



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

Criminal Case 51 of 2004

REPUBLICPROSECUTOR

VERSUS

JOSEPH KAMAU ACCUSED

JUDGEMENT

In this case it is alleged that the Accused herein on 27th November, 2003 at Kariobangi North Nairobi, murdered Njeri Gachogo. This charge obviously is under Section 203 as read with Section 204 of the Penal Code (Cap.63) Laws of Kenya.

The deceased was evidently the wife of the Accused and they were living with their two daughters Annah Wambui (PW.1) and Rose Muthoni (PW.2) at a plot situated at Kariobangi North, Nairobi.

It is similarly evident that the body of the deceased was found lying under a bed in their house with multiple injuries. Dr. Jane Wasike (PW.5) performed autopsy on the body of the deceased and found multiple cuts on the hands, dorsum and a fracture of carpal bones. The serious injury was on head with ten deep cut wounds on scalp measuring 4 – 6 cm long. On internal examination she found compound fracture skull right frontal bone and brain haemorrhage. She thereafter formed an opinion that the cause of death was head injury due to sharp object.

Similar injuries had been noted by several prosecution witnesses.

Thus I do find that the prosecution has sufficiently proved that the deceased met her death due to those injuries.

What now I have to determine is that if the said death occurred due to voluntary act of the Accused and if the said act was committed with malice.

The prosecution called two daughters of the Accused and the deceased to bring out the circumstances leading to the death of the deceased. Both of them were minors and thus I shall have to seek corroboration of their respective evidence in material aspect from independent evidence.

I am entirely aware that their respective testimonies cannot corroborate each other as it is trite law that evidence which itself requires corroboration cannot be used to corroborate another evidence.

I think the said law was settled obviously from the clear provisions of Section 124 of evidence Act (Cap.80). It stipulates.

“124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

I also note that the recent amendment to said section by Act No.5 of 2003 is not applicable to this case.

I further note that it is equally settled law that the nature of corroboration required would necessarily vary according to the particular circumstances of the offence and evidence led.

With this caution I shall now dwell on the evidence led in the case.

PW.1 Annah Wambui is youngest child of the Accused and the deceased. Although she was ten years old, she gave a very candid testimony. According to her on 27th November 2003 (hereinafter referred to as ‘material date’) at about 7 p.m., she was at home with her sister (PW.2) and the deceased. The Accused came and demanded food from the deceased. The deceased responded that she had no money for food and a quarrel started between the two. The deceased then went out of their house but was called back by the Accused. When the deceased came in PW.1 and PW.2 were asked to go out by the Accused. When they did so he closed the door behind them. Then the Accused started beating the deceased which according to this witness was very usual. The deceased screamed and so did she and her sister. After an hour the screaming stopped and Accused came out dressed in changed clothes and locked the door with the toilet padlock by saying that the key of their house padlock was lost. She saw him going through house of their neighbour Njehia (PW.4) after he told them that he was going to look for a vehicle to take their mother to hospital.

He did not come back and they slept in the house of their neighbour. But she also testified that when the Accused was beating the deceased the said neighbour Njehia (PW.4) came and asked them what was happening. When they told him that the deceased was beaten by the Accused, he did not do anything. If this is so, it does mirror a very sad side of our society. Be that as it may, the next day the door was opened by borrowing toilet key from the neighbour and she saw blood in the house. She specifically denied that anyone visited their house when the Accused came back home or before that.

PW.2 Rose Muthoni the older daughter of 13 years gave similar testimony. She further stated that she found an axe (Ex.2), a panga and a knife (Ex.3) with blood on walls, cupboard and curtains.

PW.3 is Jane Nyambura who was known as cousin to the deceased and on 28th November 2003 she was informed by Rebecca (PW.6) that the deceased was beaten previous night and was not responding to the calls. She went to the scene after first passing through her workplace. The door of the Accused’s house was opened to her by Njehia (PW.4) and she found the body under the bed with blood in the house.

Similar testimony was given by PW.6 Rebecca who sold Githeri in the neighbourhood. She saw the two daughters opening the door to their house and coming out screaming. She went in and found the blood all over and the deceased under the bed. These two witnesses also described injuries which were similar to those mentioned in the postmortem report (Ex.1). She also stated that Njehia (PW.4) opened the door which was locked back after the daughters found the body.

PW.7 Caroline Njeri is niece to the deceased and she went to the scene on 28th November, 2003 after she was informed of the incident. According to her testimony she found a Somali sword and an axe the next day i.e. 29th November, 2003 while she was cleaning the house. These two exhibits (Ex.2 and 3) were taken over by Chief Inspector Samuel Otongo (PW.9). However, nothing much has turned on these

recoveries as I do not have any report thereon from the Government Chemist. I shall not accept the explanation by PW.9 C.I. Otongo that he could not send them to Government Chemist as the deceased was already buried on the date of recovery. I find so simply because the recovery was on 29th November, 2003 when the post mortem was not performed until 3rd December, 2003. The body could not have been buried before that.

This witness also produced with no objection from the Defence, the P3 form dated 10th February, 2004 in respect of the Accused person when he was examined by the police surgeon for assessment of age and mental capacity as well as to check on injuries if any.

He was found to have injuries on head and neck. He also had human bite injuries on thorax and abdomen, on upper limbs and lower limbs. The injuries were assessed as approximately two and half months old which could coincide with the date of the incident.

I have elaborated the above injuries as it shall be relevant in view of the defence raised by the Accused.

The last material witness to the prosecution case is Simon Njehia (PW.4) who was a neighbour to the Accused and family and has been referred by almost all independent witnesses. His evidence shall also become important in view of necessity of corroboration of the evidence of two minor witnesses so far as what transpired on the material day is concerned. In my view the evidence of minor witnesses of the second day has been materially corroborated by PW.3, PW.6 and PW.7 and I do find so.

PW.4 testified that he lived in the same plot with the deceased and the Accused which had eight houses, and his door is at a distance of about 20 feet from the house of the Accused. The plot had electricity. He also has a shop where he used to sell milk etc. His house had two doors which included the one connecting his shop and from where one can also go out of the plot.

He testified that on the material date at about 10 p.m. when he was washing dishes, he heard screams of children and those of someone being beaten. On hearing this he went to where screams were heard from and found Accused's children crying outside the door which was locked. He went first to his house to put back the dishes and when he came out he saw the door was open slightly ajar and the Accused standing outside the door. The children who were outside were told to wash their feet. As all was quiet he went back to his house. About five other neighbours had also come out when they heard screams, although none was named. Then at about 11.00 p.m. he heard a knock at his door and found the Accused who requested him to open the door of his shop as he had lost the main gate's key and wanted to get a vehicle to take his sick wife to hospital. He did so and the Accused left by telling him not to go back to sleep as he would come back. He never did.

Next morning he heard screams of Accused's children crying at about 9.00 a.m. The house was full of people and he went in and saw the same full with blood.

Although he denied that he was the one who opened the house to PW.3 as has been testified by others, I do not think much rests thereon. There is ample evidence, and which I believe to be credible and prove that the door was opened by a toilet key and the body of the deceased was found therein. The discrepancy as to who opened the door for whom is not material to the facts of this. What is important is that all the witnesses have unequivocally testified that the door of the house was opened with the toilet key and not with the house key. The evidence of the two minors is thus amply corroborated in this aspect.

PW.4's evidence that he saw the children crying outside a locked door and hearing the screams from beatings, that he saw the Accused afterwards outside his door and talking to the children, that all was quiet thereafter, that the Accused requested him to open the door to his shop and Accused leaving the plot, was not shaken during cross-examination. There is no adverse suggestion made as to its credibility. Minor discrepancies in the evidence on the contrary, in my opinion, strengthens its credence and reliability.

Similarly discrepancies in evidence as relates to the axe and a Somali sword (Exs. 2 and 3) although could be frowned upon but do not go to the root of the matter and do not raise any reasonable doubt as to their existence and recovery.

As against the aforesaid evidence the Accused gave unsworn statement, which stretching it to any limit cannot be considered as a testimony I must hasten to put down that by saying that, I do not cast any burden of proof on the Accused.

What he stated was that he was a matatu driver and usually worked upto 11.00 pm, but on the material day his matatu developed some mechanical problem and thus he did not work after around 5.30 p.m. He went to a bar with a friend and drank upto 7.00 p.m. After that he went home and found the door of his house locked from inside. He knocked and after two knocks the deceased opened the door and he found one Inspector Murarya in his house. Inspector Muraya hit him with his gun on his head when he found out that the Accused was the owner of the house and ordered him to sit down next to a stool in the room. He squatted and hit the Inspector on hand and his gun fell down and they both started fighting afterwards with stools in the room. The Accused felt weak and overpowered and left the house. After sometime he decided to go back and was waiting at a dark place and saw his daughter PW.1 and asked her where her mother was. She replied that she found the door closed from inside after she returned from the tuition. When she knocked the door the deceased asked her to wait outside as she was finishing her work. PW.1 came nearer to him and found his clothes dirty and him with injuries. PW.1 went to the house and told the deceased that he was outside and was hurt. The deceased opened the door and gave him clothes to change. He did not enter the house as he was scared that Inspector Muraya could still be inside although the deceased asked him to come inside. He then went near the door to get his shoes and at that time the deceased asked him to take her to the hospital as the other man had hurt her. He did not describe injuries on the deceased.

He went out to get a taxi after PW.1 refused to accompany him. When he was coming back home, he found Inspector Muraya with other officers outside his plot and he decided not to go back. Then with long version he told how he informed his mother and aunt what had happened and how his father accompanied him to Kasarani Police Station and was thereafter taken to Muthaiga Police where he was charged with this offence.

I should pause here and consider that although the Accused has specifically placed PW.1 in his defence, no questions were asked to her to the effect whether she found him outside the house with dirty clothes and injuries and whether she was the one who asked the deceased to open the door for him and that she refused to accompany him. Furthermore he has definitely corroborated evidence of PW.1 and PW.2 that he left the house after changing clothes and that he left to get a taxi to take the deceased to the hospital.

I shall further consider version of his fight with an unknown Inspector Muraya. Accused fought with him with the stools but as per P3 forms he had injuries of human bites, injuries on thorax, abdomen, upper limbs and lower limbs. Evidence of these injuries are not challenged by the Defence.

The presence of human bite injuries on the areas mentioned in P3 forms goes to strengthen the Prosecution case that there was a fight between the deceased and the Accused who were close to each other. The statement by the Accused that the deceased opened the door and gave him clothes by asking him to come inside and then requested him to take her to the hospital does not deserve any reliance simply by looking at the grievous injuries found on the deceased as well as the place (under the bed) where her body was found as testified by all the witnesses who were present on the scene.

In my opinion therefore, it has been sufficiently proved that the death of the deceased resulted by voluntary acts of the Accused and I do find so. Did he then commit this act with malice aforethought.

I do not find so from the evidence before. The response by the deceased when the Accused asked for food, their subsequent fight and injuries on the Accused do compel me to conclude that he committed this offence on the spur of the moment after provocation and retaliation. I do note here evidence of PW.1 that

those fights were very usual between the two.

Having found so, I acquit the Accused of the charge of offence of murder but do instead convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and do enter a finding of guilty accordingly.

In view of the aforesaid, I do differ partially with the opinion of the Assessors.

Dated and signed at Nairobi this 26th day of July, 2005.

K.H. RAWAL

JUDGE

26.7.05

RULING ON SENTENCE

I have considered all the factors submitted in mitigation by the Learned Defence Counsel. I have considered that he is the first offender and has committed this offence under heat of moment. I also consider that his two minor daughters are without any of the parents and who have given evidence against him in this case.

I have also considered other family circumstances of the Accused.

With these facts I was urged to give the Accused a non custodial sentence.

In my view the offence of the Accused deserves more severe punishment than what is suggested in mitigation. The Accused although, acted under passion had taken away a life of a person who had been his wife and mother of his two children. His action after the incident also deserves to be considered while making decision on his sentence.

In my view the Accused should serve a prison sentence to realize the security and unlawfulness of his action.

I therefore sentence him in imprisonment for seven years which sentence shall commence with effect from 1st February, 2005.

Right of Appeal within 14 days.

K.H. RAWAL,

JUDGE

27.7.05