night and husband has left.”** He also went further and testified that he was told that before he (the Accused) left, he requested the other woman (PW.4 whom he did not know – which is confirmed by PW.4 herself) to check on the deceased. He was also told how the deceased told PW.4 as to the Accused beating her over the issue of his girlfriend. He found the Deceased on the mattress on the floor as she had urinated and had been changed. (I note the evidence of PW.2 as to their changing the deceased). He called the Accused but received a rude response but he called him (the Accused) second time and then the Accused asked to go to his sister for help. He did so and came back with the sister and her husband. They with PW.2 went to Kenyatta National Hospital. She was admitted in ward 8C. The Accused arrived at the hospital and he left the deceased under his care. He was informed at 6.00 a.m. on 31st December, 2002 that the deceased had passed away immediately after they left.

During cross-examination, he denied that he did not take any statement from the Landlord or the neighbours because their statements were not what he wanted to receive. Once again his averment that he was a friend to the Accused and thus could not investigate the case has not been challenged by the Defence. It is also on record, on the other side, that he took statements from PW.2 and PW.4. He also clarified that when he visited the scene it was interfered with because Muthoni (PW.4) cleaned the home after they changed the deceased. He also stressed that the Accused did not tell him at the hospital that he was coming back from Nakuru.

Once again, there is nothing on record as to any grudge this witness had against the Accused so as to give the evidence against him.

PW.4 Nancy Muthoni is a crucial witness to the Prosecution case.

According to her evidence, the deceased came to her home on 27th December, 2002 and informed her that after she (the deceased) saw another woman at their Nakuru house, she would not see her husband again. The deceased wanted to take her child to her parents' home at Nyeri. After doing so she would deal with other things.

She did not see the deceased until 29th December, 2002. On that day about 1.00 p.m. the Accused came to her house and he looked **‘guilty conscious’** according to her. He also informed her that it was his parents' wish that he should marry another woman. He told her that he would go to pick the deceased if she did not return within two days. But at around 3.00 to 3.30 p.m. he came running to her and looked shocked. He asked her to go to his house and if the door was not opened, she should open the latch from outside. DW.3 also has confirmed that the door of the Accused's house could be opened from the

outside.

She refused to go on her own and the Accused accompanied her. After opening the door for her the Accused left. She found the deceased sitting in the living room. The deceased told her that she was beaten, she had bought a bottle of vodka and soda to celebrate with the Accused and after that if she was to die she would. Instead the accused beat her. The deceased was feeling sleepy and refused her (PW.4) offer to eat. She was also unable to walk the distance of her house. Thereafter she started talking to her about distribution of her things. She said that all the things in the house were acquired jointly and after selling them the proceeds should be given to their child.

This witness also talked about other incidents of the deceased been beaten by the Accused. She also talked about the deceased miscarriage after having been beaten by the Accused at her place of work.

She described injuries on the deceased as cut on her leg (between her ankle and toes), injury on right cheek but it was not bleeding. She had a swollen arm. She also noticed next day a bruise kind of injury on her forehead. Those injuries are almost similar to those described in Post Mortem Report.

She placed the deceased on the bed and left her. She agreed that she did not inform either the Landlord or a neighbour. But I do note that she remarked during her evidence that according to her the deceased was beaten but not seriously. Although the Learned Defence Counsel has stressed that her omission to inform the Landlord before leaving the deceased is a serious point, I do not agree as she herself had not realized its serious nature. It is not disputed that she did return the next morning which shows that she cared. I also note that she saw the deceased in the same position on the bed as she had left her the previous evening. The suggestion of her falling and receiving the injuries may not be credible under the circumstances. Both she, as well as PW.2 and PW.3 confirmed that the deceased urinated on the bed.

In any event it is not in dispute that the deceased was found in serious condition the next day, and was taken to hospital where she passed away.

She denied assertively that the Accused was in Nakuru on 27th December, 2002 as she saw him at around 10.00 a.m. on that day. She also reiterated that it was a Sunday when he came back to her and requested her to go to his home and that the deceased had come back after leaving the child to her parents. I also have checked that 29th December fell on Sunday.

She then stated that she waited for the deceased to get up till 10.00 a.m. and then decided to wake her up, but her (deceased) head drooped when she touched her. She and the landlord went to a doctor who accompanied them and gave her an injection, and I quote **"so that if she had taken anything, she would vomit"**. The doctor advised them **'to take her to Kenyatta National Hospital if she did not vomit within four hours'**.

After sometime, the Accused came home when she informed him that the deceased had not woken up, he told her to leave her alone and not to talk about the matter. He added that if she was dead it was o.k. and if not, her parents would take her. He left after that.

Then PW.2 came and told her what had happened. She then corroborated the evidence of PW.2 upto the time the deceased was taken to Kenyatta National Hospital. She also confirmed that she did not go to the hospital in the vehicle and that it was PW.2 who did so.

I am observing this evidence because, PW.6 Serah Njeri who is sister to the Accused gave evidence that on the way to the hospital PW.4 informed her that the deceased had told her (PW.4) that she would commit suicide. Her (PW.6) evidence to that respect is rejected by me not only because she is a sister to the Accused and had reason not to tell the truth, but also that there is no other evidence on record to support her testimony. I would also not give much reliance on her evidence as to good relation between the deceased and the Accused as well as her evidence of finding a bottle of vodka on arrival at the house. PW.3 Sgt. Wanjohi has not talked about the bottle. PW.2 only talked about the house smelling of alcohol

and the deceased telling her about buying a bottle of vodka and soda to celebrate without saying what she was celebrating. PW.2 talked about pieces of broken bottle and added that Muthoni (PW.4) cleaned the house.

The omission to bring this exhibit before the court has been emphasized excessively by the learned Defence Counsel. I do not understand its emphasis, as in my humble view it is on record that the deceased's blood has been found to have contained alcohol but there is no evidence of actual state of her drunkenness. It is also before the court that the deceased could not have received injuries on her body by **a fall**. It must be so because the injuries were on different parts of her body which may be inconsistent with a single fall. Moreover, the Government Chemist categorically ruled out existence of any toxic substance in the deceased's blood. Thus the absence of the bottle cannot be found to be fatal to the prosecution case.

Evidence of **PW.5** David Kingori does not also add much to either side of the case, except the issue of the deceased having taken poison as per Sgt. Wanjohi which has been ruled out by an expert evidence and which I do not have any reason to disbelieve.

PW.6 Serah Njeri Muigai is sister to the Accused and has obviously corroborated the story of the defence to the effect that the Accused was away at Nakuru rural home on 27th December, 2002 and had called on 26th December, 2002 that their mother was serious. She received a call from the Accused on 30th December, 2002 that he was on his way back from Nakuru and Sgt Wanjohi had called him that the deceased was sick. It took his second call for her to proceed to check on the deceased. She reasoned that during his first call the Accused did not sound serious and thus did not go on first call. I have already made my observations on her evidence as to PW.4 telling her that the deceased had committed suicide. I do not have to reiterate that the theory of suicide propounded by the witnesses allied to the Accused has been proved to be worthless. Injuries on the deceased also support my finding to that effect.

PW.7 Robinson is husband to PW.6 and he stated that he received a call from the Accused on 30th December, 2002 while PW.7 stated that it was she who received the same.

PW.10 Inspector of Police Richard Mathenge arrested the Accused on 29th April, 2003 at his home.

PW.11 Inspector of Police Aggrey Abogi was instructed to take over the investigations of this case on 30th January, 2003. He took statements from other witnesses except that of PW.2 and PW.4 whose statements were recorded by Sgt. Wanjohi (PW.3).

The Accused was placed on his defence and testified under oath and gave the defence of alibi. He testified that he was in Nakuru District from 27th to 30th December, 2002 at his rural home. He narrated how he received a call from his younger brother informing about sickness of their mother. He left to go there on 26th December, 2002 to cast his vote for general election and on the way he received the aforesaid call. He arrived late at night (10.00 p.m.) and found his mother very sick. However, in his cross-examination he stated that he travelled on 29th December, 2002. He took her to the Kwarkwa Dispensary the next day i.e. on 27th December 2006. She was treated and he was instructed to take her back the next day. What he produced was the treatment note of 27th December, 2002. He could not produce any document to show that he took the mother back on 29th December, 2002 instead of 28th December, 2002 as instructed due to political tension. He left rural home on 30th December, 2002.

He described his marriage with the deceased as a happy one. He also stated that on arrival at the hospital he was told by Sgt Wanjohi that PW.4 had informed him that the deceased had taken poison. I had amply noted this issue earlier.

He denied meeting PW.4 on 27th and 29th December, and stated that she was a friend to the deceased and could not have gone to her as testified by her. But then he said after he had gone to the hospital he took PW.4 to his home and found the house in disarray. Of course none of this was posed to PW.4. I

have also explained why he thought that PW.2 and PW.4 cooked a story against him. He has mentioned the grudge which PW.2 could be having against him. As regards PW.4 he stated that she had not paid for work he did for her in April 2002. He did not specify the details of the work or the amount due to him.

DW.2 Jane Njeri is mother to the Accused who corroborated the alibi of the Accused. She also stated that the treatment card produced only showed the first treatment and subsequent treatment or appointment is neither specified nor recorded therein. She simply said that those records were kept by the doctor. I would definitely hesitate to accept this explanation as true. She also stated that she has not seen or heard of any problems between the Accused and the Deceased. She naturally denied that she was lying to help her son.

DW.3 Simon Kinyanjui a neighbour to the Accused gave very interesting evidence. His house is just opposite to that of the Accused. He was told by the Accused on 26th December, 2002 that he would be leaving for his rural home to cast his vote. Then at around 11.00 a.m. the Accused came to him to say that he was leaving. He then saw the Accused pushing his bike escorted by the deceased and their child. He saw the two i.e. the deceased and the child on 27th but did not see them on 28th or 29th December, 2002. He stated that on those two days he went out on and off to relax but did not specify where he went and for how long. He also stated that while in the house he did not check all the time on the Accused's House. He agreed that on 30th December, 2002 he was told by the Landlord that the Deceased was lying sick for two days and that the child was not expected to be in the house all the time for those two days.

I only note that although he has stated that the Accused had told him that he would go to rural home to cast his vote, he has not stated whether he also told him when he was to come back. Furthermore his evidence during cross-examination that the deceased was supposed to take the child to her parents corroborates the story of the prosecution (PW.4).

Those are the facts before me as given through respective evidence from the Prosecution and Defence.

At the outset, I must warn myself that the prosecution rests on circumstantial evidence and the court can only act on circumstantial evidence to support the conviction of an accused person if the evidence points, irresistibly at the deceased's guilt to the exclusion of anybody else (*emphasis mine*). see **Kimeu – vs.- R. (2002) 1 KLR.756**

In the case of **James Mwangi vs. R.(1983) KLR 327 at 331** the Court of Appeal observed and I quote:

“In a case depended on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. (Sarkar on Evidence – 10th Edition P.31). It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference Teper –vs.- The Queen (1952) AC 480 at page 459.”

It is now trite law that if a case passes that test, then the circumstantial evidence is as good as any direct evidence to prove the offence charged.

I have detailed evidence led by PW.1 to PW.4. It is also very clear that PW.2 and PW.4 are the most relevant and material witnesses of the Prosecution. The Learned Defence Counsel has contended strongly that their evidence is an afterthought and cannot be relied upon in absence of proper investigation. He also emphasized that PW.9 fell short of giving the limit to the person being in drunken state, and that there are so many causes for injury i.e. trauma due to blunt force under the circumstances of the case. He also relied on the evidence of PW.6 and PW.7 who are the prosecution witnesses and they have not been shown by the Prosecution to have lied to protect the Accused. He showed contradictions in evidence of PW.2, PW.3 and PW.4 vis-à-vis that of the evidence of PW.5 who gave Accused's telephone to PW.3.

Furthermore, it was contended that despite the fact that PW.2 has testified that PW.4 informed her about what happened to the deceased, she did not tell anything about the visit by a doctor who is mentioned by PW.4. The absence of the doctor as a witness was also emphasized.

Evidence of PW.4 on the deceased directing her how to distribute her things is in nature of a dying declaration. The Learned Defence Counsel Mr. Njanja made great effort to challenge its admissibility and contended that in view of the case as a whole, the evidence of a sole witness cannot be admitted. The law on Dying Declaration is very clear in our jurisdiction. The evidence of such Dying Declaration does not need to be corroborated but the court has to exercise great caution in receiving the same in evidence and it is unsafe to base a conviction solely on the dying declaration of a deceased person. In this case, it is only PW.4 who has testified to have talked to the deceased the previous day and according to her evidence, she did not think that the deceased was seriously injured. Her evidence as to the deceased declaring that it was the Accused who beat her and that her things be distributed had to be looked at very carefully and closely. The weight of her evidence is lessened by PW.2 not stating anything about distribution and the visit by a doctor, despite her evidence that PW.4 had told her what had happened.

I also have to take the evidence of these witnesses in conjunction with evidence of PW.5, PW.6 and PW.7 against which I have some frawns to be raised. However, unfortunately, I cannot ignore the fact that they are Prosecution witnesses and they have given evidence which corroborates the evidence led by the Defence.

I shall further have to consider the defence of alibi put forth by the Accused and supported by two defence witnesses. Once again I have to warn myself that despite the evidence on alibi the burden to prove the same does not shift to the Accused. It raises simply a specific defence as an answer to the charge preferred against him but in law the Accused does not assume the burden of proving that specific answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable. (see Kiarie -vs.- Republic (1984) KLR 739 at page 745 paragraph 25).

The alibi which is raised by the Accused is somehow supported by the prosecution witnesses. The prosecution has not made even an attempt to prove that the evidence of PW.5, PW.6 and PW.7 is not true and that they have given their respective evidence only to support the Accused.

With this lack of proof comes the contradiction in the evidence of other three witnesses (PW.2, PW.3 and PW.4) which in the case of circumstantial evidence cannot be treated as trivial.

I do nurture suspicion that it was the Accused who inflicted the injuries on the deceased but my suspicion, however strong, cannot be the basis for his conviction. It is always upon the Prosecution to put forth its case with dexterity which is expected in the case of serious offences like murder. Once again, it is not to be.

I also note, although not submitted by the Defence that there is discrepancy in the date of commission of offence mentioned in the information and that testified by the witness. The date in information is 31st December, 2002 and the date mentioned by witnesses is 30th December, 2002.

I short I am unable to find that the Prosecution has proved its case beyond any reasonable doubt. I thus enter the finding of not guilty against the Accused and acquit him of the offence of murder as leveled against him.

I further direct that he be released forthwith unless held otherwise as per law.

The Assessors have also given similar opinion. However, I regret to note that they do not seem to understand the case at all even after long summing up by me.

I only hope that the higher law than my court prevails in this case.

K. H. RAWAL

JUDGE

11.10.2006