



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MAKUENI
CRIMINAL CASE NO. 20 OF 2017
REPUBLIC.....PROSECUTOR
VERSUS
BONIFACE MUTUA.....ACCUSED

JUDGMENT

1. **Boniface Mutua** the accused herein stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that on 9th June 2017 at Kimundi sub location, Kathonzweni sub county within Makueni County, murdered Catherine Mutua.
2. The accused denied the charge and the prosecution presented seven (7) witnesses to establish its case. The accused gave a sworn statement of defence and called no witness.
3. **PW2 (R.M.M.) and PW3 (E.M.M.)** are children of PW1 (*Cyrus Mutua Ndululi*) and the deceased and they were minors at the time of incident. Both of them gave unsworn evidence and were cross-examined by counsel. It was their evidence that on 9th June 2017 morning they were from school having been sent home for tuition fees. They did not find their mother home but she arrived later. PW2 reported to her how the accused (a neighbor), his wife and mother had collected firewood from their sack.
4. On getting this report their mother (deceased herein) went to the accused's home. The accused was spraying crops. PW2 and PW3 followed and saw the accused remove the spraying device. He held the deceased's hands and knocked her down on her back. PW2 inquired from accused why he was knocking their mother and he threatened to beat them.
5. They screamed and people came but PW3 ran to the neighbours. The deceased was not able to sit and had to be lifted up before being taken to hospital. In cross examination the two children talked of a tree which had been cut down by the deceased.
6. **PW1 Cyrus Mutua Ndululi** testified that on 9th June 2017 he had tried to talk to the deceased but her phone had not charged. He expected her to call at 2.00pm but she did not. At 3.30 pm Mumbua Mbila called him and he asked her to take her phone to the deceased so that he could talk to her. The deceased could not hold the phone. The phone was placed near the deceased's ear and all she told him was "ujue ile utafanya". She started crying and he disconnected the phone.
7. He was called by the accused at 4.30 pm, inquiring if he could go to the hospital as the deceased was being transferred to hospital in Makueni. He went to the hospital in Wote the next day and found her admitted. She was conscious and they even talked. The deceased told him that the cause of the problem was a tree at their place which she had cut. That the accused held her hands on the back and knocked her down. A referral letter to Kenyatta was done by the doctor but he took her to Makindu on 15th June 2017, where she died on 18th June 2017. He witnessed the post mortem.
8. In cross examination he said the accused took the deceased to hospital and he was visiting her there. The accused is his cousin. The deceased was home between 10th – 15th June 2017. She only spent one day at the hospital in Wote.
9. **PW4 Diana Mumbua Mwema** testified that on 9th June 2017 5.00pm she went to Kanzo Kiani dispensary to see the deceased. She found her there being treated and she was referred to Makueni Referral. She and others including the accused took her to Makueni Wote.
10. They were advised to report the matter to the police which the accused did. The deceased was treated and discharged. They slept at the hospital and were informed the next morning that the deceased had been referred to Kenyatta national hospital or Machakos hospital. PW1 arrived and they took the deceased home. She later learnt of her death from PW1.

11. In cross examination she said the accused was with them on the 1st and 2nd day. She went with him to the station to report even though she did not hear what he told the police. The deceased was treated and discharged though she was not able to support herself.

12. **PW5 Rose Ndanu Nzao** assisted the deceased get treatment at Kathonzweni and later Wote.

13. **PW6 no. 99774 P.C. Dennis Masaki** was the investigating officer. He testified that a case of assault was reported at Kabumbu police post. The complainant was Catherine while the culprit was the accused. He visited the victim and he noted that she could not sit as she had a spinal injury. He attended the post mortem accompanied by two relatives on 27th June 2017. The accused was arrested on 25th July 2017.

14. In cross examination he denied that the accused took the deceased to hospital or took care of her. He however stated that the accused never disappeared from home. Further that he was not armed during the attack.

15. **PW7 Dr Josephine Mueni** of Makindu sub county hospital conducted the post mortem on the deceased's body on 27th June 2017. She found the following:

- (i) Presence of rigor mortis.
- (ii) Bedsores on buttocks.
- (iii) Blood between the spinal cord and brain.

The cause of death was haemorrhage in space of spine and brain. She produced the post mortem report as EXB1.

16. In cross examination she said the condition stated in the report can cause death depending on the degree of injury. She added that if one is so injured and is not properly handled such a condition worsens the situation.

17. In his sworn defence the accused in denying the charge said on 9th June 2017 at 8.00 am he went and saw the deceased who had cut boundary trees. She denied that the trees were on the boundary. They were neighbours and she was his cousin's wife. She however admitted the mistake and they agreed to share the firewood after she split it. She later said a thorn had pricked her hand and she went to hospital. The timber was divided and he was given his share. While in hospital her children were sent home for fees.

18. The accused went to sprinkle water on his crops on his compound. At 11.00 am he saw the deceased passing through his shamba of peas and she hurled insults at him. She suddenly came with a rungu and panga and hit him with the rungu, which she again threw at him but it missed him. He still had his pump on the back. She hit him with the blunt side of the panga on his knees and he got injured. They struggled over the said panga.

19. The deceased then skidded in the trenches and fell on her stomach. It then she started saying she had been injured. Her children arrived ready for a fight. He and the said children lifted her and placed her on the accused's compound.

20. A boda boda person came and the deceased was taken to hospital. She was treated and they were advised to take her to Machakos or Kenyatta. He was not able financially to take her to those hospitals, since he had been paying for the other expenses.

21. He is the one who called the husband who came the next day and he explained everything to him. The deceased was discharged after a day. They were able to take her to Makindu – Mulatia hospital after doing a fundraising. She was admitted but died three (3) days later. He was arrested a month after her death.

22. He stated that he never intended to injure her as he was only defending himself. He went for treatment later. His initial P3 form got lost in the process of his arrest as he returned it to Kavumbi police station. He produced his O.B report and P3 form as EXB1&2. Finally, he said he regrets the incident that occurred as it was not intentional.

23. In cross examination he said the tree in question was on the boundary. He did not know who allowed her to cut it. They talked and sorted out the matter. PW2 and PW3 came as he and the deceased tussled over the panga and she had already fallen.

24. Answering a question from the court he said the death was as a result of the injury she suffered on the fateful day.

25. After the close of the defence case, Mr. Kihara learned counsel for the state told the court that the prosecution would rely on the evidence on record and not file any submissions.

26. Learned Counsel for the accused, Mr. Mathenge submitted that there is clear evidence that the accused was heavily involved in trying to save the deceased's life. He however argues that none of those who allegedly responded and came to the scene testified. Counsel further submits that according to PW4 the deceased was conscious and was talking but she did not explain what had befallen her. That had she been assaulted by the accused she could have stated so since the accused was there with them.

27. He contends that the accused had been injured on his left knee. An O.B. abstract and P3 form were produced by him confirming he was assaulted by the deceased. He blames the investigating officer for doing a shoddy job, as he had denied that the accused was involved in taking the deceased to hospital.

28. His final submission is that accused did not have the intention to kill the deceased. That he was actually trying to protect himself from an assault, which took place in his homestead. This to him shows that the deceased went to attack the accused, who only held her hands to prevent further assault whereby the deceased accidentally fell. He therefore submits that the prosecution has failed to prove its case and prays for the accused's acquittal.

Analysis and determination

29. The charge of murder which the accused is facing is defined under **section 203 of the Penal Code** as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

30. The ingredients requiring proof for this offence are:

- (i) The fact and cause of death.
- (ii) Proof that the act of commission or omission causing the death was by the accused (*actus reus*).
- (iii) That the act of commission or omission was accompanied by malice aforethought/intention (*mens rea*).

31. Malice aforethought is defined under **section 206 of the Penal Code** as follows:

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

32. PW1 who is the husband of the deceased among others has confirmed that indeed his wife died on 18th June 2017. PW7 Dr. Josephine Mueni who performed the postmortem found the cause of death to be haemorrhage in the space of the spine and brain (EXB1). This issue is therefore sorted.

Issue No. (ii) Proof that the act of commission or omission causing the death was by the accused (actus reus).

33. PW2 and PW3 who are children of PW1 and the deceased testified that their late mother was attacked by the accused who held her hands at the back and knocked her down. They gave the same narrative to their father (PW1) and the investigating officer (PW6).

34. The accused on the other hand states that its the deceased who attacked him with a panga and rungu and hit him with the former on his knees. They struggled over the same and that's when she fell on some trenches injuring herself. He disputed the evidence of PW2 and PW3 saying the two arrived when their mother had already fallen down.

35. It is clear from this evidence that the accused has been squarely placed at the scene. Secondly there was a confrontation between the accused and deceased.

36. PW1 – PW3 and the accused have confirmed that prior to this incident the deceased had injured her hand and she had gone to the hospital. It was upon her return from hospital that this incident occurred. The deceased's initial injury cannot be said to have been a minor thing because if it was she could not have gone to seek for medical attention.

37. This in itself disapproves the accused's allegations that the deceased attacked him while armed with a rungu and panga and even hit him with the same tools. She is expected to have used the same injured hand to carry the rungu and panga to hit the accused! That could not be the case.

38. It has been explained that the cause of the tussle was a tree believed to have been on the boundary between the accused's and deceased's families since the two are neighbours. The tree had been cut by the deceased and split into firewood. When the deceased returned from hospital she was informed by PW2 and PW3 that the accused, his wife and mother had taken firewood from her sack.

39. Following that report she went to see the accused which was quite normal as they are relatives. On what transpired thereafter I find the evidence of PW2 and PW3 to be more reliable. They were minors who gave unsworn evidence but their evidence was tested through cross examination and they did not depart from what they had stated in their examination in chief.

40. They said their mother fell down which is also confirmed by the accused. It was their evidence that it is the accused who knocked her down. The accused in his defence does not deny that. All he says is that he did so in self defence, which has been found by this court to be

untrue. She injured her back and could not sit up again. This injury however unintended resulted in the deceased's death. I therefore find that the act of pushing down the deceased, by the accused, caused the injury which finally resulted in the deceased's death which was unlawful.

(iii) That the act of commission or omission was accompanied by malice aforethought/intention (Mens rea).

41. In the case of **Tubere s/o Ochen [1945] 12 EACA 63** the Court of Appeal in determining whether malice aforethought had been established considered the following elements:

- (i) The nature of the weapon used.
- (ii) The manner in which it was used.
- (iii) The part of the body targeted.
- (iv) The nature of the injuries inflicted either single stab/wound or multiple injuries.
- (v) The conduct of the and before, during and after the accident.

42. From the evidence presented to this court and the circumstances of the case, it is clear that the accused pushed the deceased to the ground, and she got injured. He did not however imagine the seriousness of the injury that the deceased would suffer or even suffered. His conduct after the incident speaks to this. He called PW1 and informed him of what had happened. He was part of the team that took the deceased to hospital for treatment and back home; he also was part of those who took her to a Makindu hospital; he never ran away from home.

43. All this goes a long way to show that he really had no intention of grievously harming or killing the deceased person.

I therefore find that malice aforethought has not been established as required.

44. Having found that the accused caused the deceased's killing which was unlawful I now move to **section 179** of the **Criminal Procedure Code** which stipulates:

“(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

45. The Black's law dictionary 9th Edition page 1186 defines a cognate offence as:

“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.” See – David Mwangi Njoroge vs Republic [2015] eKLR; Kalu vs Republic [2010] 1 KLR.

46. I am satisfied that the offence which has been established is manslaughter which is a cognate offence of murder. I therefore under section 179(1) & (2) of the Criminal Procedure Code reduce the charge of murder to manslaughter contrary to section 202 as read with section 205 of the penal code which I accordingly convict the accused.

SIGNED AND DATED THIS 19TH DAY OF MAY 2021 AT MILIMANI NAIROBI BY:

H. I. ONG'UDI

JUDGE

DELIVERED ON 17TH DAY OF JUNE 2021 IN OPEN COURT AT MAKUENI BY:

GEORGE DULU

JUDGE