



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CRIMINAL CASE NO. 163 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DANIEL NZIOKA MBOTE.....ACCUSED**

**JUDGMENT**

1. **Daniel Nzioka Mbote** the accused herein is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that the accused on or about 14<sup>th</sup> December 2015, at about 10a.m. at Kamunyolo village, Unoa sub-location in Makueni District within Makueni County murdered Esther Mumbe Kiangi.
2. The accused denied the charge and the prosecution presented a total of seven (7) witnesses to prove it's case.
3. The deceased was the accused's wife. The evidence is that the accused, deceased and son had visited the accused's aunt (PW2) in Wote town two weeks prior to this incident. The deceased was preparing for her graduation.
4. **PW2 Agnes Nyiva** testified that on 13<sup>th</sup> December 2015 the deceased and her child went to church leaving her home with her husband (PW5) and the accused. When the deceased returned she was talking on phone and this upset the accused. He ordered her to give him the phone accusing her of always talking to her parents yet she was married. He took the phone, smashed it with a stone and took the pieces to the toilet. The accused threatened the deceased with a piece of timber saying he would kill her.
5. PW2 advised the deceased to run away and she went and locked herself in PW2's store. That evening PW2 transferred her to one of the rooms where she spent the night with the child. The next morning of 14<sup>th</sup> December 2015 PW2 and PW5 left for work after talking to the accused who was not relenting. The deceased remained locked in the house while the accused was outside.
6. While at her place of work (*Ministry of Education*) at 9.30 am PW2 received a call from **Martin Mumina (PW4)** the T.V. repairer. He told her that the accused wanted to forcefully gain entry into the house and beat the deceased. She went to the nearest police station for help but she was not assisted. She went home where she found the accused who asked her to open for the "dogs" to go to their home as he had nothing to do with them. He assured her he was not going to beat the deceased. She opened for the deceased who went to bath and thereafter packed her luggage.
7. PW2 followed by the deceased PW4 and accused then left. When they reached the gate the accused told PW4 to go and pick for him a bag, which was not being seen. PW4 rushed to the house for a non-existent bag. There and there PW2 saw the accused pull out a knife from his trouser's waistline. It had been covered by his shirt. The deceased ran and held the witness (PW2).
8. The deceased came to them (*i.e. PW2 and deceased*) and twisted their legs with his and they fell down. The deceased was carrying the child, on her back. Within a minute the accused had cut the deceased's neck and blood was oozing. She screamed and PW4 came. The deceased died on the spot. PW4 beat the accused's hands and he dropped the knife. The accused then picked the knife and stabbed PW2 on her right thigh.
9. There was a struggle and again PW4 hit him and he dropped the knife. He picked it up again and disappeared with it when he saw people coming. She was rushed to hospital where she was admitted for two (2) weeks. The accused's mother is PW2's sister. Accused disappeared and was arrested three weeks later in Mombasa.
10. In cross examination she said the accused and deceased had been at her home for almost a week and there had been no problem. They were however sleeping in different rooms. She explained that she and PW5 had to plead with the accused on 14<sup>th</sup> December because he was threatening to kill the deceased. She denied hearing the grandson say he wanted to be carried by the father (*accused*). She said she had before removal of the knife heard the accused say, "This is now the time". He thereafter removed the knife. She confirmed having been injured on the hand, fingers and back.

11. **PW4 Martin Mumina Mutinda** testified that on 14<sup>th</sup> December 2015 at 10.00-11.00 am he was at the home of PW2 and PW5 – where he had gone to see his friend Benjamin and to repair for PW2 her Zuku decoder. A meeting was held between him, PW2 and accused following friction between the accused and deceased. The accused assured them there would be no scuffle and the deceased would go back to Kitui. The deceased who had been locked in a room came out with the child.

12. They (*Accused, deceased, PW2 and PW4*) left. After going for 30m from the house towards the market the accused told him to go to the house and get him his luggage/bag as he was also travelling to Kitui. PW4 complied and left to get the bag. Upon entering the house he heard screams and came out to check. He saw the deceased on the ground with her child on the back. PW2 was also on the ground. He ran to the scene and saw accused carrying a knife. Accused ran towards him calling his name. He lifted a stick but did not hit more. The accused ran away.

13. PW2 was bleeding from her fingers and head while the deceased was bleeding from the neck, and was already dead. He ran and called PW5 who got an ambulance which took PW2 to hospital. The child was not injured.

14. In cross examination he said Benjamin son of PW5 was not present when this incident took place. He had learnt of the problem between the accused and deceased from Benjamin and PW2. As they escorted the deceased, PW2 and deceased walked ahead followed by the accused. He denied hearing the child say he wanted to be carried by his father.

15. **PW5 Benard Kativa** who is PW2's husband confirmed having left home with PW2 on 14<sup>th</sup> December 2015 at 8.30 am for work, and everything was alright. He later received a report from PW4 of the occurrence and he got an ambulance and went home. They found the deceased already dead with a bad cut on her neck, while PW2 had injuries on the hands, fingers, back and neck.

16. **PW1 Dr. David Kimanzi Kiteme** an uncle to the deceased witnessed the postmortem. He observed injuries/cuts on the following parts of the body; neck, right hand arm and shoulder.

17. **PW3 Dr. Alex Makau** a Medical Officer based at Makueni referral hospital produced a post mortem report by Dr. Loiposhe EXB1. Findings were as follows:

- Four visible stab wounds on the right neck with blood clots measuring;
  - 4 x 4 x 1cm
  - 4 x 2 x 1 cm
  - 4 x 2 x 1cm
  - 4 x 3 x 1cm
- Cut wound on anterior region of the neck and a slit throat (*it was open*) 10 x 8 x 3cm
- Two stab wounds on right side of chest.
- Fractured 6<sup>th</sup> rib with blood clots.
- Stab wound on scalp right occipital region.
- Blood clots in chest.
- Severed major vessels which take blood to the head.

He found the cause of death to be severe massive haemorrhage as a result of severed vessels caused by multiple stab wounds caused by a sharp object (EXB1).

18. **PW6 No. 233423 C. I. Chepkwony Philemon** was on duty at Makueni police station where he served as the OCS, when he received a report of a murder on 14<sup>th</sup> December 2015 at 9.30 am. Together with other officers they went to the scene where they found the body of a female adult in a pool of blood. There were several members of public who told them it is the husband who had committed the crime and had escaped. A team was dispatched to search for him but they were not successful.

19. The team was told of another casualty (PW2) who had been rushed to hospital. The deceased had several stab wounds on the ribs and neck. The accused was arrested three (3) weeks later.

20. In cross examination he confirmed having received a complaint to the effect that a relevant complaint had been made at the police station, with no action being taken. He said, this happens at times. He however investigated and found no truth in the complaint.

21. **PW7 No 45958 Detective P.C. Peter Kariuki** is one of the officers who went to the scene of crime. He saw a big cut on the deceased's neck; 3 stabs on the left cheek and another on the ribs. The suspect had disappeared and the murder weapon was not recovered. The body

was already at the mortuary while PW2 was at the hospital. A postmortem was conducted on 17<sup>th</sup> December 2015 by Dr. Loiposhe. The accused was arrested on 11<sup>th</sup> January 2016 at Makindu.

22. The accused elected to give a sworn statement of defence and called two (2) witnesses. He stated that they went to PW2's place on her invitation. While there him and his wife (*deceased*) were staying in separate rooms but they stayed well. It is his evidence that on 14<sup>th</sup> December 2015 they woke up well, and took breakfast together. PW2 came home with PW4 at around 9.00 am and called the deceased for a meeting. Thereafter he said the deceased left carrying their child, while PW2 carried a suitcase and bag. PW4 also carried a bag.

23. On asking where they were going he was told they wanted the deceased to graduate from her home in Kitui. He wondered why yet all arrangements had been done. All he asked of them was for his son to be left behind. PW2 insisted that he gives them fare and he finally obliged. He went to the house and took an ATM for withdrawal of money. He was talking to his wife as they walked. PW2 was ahead while PW4 was behind them.

24. A few steps from the gate their son whom the deceased carried on her back started shouting saying he wanted to be carried by his father (*the accused*). PW2 ordered him to shut up. Accused suddenly saw the deceased pull out a knife from her hand bag, and he moved and held her right hand which had the knife. He then silenced his son.

25. PW2 came and pulled him and they (*accused, deceased and child*) fell down. He fell on his back while the deceased fell on her face and on the knife which pierced her, as it was facing up. He was beaten by PW4 using a knife. He said he would push the deceased towards PW4. PW2 pulled the knife and he took off as PW4 chased him.

26. It is his evidence that he never held the knife at any one given moment but he only held the deceased's hand to hinder her from injuring anyone of them. He got injured on his right hand and neck, but he never went for treatment. He added that he married the deceased in 2011 and paid her fees at Kenyatta University – Kitui campus. They never had any issues.

27. In cross examination and re-examination the accused insisted that he had no issues with the deceased and that being separated from his wife while at PW2's home did not offend him. He had noted that PW2 and the deceased were relating too much this time round. He dismissed PW2's and PW4's evidence as being full of lies. Further that the wife was stabbed by the knife as she rolled on the ground.

28. **DW1 Paul Muli Maingi** is a maternal uncle to the accused person. He knew the deceased as the accused's wife. He testified that the accused came to his home on 14<sup>th</sup> December 2014 at 1.00 pm while bleeding on his left thumb and neck, and was angry. He refused to tell him what had happened but he directed him to his aunt's in Wote. The witness came to Wote where he found PW5 who explained to him what he had heard. They went to the hospital and saw PW2 and also the deceased's body. He too confirmed he had never heard of any problems between the accused and his wife.

29. In cross examination he said the injuries the accused had were not bandaged and it was not easy for him to have inflicted those injuries on himself.

30. **DW2 Mbote Mutisya** who was affirmed testified that the accused is his kid brother, while the deceased was the accused's wife. He recalled having been called by the accused on 14<sup>th</sup> December 2014 at 1.00 pm. He told him of a misunderstanding between him and PW2 and he needed help. He went to Wote and found PW5 at home. PW5 informed him that PW2 was in hospital. They went to the hospital but were advised to see her the next day. It is then that he learnt about the deceased's death.

31. He visited the hospital the next day and saw PW2. She refused to talk to him and she spoke very badly. He left and had a discussion with the deceased's family. He called the accused and informed him of what he had been informed. The accused kept crying and so they could not communicate. He too said he had never heard of any problems between the accused and deceased.

32. In cross examination he said when the accused sent him to PW2 he never told him anything about the deceased. He never went to the mortuary.

33. The learned prosecuting counsel Mr. Kihara told the court that the prosecution would rely on the evidence on record and not file submissions after the close of the defence case.

34. **M/s O. N. Makau & Mulei** advocates for the accused filed written submissions on 26<sup>th</sup> January 2021. Counsel has relied on Section 206 of the Penal Code and the case of **Daniel Muthee vs Republic Criminal Appeal No. 218 of 2005** cited in **Republic v Lawrence Mukaria & Anor [2014] eKLR**.

35. He has submitted that it is the duty of the prosecution to prove that the accused had the intention to kill or that he had knowledge that his act or omission would probably cause death. In this case he argues that the prosecution failed to prove any malice. That the accused had demonstrated his good will and intentions in his defence. Further that the injuries were self-inflicting by the deceased. Counsel has submitted that PW3 in his evidence said the injuries on the deceased could have been self-inflicting.

36. He argues that the accused's fleeing from the scene was because of fear of being attacked by PW2 and not because of any wrong doing. That this was confirmed by PW6 who said the accused's running away from the scene could have been for any other reason besides guilt.

37. Finally, he submits that no recoveries were made of the murder weapon, suitcases and bloodstained clothes. Furthermore, no photographs of the scene were taken. These were to him unresolved issues which created doubts in the prosecution case. He urged the court to acquit the accused person of the charge of murder.

## Analysis and determination

38. The offence of murder is defined under Section 203 of the penal code as:

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

39. From this definition, there are three elements which must be satisfied to prove the charge of murder. These are:

- The fact and cause of death.
- The act of commission or omission being linked to the accused person (*actus reus*).
- The act of commission or omission must have been actuated by malice aforethought (*mens rea/intention*).

40. **Section 206 of the penal code** defines malice aforethought 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.”***

## Fact and cause of death

41. Almost all the witnesses who have testified including the accused have spoken to this. PW1 an uncle to the deceased attended the postmortem. On the cause of death the evidence of PW3 and the postmortem report (EXB1) clearly shows the deceased's death was not natural. She had several stab wounds on different parts of her body. I therefore find the fact and cause of death established.

## The act of commission or omission leading to the death

42. The deceased was the accused's wife. The incident occurred in broad daylight. From the evidence of PW2, PW4 and the accused himself, they were all at the scene. The evidence of PW2 and PW4 is to the effect that the accused attacked the deceased and stabbed her. He later attacked PW2 before fleeing the scene with the murder weapon, which was never recovered. The evidence of these two witnesses is very corroborative.

43. On the other hand, the accused says it is the deceased who had the knife and wanted to stab him with it. He said PW2 pulled him as he held the deceased and thereafter the deceased, him and the child fell down. He fell on his back while the deceased fell on her face falling on the knife which pierced her as it was facing up.

44. The accused in his defence has not mentioned which part of the deceased's body was pierced by this knife that was allegedly facing up. If indeed both of them fell down how was this knife strategically placed such that it only injured the deceased? He does not mention what happened to their son who was on the deceased's back. His aunt (PW2) appeared before this court. She is an elderly lady. There is no way this old woman would have pulled a strong person like the accused making him and his wife and child to fall down.

45. If what he is saying is true, then it appears that when he dropped down he was not injured. So what kept him on the ground and yet he could see his wife being pierced by the knife? What steps did he take to save this woman he allegedly loved so much? He did nothing and instead took off leaving behind his dead wife with a child on her back and an injured old woman (PW2). This cannot be the conduct of an innocent person.

46. The two witnesses he called (DW1 and DW2) only reported what he had told them. When he went home and found his mother's brother (DW1) he simply told him to go to PW2's home which he did. It is there that DW1 learnt from PW5 what had transpired. DW1's evidence was therefore of no assistance to him.

47. Equally, DW2 who is the accused's brother when called by the accused was just told of a misunderstanding between him and PW2. DW2 went to PW2's home and from there he learnt of what had transpired. Both DW1 and DW2 confirmed the death of the deceased and the injuries to PW2.

48. This defence by the accused has not shaken the evidence adduced by PW2 and PW4. There is no reason that would have made the two lie against him. In fact the accused said he was seeing PW4 for the first time that day and so had not known him earlier. There is no dispute that the accused and his wife had been at the home of PW2 and PW5 for a few days prior to this incident.

49. The evidence is that the accused disappeared with the murder weapon and he was arrested after about a month of hiding. It is only him who knows where the knife went. The fact that the knife was not recovered and the scene not photographed does not by itself mean the deceased was not murdered. I am satisfied that PW2 and PW4 were truthful witnesses and they narrated to the court what exactly happened on the 14<sup>th</sup> December 2015 at 9.30 am outside PW5's home.

**Whether malice aforethought was proved**

50. Counsel for the accused referred to the case of **Daniel Muthee v Republic Criminal Appeal No. 218 of 2005** cited in the case of **Republic vs Lawrence Mukaria & Anor [2014] eKLR** where the Court of Appeal while considering what constitutes malice aforethought remarked as follows:

*“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”*

51. In the case of **Mary Wanjiku Gitonga vs Republic (C.O.A.) Nyeri Criminal Appeal No. 83 of 2007 (UR)** the court in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows:

*“We are told by the counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and deceased must have had a dispute over some issue just before the deceased was killed ... Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention to do grievous harm to any person .....” Is shown. In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband. She ended up killing her (sic).*

*In the circumstances we see no reason to interfere with the appellant's conviction for murder. The conviction was fully justified by the evidence on record.”*

52. The evidence on record shows that the accused tricked PW4 into going back to the house to get him a non-existing luggage/bag in order for him to execute his evil plan. Secondly a glimpse on the injuries suffered by the deceased tells it all. The deceased suffered too many stab wounds including a slit throat. The injuries were:

- Four (4) visible stab wounds on right neck.
- Cut wound on anterior region of the neck.
- A slit throat which was open.
- Two stab wounds on the right side of chest.
- Fractured 6<sup>th</sup> rib.
- Stab wound on scalp, right occipital region.
- Blood clots in the chest and 6<sup>th</sup> rib.
- Severed major vessels which take blood to the head.

53. A perusal of these many injuries shows that the areas of the body targeted were very sensitive. These were not self-inflicting. There was no way the deceased would have survived after the said injuries. The main aim was to kill her and nothing less. Infact the deceased died on the spot.

54. I am satisfied that malice aforethought was proved. For my part I find the accused guilty of murder contrary to section 203 as read with section 204 of the penal code and I convict him accordingly.

**Dated and signed this 19<sup>th</sup> day of May 2021 at Milimani Nairobi by:**

**H. I. ONG'UDI**

**JUDGE**

**Delivered this 17<sup>th</sup> day of June 2021 in open Court at Makueni by:**

**GEORGE DULU**

**JUDGE**