



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 15 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**CATHERINE WAWIRA NJAGI ALIAS WAMBETI.....ACCUSED**

**JUDGMENT**

**A. Introduction**

1. The accused herein faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the offence are that on 4.03.2017, at Kangaru village in Embu within Embu County murdered Lydia Wanja. She was arraigned in court on 15.08.2017 and wherein she pleaded not guilty to the charge and a plea of not guilty entered. The trial commenced and the prosecution called seven (7) witnesses in support of its case.

**B. Prosecution's case**

2. PW1 - Justa Muthoni Njeru gave evidence that on 4.03.2017 at around 3.00pm she was at her home when the deceased came and requested to rest as she was tired. That she took the deceased to her house and showed her a bed to rest on, and she left for the market where she sold bananas. That at around 8.45pm, she was called by her brother one Salesio who told her that the deceased had been cut severally by his (Salesio's) wife.

3. That she proceeded home to see what had happened and also called the deceased's sister one Mukami and they headed home and whereby they found Salesio who gave her the keys to the house and when she opened the door, she found the deceased on the floor of her bedroom lying face up. That she had fresh injuries and lay on a pool of blood and looked like she was dead. That she reported to the Assistant Chief who told her that the accused had gone to her place and reported that she had cut Wanja (the deceased) and stabbed her husband Salesio. The police later went to the scene and removed the body from the scene. In cross examination, she testified that she did not witness the incident.

4. PW2 - Annette Mukami Kimotho's evidence was expunged from the court record pursuant to the application by the prosecution.

5. PW3 - Mary Rita Wanjira Kariuki made sworn evidence that on 10.03.2017, she accompanied her mother to witness the post-mortem of her sister (deceased) at Embu Level 5 hospital and she was able to identify the body of the deceased.

6. It was PW3's evidence that she knew the deceased as she was her sister-in-law and that on 4.03.2017, at around 8.00pm she went to the deceased's place after she received a report from her brother-in-law one Joseph Njue.

7. PW4 - Catherine Nyambura gave evidence that on 4.03.2017 while on duty at Embu police station at around 10.00pm one Justa Muthoni (PW1) reported that her friend Lydia Muthoni had been stabbed and that she had left her sleeping in her house and went to the market but her brother one Salesio Njagi called her and said that his wife Catherine (the accused herein) had entered through the window and attacked Lydia and Salesio who were both in the house.

8. That she visited the scene together with Chief Inspector Ngotho and on pushing the door, she noticed the deceased's body lying behind the door and in a pool of blood. That the scene was photographed by scene of crime personnel. That they entered the accused's house (which was in the same compound with that where the deceased was found) and found one Salesio Njagi therein. He had a stab wound on the arm and was bleeding and he said that he had been attacked by the accused as she was attacking the deceased. That Salesio was taken to the hospital and the deceased's body taken to the mortuary for post-mortem. In cross examination, she testified that she did not recover the murder weapon.

9. PW5 - Dr. Phyllis Muhonja testified that she was a doctor stationed at Embu Level 5 hospital and that on 8.03.2017 she conducted a post mortem on the body of the deceased and that on external examination, there was a stab wound on the waist at the left femoral region, there was also dried blood on the legs, a bruise on the left shoulder and also on the left arm and the right chin. That the single stab injury on the

waist severed a major artery which caused massive bleeding in the femoral muscles. She testified that she formed an opinion that the cause of the death was the single stab wound on the femoral region bleeding into the muscles and thereby causing haemorrhagic shock. The post-mortem report was produced as PExbt 1.

10. PW6 – Cpl. Paul Irungu testified that on 4.03.2017 he was assigned the duty to investigate the incident herein and then proceeded to the scene of crime (the house of PW1), he was shown the body of the deceased which lay in a pool of blood and her clothes soaked in blood. That he looked around but did not recover the murder weapon. He produced the sketch plan of the scene of crime as PExbt 2. He further produced the witness statement for Salesio Njagi Njeru and further testified that the witness gave the names of the suspect (accused). In cross examination, he testified that he recorded the statement for all the witnesses. That it was only Salesio who witnessed the murder and whom he learned was the husband of the accused.

11. PW7 - Dr. Joseph Thuo testified that he was a psychiatrist at Embu Level 5 Hospital and that on 1.08.2017 he examined the accused and found her fit to plead. He produced his report as PExbt 4.

12. The prosecution proceeded to close its case and vide a ruling delivered on 10.02.2021, this court found that the prosecution had established a *prima facie* case against the accused person herein and she was placed on her defence.

### **C. Defence's case**

13. The accused in her defence gave sworn evidence that on the material date, she had gone to Mbeere to visit her grandmother. She denied having killed the deceased and only came to know about it when she was arrested. In cross examination, she testified that she was married to one Salesio Njagi who was now deceased. She denied having injured the deceased but stated that it was her husband who said that her sister-in-law (PW1) was saying that she killed the deceased. She proceeded to close her case.

14. The counsel for the accused proceeded to adopt the submissions earlier filed at the close of the prosecution's case as the defence's closing submissions.

### **D. Issues for determination**

15. I have considered the evidence tendered before this court by both the prosecution and the defence and the written submissions filed by the defence. The accused herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

16. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with and in this case, prove that the accused person herein murdered the deceased (see **Woolmington –vs- DPP (1935) AC 462**). The standard of proof required of the prosecution is that of "beyond any reasonable doubt" (See **Miller –vs- Ministry of Pensions, [1947] 2All ER 372**).

17. The offence of murder is defined under **Section 203 of the Penal Code** in the following terms; -

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

18. From the above definition, it therefore means that for the prosecution to secure a conviction on a charge of murder, it has to prove, beyond reasonable doubt, three ingredients against an accused person. Those ingredients are as follows:

***a. the death of the deceased and the cause of death;***

***b. that the accused committed the unlawful act which caused the death of the deceased; and***

***c. that the accused had malice aforethought.***

(See **Anthony Ndegwa Ngari –vs- Republic [2014] eKLR** and **Johnson Njue Peter v Republic [2015] eKLR**).

19. The question therefore is whether the above ingredients were proved to the required standards.

### **E. Analysis of the law and determination**

20. As for the proof of the death of the deceased and the cause of the death, PW1, PW4 and PW6 all testified as to having seen the body of the deceased lying in a pool of blood. PW2 on her part testified as having witnessed the post-mortem of the deceased herein. The fact of the death of the deceased was further corroborated by the testimony of PW5 who testified that she conducted autopsy on the deceased's body. As such, it is my view that the death of the deceased was proven.

21. As for the cause of the death, PW5 testified that upon carrying out the autopsy, she formed an opinion that the cause of the death was the single stab wound on the femoral region bleeding into the muscles and thereby causing haemorrhagic shock. The post-mortem report was produced as PExbt 1. As such, the cause of the death was proved. Right to life is protected by our Constitution under article 26 and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. In **Guzambizi Wesonga –vs- Republic [1948] 15 EACA 63** the court held that;-

***“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by***

**law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”**

(See also **Sharm Pal Singh [1962] EA 13** and **Daniel Nzioka Mbuti & another –vs- Republic (supra)**).

22. The cause of the death of the deceased herein was not excusable or authorized by law and thus the same was unlawful.

23. As to whether the accused person herein committed the unlawful act which caused the death of the deceased herein, I have perused the prosecution’s evidence as was presented before this court. I note that none of the prosecution witnesses witnessed the incident in which the deceased was killed. PW1 testified that she was called by her brother one Salesio who told her that the deceased had been cut severally by the accused herein (Salesio’s wife). She headed home and found Salesio who gave her the keys to the house and when she opened the door, she found the deceased on the floor of her bedroom lying face up.

24. PW2 testified that she only accompanied her mother to the hospital at the time of the post-mortem. All the other prosecution witnesses were not present at the time of the offence. As such, there is no direct evidence to connect the accused with the commission of the offence. The only evidence which ought to be relevant is that of the person who witnessed the offence. Any testimony by a witness who did not witness the said incidence can only be said to be hearsay evidence and as a rule of evidence, hearsay is inadmissible as evidence of a stated fact. (See **Kinyatti –vs- Republic [1984] eKLR**). Despite there being many exceptions to this general rule, there is none of the prosecution witnesses’ evidence which can be said to be admissible under any of the exceptions.

25. However, I note that PW6 in the course of his testimony produced witness statement by one Salesio Njagi Njeru and whom he stated, died before he testified. The production of the said statement was opposed by Ms. Muriuki for the defense on the ground that she had not been served with the copy of the death certificate of the said deceased. The prosecution requested for time to produce a copy of the death certificate. The court in its ruling made an order allowing the witness to proceed with the evidence and that any issue that may arise in the production of the death certificate be sorted out at the stage of filing submissions. The witness proceeded to produce the said statement and testified that the said witness (who is said to be deceased) gave him the name of the accused as the suspect.

26. From the evidence on record, it is this witness (Salesio Njagi Njeru- deceased) who seems to have witnessed the incident. However, he was never called to testify in court but the prosecution produced his statement in court.

27. The Court of Appeal in **Kinyatti –vs- Republic (supra)** defined hearsay as ***the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made***. The court went on to hold that as such, as a general rule, statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact. Further that evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

28. The statement which was produced by the prosecution and which was made by Salesio Njagi Njeru - deceased is in my view hearsay evidence as was defined in **Kinyatti’s** case and the same is not admissible. One, despite the prosecution having undertaken to produce the witness’ death certificate to prove that indeed the witness was deceased, the same was nonetheless never produced. As such, the death of the said witness is in doubt. Further, even assuming that the death was proved by evidence, the said statement cannot be admitted as evidence under Section 33 of the Evidence Act Chapter 80 Laws of Kenya. This section provides for exceptions to the hearsay rule when a witness is dead, unavailable or can otherwise not be procured to give evidence.

29. The part of the said section which is relevant to the matter at hand herein provides as thus:-

*“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-*

*a. Relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.*

30. Despite one of the issues before this court being the cause of the death of the deceased herein, the statement by the deceased witness cannot be admitted as evidence under the above section. The said statement is not in relation to the cause of the death of the maker (deceased witness) or circumstances of the transaction which resulted in his death. The statement relates to another person (the deceased herein).

31. It is not, therefore, one of the permissible scenarios where hearsay evidence is admissible as evidence. As the court rightfully observed in **Republic v John Ng’ang’a Njeri [2018] eKLR**, admissibility of statements which will not be subjected to cross-examination or confrontation is per se prohibited as definitionally violative of Article 50(2)(k) of the Constitution and which article guarantees to every accused person the right to “adduce and challenge evidence.”

32. That being the case, it therefore means that the prosecution did not prove that the accused herein was the one who caused the death of the deceased by her acts or omissions. This is despite having succeeded in establishing the death of the deceased and the cause of her death.

33. Having failed to do so, it is my considered view that the prosecution failed to prove all the elements of the offence of murder. It will therefore be an academic exercise to interrogate the issue as to whether the prosecution was able to prove malice aforethought.

34. The upshot is that the prosecution case fails, and the accused person is hereby acquitted.

35. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF JUNE, 2021.**

L. NJUGUNA

JUDGE

.....for the Accused

.....for the Prosecution