



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE 69 OF 2004

REPUBLIC PROSECUTOR

VERSUS

BEATRICE WANJIRU GITUKU ACCUSED

JUDGMENT

The Accused before the court 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).

It is sufficiently on record that the Accused and the deceased were living together as wife and husband and had children from that union. It is also on record that both had domestic problems which resulted in quarrels (PW.1 and PW.3). The Accused herself had, in her unsworn statement, stated that there were frequent quarrels between the two and the deceased used to beat her.

I can at this juncture safely find that the death of the deceased has been appropriately proved by evidence of Dr. Wasike (PW.6), by production of Post Mortem report and identification of the body before autopsy by PW.1 and PW.2. The cause of death was stated as abdominal injury with peritonitis due to blunt trauma. I shall revisit this opinion when I shall refer to the evidence led before the court. Prosecution's material witnesses are Francis Kamau Ngugi (PW.1) and Timothy Njoroge (PW.4).

PW.1 is nephew to the deceased and on the material date i.e. 1st February, 2004 at about 7.30 p.m. he was at home with his family and his pastor (PW.4). Two young sons of the deceased came to his house and informed him that the deceased had called for him. He with PW.4 went to the house of the deceased and found the Accused milking a cow. On arrival he heard screams of pain from the deceased and that time Accused started to tell him what had happened and how fight started. However before she could do so, he was called inside the house by the deceased. He did so and found the deceased in serious condition on the bed. The deceased told him that he was hit on the stomach by the Accused with an axe and requested him to take him (deceased) to the hospital. With great struggle the deceased was eventually taken to Kenyatta National Hospital at 5.00 a.m. Next day he was informed that the deceased left the world.

He reported the matter to Kayole Police Station on 9th February, 2004 as he was awaiting a decision from the deceased's family. He also testified that there were differences between the Accused and the Deceased. In cross-examination he testified that he was told by the deceased that the fight was outside the house and that the two were chasing each other. The Deceased also informed him that he was killed over his properties.

PW.4 almost repeated what PW.1 testified on the event before the deceased was taken to the hospital. He also reiterated that the Accused was saying that he was hit with an axe by his wife and that this was said in presence of his wife i.e. the Accused. He denied to the suggestion from the Defence that the

Deceased was drunk that night.

PW.2 Lukas Njoroge Mwangi a brother to the deceased confirmed that the Accused and the Deceased were living together and had children. He further testified that the Accused informed him that there was a fight between the two and were chasing each other. During that chase the Accused threw a stone at the Deceased. She was not sure where it hit the Deceased but he fell on the stone.

The evidence on the fight and chase given by PW.1 and PW.2 has also been stated by the Accused. Her version is that on the material date, she went to buy vegetables at around 6.00 to 6.30 p.m., which fact is corroborated by PW.1 when he stated that he saw the Accused at the market around the aforesaid time. When she came back the Accused was drunk and standing at the door. She was holding a baby and tried to enter the house but the Deceased started beating her and she ran away placing the baby in care of other children. A chase ensued but she was faster than the deceased and while chasing her he fell on the stones at a construction site. When she went back home she found him with injury and he told her that he was hit with a stone. She denied that the Deceased gave her name as his killer to PW.1 and PW.4.

It is strange that despite testimonies of PW.1 and PW.4 that the deceased was hit with an axe by the Accused, the prosecution has totally observed silence on its absence on the record of the case. I take its absence a bit seriously because even the medical evidence suggest the injury due to blunt object. In absence of the production of the axe, it shall be difficult for the court to presume that it is a blunt object, simply because ordinarily an axe cannot be termed as a blunt object.

Moreover, PW.1 and PW.2 have indirectly corroborated version of the Accused as regards the fight being outside the house and the two chasing each other. The only difference between the two versions is the use of axe by the Accused and the accused falling on a stone.

Going back to testimony of PW.1 and PW.4, they had stated that the Deceased gave them name of the deceased as his assailant. There is no doubt that the deceased died the next day of receiving the injury. Thus the evidence of deceased informing him cause of his death becomes Dying Declaration. From the evidence on record, I cannot deny its admissibility.

But can I solely rely on that dying declaration? It is clear that the prosecution case rests solely on that aspect. In the **case of Chege V.R. (1985) KLR 1**. The Court of Appeal, after citing several cases, has observed namely:

“that the court has to observe caution before relying on the dying declaration to convict the Accused. The reason is simple. The dying declaration has not been tested by question to the declarant i.e. the deceased.”

In this case, I observe that the Accused was at home when PW.1 and PW.4 arrived and also accompanied them to the hospital. This action does not point to acts of a guilty person.

Her version of how the Deceased met his unfortunate death does create reasonable doubt, the benefit whereof I am bound to confer on the Accused. I thus agree with the opinion of the Assessors.

In the premises, I enter a finding of not guilty against the Accused who shall be released forthwith unless held otherwise as per law.

Dated and signed at Nairobi, this 6th day of October, 2005.

K.H. RAWAL

JUDGE

6.10.2005