



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
Criminal Case 86 of 2004

REPUBLIC PROSECUTOR

VERSUS

JOSEPH GITAU NJUGUNA ACCUSED

JUDGMENT

The Accused Joseph Gitau Njuguna 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). In that on 28th April, 2003 at Kibera Kianda within Nairobi area he is alleged to have murdered Martha Muthoni. (hereinafter referred to as the 'deceased').

From the evidence PW.1, PW.2 and PW.3 as well as the Accused person who had admitted having stabbed the deceased on chest, I do find that the issue of death has been proved by the prosecution. The Post Mortem report signed by Dr. Jane Wasike was produced by one of the Investigating Officer P.C. Festus Katiba (PW.4). I allowed him to produce the same after the learned State Counsel made an application under Section 77 read with Section 33 of the Evidence Act (Cap.80 Laws of Kenya). I considered the application on merits and the Learned Defence Counsel also did not object to its production by the said witness. The cause of death mentioned in the Post Mortem Report was mentioned as penetrating chest injury due to sharp object.

The first ingredient of an offence of murder i.e. the death of the deceased, in my opinion, is satisfactorily proved by the Prosecution.

The court has to consider thereafter the second phase of the offence which is whether the Accused caused the death by his voluntary act with malice.

The Accused person in his defence has openly conceded that he stabbed the deceased with the knife (Ex.1) on the material date and time.

How the Accused and the deceased came to the scene, which was their matrimonial house, also somehow has the same background.

The Accused who was husband of the deceased had gone to his rural home allegedly after writing a letter to the deceased that they were separated. The letter or the two notes as per PW.3 Esther Wanjiru (deceased's mother) were the cause of the dispute. Even though the letter or the two notes are not produced before the court it was mentioned by all witnesses including the Accused.

In any event as per the evidence led by the Prosecution (PW.1, PW.2 and PW.3) the Accused was questioned by PW.3 on his return over the contents of the said notes. Although PW.2 Joseph Karanja brother of the deceased and PW.3 mother of the deceased were satisfied and did not find anything serious on the contents of the notes, the deceased was not satisfied and had some premonition about its contents. That is the reason she asked PW.1 Patrick Kinuthia her nephew to accompany her to the matrimonial home so that she could get her clothes to sleep with her mother.

PW.1 further testified that while she was packing her clothes the Accused tried to pursue her to compromise and gave his bag to PW.1 saying he would also not sleep in that house. PW.2 came at that time and stood outside the door. At that time the Accused searched for something under the mattress and they both started struggling. Although he did not see the Accused stabbing the deceased he heard her screams and the Accused started running away but was held by PW.2. When they started shouting people gathered and the Accused was held by them. The deceased was taken to hospital but died before she could receive any treatment.

He testified that when the incident occurred he was in children's room which was separated by a transparent curtain and there was a paraffin lamp in the other room. PW.2 removed the knife from the deceased's chest.

PW.2 brother to the deceased also was present when the Accused was called to explain by his mother (PW.3). After discussion he also asked the deceased to go back with the Accused.

But the deceased refused and insisted to come back to her mother's house after getting her clothes. She accompanied PW.1 to do so. After five minutes the Accused and himself left the house. On the way he stopped to have a hot water drink (sic) and when he came back he did not find the Accused. So he went to his house which according to him was at a distance of 50 metres from that of the Accused. As he was opening his house, he heard noise of struggle and a voice saying "**Kararnja come, I am dead**". He did not state that the voice was that of the deceased. He followed the noise to Accuseds house and found the deceased lying on the floor and the Accused standing nearby. The Accused told him that she had fallen as usual. But nearing her he found the knife on her chest. The Accused was held by the people who gathered.

Both those two witnesses identified the knife (Ex.1) as the one found on her chest.

PW.3 the mother repeated how the Accused was questioned on contents of letters and why he returned earlier as he was supposed to be separated from the deceased. After the Accused denied having written the notes and explained that he had come to solve the domestic problem she was satisfied and also stated that the Accused was in a happy mood. I take special note of this part of her evidence as it seemingly corroborates the version of the Accused in his defence. She also stated that the deceased however refused and insisted on sleeping at her house. She left with PW.1 to get her clothes. The Accused and PW.2 also left after five minutes. PW.2 thereafter came to her and told her that the Accused had stabbed the deceased.

The evidence of the police witnesses did not add any value to the Prosecution case.

The Accused after the close of the Prosecution case gave his defence through unsworn statement.

He reiterated how he came to his house on the material day and the deceased left him after seeing him in the house, how he was called by her mother (PW.1) and how he was questioned and how he explained. According to him the dispute was resolved and PW.3 asked them to go home which they did in company of PW.1 and PW.2. On the way he stopped to buy a cigarette and when he reached home he found the deceased behind the door and two brothers inside the house.

He closed the door. Then he was asked by them whose home it was. He replied it belonged to both of them i.e. deceased and himself. But they insisted it was the deceased's house and asked him to leave. He refused and they started pushing him and a fight ensued. He fell over a basin and then he took a knife

which was in the basin. He warned the other three not to come near him or else he would use the knife. They did not listen and continued pushing him. At that time, he stated and I quote **“I decided to stab the deceased”** which he did. They screamed and people gathered who beat him unconscious.

I look at the evidence as a whole. PW.1 has also stated that the Accused asked the deceased to reconcile and volunteered not to go out to sleep in the house. Furthermore he also stated that a struggle ensued between the two. PW.2 and PW.3 did not witness the act of stabbing but were satisfied that the Accused did not pose any threat, and that he was in a happy mood. It was the deceased who was adamant. The Accused accompanied PW.2 to go home. As a matter of fact it was PW.2 who stayed behind.

With the above evidence led by the Prosecution, the version of the Accused seems more probable. I can, with these observations, find that the Accused did not have malice – aforethought to unlawfully kill the deceased when he entered the matrimonial home. He, in face of a struggle, committed the act of stabbing the deceased. I would like to accept the version of the Accused as being more logical to have happened, and do find that the Accused stabbed the deceased under provocation. There is, I note, evidence of their domestic differences which PW.3 used to settle.

The Learned Defence Counsel had submitted that the Accused committed the act as an act of self defence. But looking to the facts adduced by both sides, it is no doubt in my mind that the Accused definitely used excessive force so as to get benefit of self defence. It is not on record that they were armed and that the life of the Accused was under threat. The Accused himself said that when they continued to come towards him after his caution, he decided to stab the deceased.

I shall reiterate and I do find that the Accused committed the act under provocation and without malice.

Thus I shall acquit him of the offence of murder as leveled against him but do convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

The Assessors also gave similar opinion.

Right of Appeal against the conviction within 14 days.

Dated and signed at Nairobi this 10th day of November, 2005.

K.H. RAWAL

JUDGE

10.11.05