REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

HIGH COURT CRIMINAL CASE NO. 14 OF 2018

REPUBLIC.....DPP

VERSUS

WILSON KARIMI MUNGE

MIRIAM WAITHERA KARIMI.....ACCUSED PERSONS

CORAM: - Hon Justice R. Nyakundi

Mr Mwangi for the state

Mr Omwancha for the Accused

JUDGEMENT

Wilson Karimi Munge and Miriam Waithera Karimi hereinafter referred as the 1st accused and 2nd accused person were charged with the offence of murder c/s 203 and 2014 of the penal code. Both accused pleaded not guilty. The accused were represented at the trial by counsel Mr Omwancha while the state case was being prosecuted by Mr Mwangi –the prosecution counsel.

In support of the state case Mr Mwangi summoned the attendance of ten witness to proof the charge beyond reasonable doubt. In terms of medic Margaret Njoki testimony on date she told the court that on 11.2.2018 while walking to the water well to go and wash some clothes a child by the bane C who also testified as pw3 beckoned her to run and witness the body of a dead person.

On return to the scene pw1 confirmed to have met (Pw3) holding the deceased who also happened to be his brother. PW1 was able to see the deceased kneeling down with a rope on his neck. At the same time the 1st accused and 2nd accused stood nearby in close proximity to the body prior to that observation (pw1) further testified that she had seen the 1st accused holding the deceased. It was also the evidence by pw1 that three days to the fateful day, the accused persons had been seen at the deceased house on that material day (Pw1) told the court that she overheard a voice of the 2nd accused to the effect that" she will do something that will shock you".

In cross examination the witness testified that she was almost 30 metres when (pw3) called her out to go and witness the death of the deceased that on arrival at the actual scene. She saw the deceased and both accused walking around. She denied witnessing the 1st accused strangling the deceased although he initially played with him. It was also the evidence by the witness that accused persons at one incident had threatened the deceased.

Pw 2 Wambugu Kamunge told the court that on 11.2.2018 the deceased was found kneeling down with a rope around his neck. He later participated in the post mortem examination in which it was opined that the deceased died as result of lack of oxygen.

Pw 3 C is a minor aged 15 years and at the time of his testimony attending class in standard six. In his evidence pw3 testified that on the material day of 11.2.2018 she was looking after cows and goats in the field. In the course he came into contact with the deceased body which had been strangled. According to pw3 he had seen the deceased the same morning in good health.

Pw 4 Joseph Mwangi the father of the deceased gave evidence that he woke up normally on that particular day. He also told the court that his children including the deceased went about their chores as usual. However, in a little while pw3 came back crying that the deceased has hanged himself. At the same time pw4 met with his brother, the 1st accused who stated that the death of the deceased was just a small thing and they should proceed to bury him normally. He also recalled that three days earlier they had threatened to do something that will surprise and them when it happens.

PW 5 Mary Wacuka similarly told the court that on 11.2.2018 he was with the 1st accused driving his livestock to the grazing fields.

In did not take long she heard screams to the effect that the deceased had hanged himself. She rushed to the scene and saw the deceased kneeling down with rope around his neck.

Pw 6 Alice Ngendo testified in court that on 11.2.2018 she saw the deceased with a catapult and at the same time the 2nd accused called out her children in the same circumstances, PW6 told the court that screams from the scene of the news of the death of the deceased emerged she was only to hear a response for the 2nd accused that we should not mourn as if we have never seen someone hang himself.

PW 7 Ben Mburu Waweru gave evidence to the effect that on 11.2.2018 while at Mpeketoni Bahati – Baharini sister's house, he was knew deceased and the other children were to proceed to the place of worship soon but, the deceased remained behind. In a short while he was told that the deceased is dead that is how they made arrangements to take the body to the mortuary.

On cross examination the witness confirmed to the court that the deceased served him tea the same morning on rushing to the scene when the tragic news spread within the village. he had also to visit the scene where he observed the deceased kneeling down with a roped tied around his neck.

Pw 8 Naomi Kabere gave evidence that on the fateful day she was at the salon when she was called by the chief and other neighbours to go back home. It was a call that her child the deceased had been taken ill, on arrival at the home he saw a police vehicle and the body of the deceased alleged being carried away with background information that he had committed suicide.

PW 9 No. 805556 P.C Geofrey Too testified as the investigating officer of the death of the deceased.

He went ahead by visiting the scene recording witness statements, drew a sketch plan in respect of the aforesaid scene. In his view the deceased had been strangled and the suspects happened to be the accused persons. He produced the sketch plan as exhibit 4. The rope, catapult as exhibit 1 and 3 respectively. The set of photographs documenting the scene.

PW 10 -Dr Samwel Kamau testified in respect of the post mortem examination in the, positive findings, he told the court that the deceased had bruises around the neck and both hands. According to DW10 the examination presumed sufficient evidence to opine that the deceased died as a result of hypoxia secondary to strangulation. To that extent and close of the prosecution case both accused persons were placed on their defence.

The 1st accused on oath denied any involvement with the death of the deceased. He recalled that on the fateful day he had taken his livestock to the grazing fields, it was while looking after the animals that his son telephoned him about the incident. He also arrived at the scene and saw the deceased on the ground with a rope around his neck. On observation the 1st accused testified that it was concluded that he committed suicide. He denied being at the scene or participating in committing the offence.

On the other hand the second accused also gave a sworn testimony in which she denied knowing the deceased. It was her defence that material day she went about her daily chores when she heard screams on the death of the deceased. She also visited the scene where the body of the deceased was discovered in a kneeling position with a rope around the neck. The defence also called further evidence of their daughter.

Pw 3 Beth Karimi –she testified that on 11.2.2018 while at home washing clothes she heard a voice of distress from (pw3) to the effect that the deceased had hanged himself with a roped. That is when the she left whatever she was doing to visit the scene and confirm for herself the report from (pw3) in her evidence of, she did not know how the deceased met his death.

In summary the defence counsel Mr Omwancha filed written submissions on the various perspectives of the case. The submissions will from part of the evaluation in arriving at a determination of the matter at the end of it all.

DETERMINATION

Our Penal Law on murder as stated in section 203 and 204 which provisions contemplate that the state has to proof the following elements beyond reasonable doubt.

a. The death of the deceased

b. That his death was unlawfully caused

c. That in causing his death the accused acts were motivated with malice aforethought.

d. That it was the accused persons who committed the murder

e. Finally, the circumstances of this case it was a joint enterprise liability commonly referred to as common intention.

The evidence by the prosecution as presented was both direct but majorly circumstantial. The degree of circumstantial evidence is normally treated as the base evidence as established.

In ***Abanga alias Onyango VR CRA No. 32 of 1990***. The court of appeal held that it is settled law that when a case rests entirely on a

circumstantial evidence such evidence must satisfy three tests.

> ***i. The circumstances from which an inference of guilty is sought to be drawn and must be cogently and firmly established.***
>
> ***ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused*** *iii)* ***the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The court also held in Simon Musoke VRC (1958) EA 75 said that it is also necessary before arriving at the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other coexisting circumstances which could weaken or destroy the inference".***

Revisiting the evidence presented at the trial of the accused persons, it is plain and clear from pw1 –Margaret pw3 –C, Pw4- Joseph, PW5Mary PW6 –Alice and PW7- Ben while at their respective location they happened to see the deceased alive in the early hours of 11.2.2018. It was their testimony that the deceased with other children identified as PW3, Willy and Samwel who went about their normal routine with no complaints of any ill-health from the deceased. The witnesses as reiterated in their evidence on oath, thereafter the deceased was confirmed dead alleging having committed suicide. It was of significance that each of the witnesses for the state received the tragic news and did respond by visiting the scene.

Each one of them attest to the fact that of seeing the deceased kneeling down with a rope around his neck. The effect of their testimonies happened to point at an independent human hand involved in the commission of the crime, thereby ruling out suicide theory. Further the evidence by Dr Kamau on the post mortem examination remained telling if the story in precise terms. That, the deceased had sustained bruises around the neck and arms. The cause of death was concluded to be asphyxia secondary to strangulation.

In the trial it's clear that the prosecution physical evidence of a rope as the murder weapon exhibited duly recovered tied the neck of the deceased. The evidence by the witnesses confirm that the deceased had not suffered any known injuries in the early hours of the 11.2.2018. The evidence of him sustaining physical harm came soon thereafter he left the homestead as precisely clarified in pw4 testimony. The fact that the deceased was not hanging from any of the trees around the scene implies and collapses the theory on self-strangulation or suicide. The evidence on the surrounding circumstances, before during and after discovering his body is are all pointers that it was pure homicide.

The cognizance of that legal proposition was well assisted, In ***Neema Nyandoro Ndunga RC 2005) EKLR.*** In this case the Court held

> ***"circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by examination is capable of proving a proposition with accuracy of Mathematics."***

The truth of the matter as adduced from (pw1) narrative illustrates circumstances on the presence of the accused person within the near side of the scene of crime where the body of the deceased was found in a kneeling position. That strand of evidence from (pw1) did not stop there she had also seen the 1st accused holding the deceased up. The oration of (pw1) exhibits evidence which can be credited to give credit to the acts of the offence. These acts being described by PW1 were not acts of common occurrence and they yield the courts inference to the proof of existence of a fact in issue to safety satisfy finding of believe against the accused. There is presumptive evidence from (pw1) for a valid conclusion to be drawn by the court that are major facts as sworn by the witness, there is discovery of truth of a fact on how the deceased met his death.

Circumstances, it is said cannot lie this is very true but witnesses can. The law appreciates a presumption which necessarily arises from circumstances which very often more convincing and more satisfactory than any other kind of evidence. It is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to proof of guilt. I have further observed that on the 11.2.2018 PW3 and PW4 was in company of the deceased who was preparing to go to church. In the spur of the moment shortly thereafter the deceased had succumbed to death. It is clear that during the whole course of events the deceased had gone to look after cows while pw3 was a shepherd for the goats almost within the same environment.

Their appearances at different locations offered no suspicious circumstances to trigger the sudden death of the deceased it is here be observed that (pw3) came face to face with the deceased when he encountered him lying on his knees with a rope around his neck. The opinion of the medical officer who conducted the post mortem was inconsistent the theory of self-strangulation. In the instant case there is certainly proof of an over act from (PW1) which proves the 1st accused during the whole episode he must have strangled the deceased while in his possession. The wisdom and goodness of our law appears in nothing more remarkably than in the perspicuity certainly clearness of the evidence. It requires to fix a crime upon any man who has committed the offence complained against him.

My view on the evidence in the present case it's not convincing that the 2nd accused really participated in the killing of the deceased she must have been an innocent bystander. The innuendos or harsh constructions offered by the witnesses did not satisfy the rules of evidence on admissibility to find her liable of the crime, charged.

In contrast, I can never bring myself to believe that the 1st accused presumptive and circumstantial evidence was without for an inference supported by credible evidence to wholly place him at the center of things before and during the actual murder.

The intention of the 1st accused indeed must always be judged by the preceded act and the antecedent circumstances. I beg here to differ with the rebuttal defense given by the 1st accused to controvert the chain of circumstantial evidence linking him with the death of the deceased. A number of circumstances given by (pw1) increased the strength of the case on proof of the prosecution case and through its cumulativeness effect is to implicate the 1st accused person with the death of the deceased.

There being no repugnance in the chain of circumstances it is an undoubted truth that the deceased was unlawfully killed by use of a rope to strangle him to so disguise it as an act of suicide. This is not a case of fabricated evidence against the 1st accused. The prosecution

witness(pw1) swore to the fact of the murder as it took place in broad light and the 1st accused never wore a mask to hide his identity at that moment. It's strange that all those happenings seen by (pw1) were never alluded to in the defence.

That time standards stated by(pw1) when she saw the 1st accused holding the deceased to the time when PW3 broke the sad news of the death were in close proximity to strikingly embold the state case on circumstantial evidence. to rely on that striking circumstantial evidence.

The offence of murder as defined under section 203 is distinguishable with other felonies of homicide by a virtue of one key element that a malice forethought defined in section 206 of the penal code. Thus,

> ***"Malice aforethought shall be deemed to be established by evidence proving any of one or more of the following circumstances: -***
>
> ***a. an intention to cause the death of or to do grievous harm to any person, whether such person in 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 such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused."***

The Courts have adopted a fourfold classification to assist in determining whether the offence of murder manifest malice of forethought or not. In the case of ***Tubere S/o Ochen (1945) 12 EACA 63*****:**

> ***"the surrounding circumstances of the charge and evidence ought to show the nature and gravity of the injuries inflicted, the nature of the dangerous weapon used, part of the body targeted, the conduct of the accused before during and after the offence") see also Ernest Asami Bwire Abanga alias Onyango v r Nairobi CRCRA No. 32 of 1990, Morris Aluoch v R CARCRA No. 47 of 1996, Karani & 3 others v R (1991) KLR 622).***

Whether the foreseeability of one's action can be equated with intent is still in a state of flux as observed in ***DPP VS Smith (1961) AC 290*** in which the court held that:

> ***"it matters not what the accused in fact contemplated as the probable result, or whether he ever contemplated at all, provided he was in law responsible and accountable for his action, the sole question is whether the unlawful and voluntary act was of such kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result."***

From the above insights murder is a result crime where the contact of the accused is the cause of that result which consist not only striking vulnerable body parts by use of dangerous weapons or a as manipulated to commit the act of killing. It therefore takes many forms i.e stabbing, strangulation, inflicting grievous harm which seriously or permanently injures the health of another human being. Essentially malice aforethought is the intention or knowledge of the offence as defined in section 206 of the penal code. It may be formed prior, during or at the spur of the moment and it must be proved beyond reasonable doubt.

The prosecution in this case set out to proof malice a forethought as provided under section 206 by the explanation and circumstances given by PW1. All that the witness told the court the offence on the part of the accused involved the initial holding of the deceased and the probable consequences which arose after that act. This damning evidence enshrined in PW1 testimony if is anything to go by it was corroborated by PW3 and PW4 on what I call proximate cause. For the purposes of this offence from the time PW1 saw the 1st accused holding the deceased there was no any other intervening factor to destroy the sequence of events until the death of the deceased.

I am of the opinion that death was due to asphyxia as the signs demonstrated in the postmortem report showed considerable pressure had been applied to the neck and being a manual strangulation there was no struggle at all to warrant any distress calls from the victim.

It is in this case PW3 told the court that both him and the deceased had gone out to look after livestock, soon thereafter strangely he found the deceased kneeling down and a rope around his neck. Apparently his first impression was that of him having committed suicide. This evidence was later to be contrasted by the medical evidence tendered in court by PW10. The view taken by the doctor as founded in the post mortem was the fact that the deceased was strangled. The items of evidence which sufficed included – bruises and lacerations around the neck and upper limbs. The fact that the rope around the neck suffocated the deceased without any self-assistance from the surrounding environment qualified this act of not being self-inflicting. This evidence from PW1 manifest that the accused had created state of affairs that had become life threatening to the deceased. It is to be noted that the 1st accused comment to PW4 immediately after the incident was more telling for he cared less on what had befallen the family of the deceased. He was quick to give an advisory that the burial of the deceased should be organized and quickly done away with.

This was case for the prosecution that the unlawful and intentional act that resulted in the death of the deceased was a joint enterprise of the two accused persons. This is commonly known as common intention as defined in Section 21 when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

What is left for this court to determine is whether the two accused persons committed the offence and therefore bringing into effect the doctrine of common intention to execute an unlawful purpose. As earlier indicated the crucial evidence on identification and placing the perpetrators of the Criminal Act at the scene happen to be that of PW1. The evidence of PW1 was not very clear on the role played by the

2nd accused, however, she was categorical of having seen the 1st accused holding the deceased and soon thereafter PW3 found him dead. In ***Mein(1995) SCAR*** the principles and common purpose entails the following summing up thus;-

> ***"Common intention does not necessarily, and in all cases, imply an express agreement and pre-arranged plan before act. The act may be tacit and common design conceived immediately before it is executed on the spur of the moment. There need not be proof of direct meeting or combination nor need the parties be brought into each other's presence; the agreement may be inferred from circumstances raising a presumption of a common plan to carry out the unlawful design."***

This the test herein of the dichotomy through which the prosecution was required to balance the various unlawful acts of the 1st accused person with that of the 2nd accused person for the benefit of proving the charge beyond reasonable doubt. It an evidential burden that the two accused persons despite being husband and wife formed a coming intention to execute an unlawful purpose. After examining the evidence in regard to accused 2 it is safe to dissolve that there is scanty evidence of her being an accessory before, during or after the fact. Although there is evidence to link her to be walking along side with the 1st accused it is not clear whether she was present when accused 1 was seen by PW1 directly holding the deceased which substantially helped the prosecution to establish his culpability there is therefore doubt in the circumstances of the case whether accused 2 was fully aware of the actions by the 1st accused.

For the foregoing reasons I find the inculpatory facts in this case are incompatible with the innocence of the 1st accused person. That cannot be the case when it comes to the 2nd accused. In the result I find the 1st accused guilty and is hereby convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. As for the 2nd accused the version narrated by the prosecution fall short of the threshold in ***(Miller v Minister of pensions (1947)2 ALL ER372)*** of proving the case against her beyond reasonable doubt. The mere fanciful probability entitles her to be acquitted of the offence. She is at liberty unless otherwise lawfully held.

SENTENCE

The right to life is jealously protected in terms of Article 26 of the Constitution of Kenya, 2010. It is provided that:

> **26.** ***Right to life***
>
> ***(1) Every person has the right to life.***
>
> ***(2) The life of a person begins at conception.***
>
> ***(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.***
>
> ***(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.***

Initially, the offence of murder is criminalised in terms of section 203 as read with 204 of the Penal Code, Laws of Kenya. The sentence prescribed is mandatory death sentence. The said sections provide as follows:

> ***203. Murder Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***
>
> ***204. Punishment of murder Any person convicted of murder shall be sentenced to death.***

However, the landmark decision in ***Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015 (2019) eKLR,*** brought about a paradigm shift as far as the aforementioned mandatory minimum sentences are concerned. The aforesaid case declared mandatory death penalty (cited above) and its commutation to life imprisonment by an administrative fiat, unconstitutional, null and void. This emerging jurisprudence equips the judge with some measure of discretion in determining appropriate sentences which are proportional to the individual circumstances of the case at hand.

By nullifying the death penalty, the Supreme Court seems to suggest that it is only the mandatory nature which was discarded. However, in appropriate cases, death sentence remains constitutional and may be imposed only on a person convicted of murder committed in the rarest of circumstances. By the same token the court is also equipped with discretion to vacate the death penalty in cases whose factual matrix exhibits extenuating circumstances or justifies the same.

In assessing an appropriate sentence, the court has to take into consideration the totality of mitigatory factors and sought to weigh them *vis-a-vis* the aggravatory factors at the same time seeking to strike a balance on the nature of the offence, murder with malice aforethought and the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done.

While the court is entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purpose of meting out the sentence, it is not proper for the court to set out to analyze the evidence as if it is meant to arrive at a decision on the guilt of the accused.

According to ***Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015****:*

> ***"[71] To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:***
>
> ***(a) age of the offender;***
>
> ***(b) being a first offender;***
>
> ***(c) whether the offender pleaded guilty;***
>
> ***(d) character and record of the offender;***
>
> ***(e) commission of the offence in response to gender-based violence;***
>
> ***(f) remorsefulness of the offender;***
>
> ***(g) the possibility of reform and social re-adaptation of the offender;***
>
> ***(h) any other factor that the Court considers relevant.***

In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in ***Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR,*** where the High Court held that the objectives include:

> ***"deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."***

In aggravation, the deceased appeared to have been brutally strangled without any significant provocation to trigger the unlawful act by the convict. Strangulation is rarely a momentary act, more likely it is continuous often and interrupted requiring moderate to considerable force with the hands or with the hands *aligture.* What is clearly evident the attack on the deceased occasioned fatal actual bodily harm which in all respect is homicide contrary to section 203 of the Penal Code. In the circumstances the convict intended at least to cause death or to do grievous harm.

Further in aggravation is the fact that precious human life was lost unnecessarily and the deceased right to life terminated prematurely. The court will not lose sight of the sanctity of human life and that lost human life can never be replaced. In any event no amount of compensation can bring back lost life.

This court is worried by the prevalence of murder cases in this region. What is disheartening being that such murder cases are being committed by persons of all ages save for children. The mind boggles as to why such persons readily resort to violence at the slightest provocation or at no provocation at all.

The accused person by unnecessarily resorting to violence against his own nephew acted in a barbaric manner occasioning the death of the deceased. The court frowns at such violent criminal conduct. We should show displeasure at such violent conduct leading to loss of life by the corresponding sentences imposed.

The circumstances in which the crime was committed and the nature of the crime far outweigh the mitigatory features advanced by the convict. The offence as observed correctly by counsel for the state and vulnerability of the victim based on age inevitably tilts the sentencing scales towards the imposition of a custodial sentence. The sentence that befits the aggravating nature of this case is 18 years imprisonment.

It is so ordered

14 days right of appeal

DATED, SIGNED AND DELIVERED AT GARSEN THIS 8TH DAY OF JUNE, 2021.

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr Omwancha Advocate for the Accused

Mr Mwangi Prosecution Counsel

The Accused in person