



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL CASE NO. 68 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**TERRY TERESIA ROSELINE NYAMBURA MBURU.....ACCUSED**

**JUDGMENT**

1. **TERRY TERESIA ROSELINE NYAMBURA MBURU**, is charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. The information shows that the alleged murder was committed on 24<sup>th</sup> December, 2014 at Runda Estate Thika Township whereby **ZACHARY NDWIGA NJAGI** (deceased) was killed.

2. Prosecution called in total of 8 witnesses.

3. The background of the occurrence of that fateful night is set out in the evidence of **David Kimani Njoroge, (PW2)**. He stated that he was an assistant lecturer at Mount Kenya University. He resided in Thika Town.

4. On the night of 24<sup>th</sup> December, 2014 he met the accused and the deceased at a club called Porkies in Thika town. This witness, at the invitation of the accused, joined the table where the accused was with the deceased and another person. This was at 3 a.m. They were all drinking alcohol. Indeed this witness said:-

***“We were drinking and making merry.”***

5. Sometime after closing time of that club the accused asked this witness (PW2) to give her and her neighbour, the deceased, a lift home. PW2 on dropping the two at Runda Estate Thika Town, he drove away.

6. Corporal of police **Esther Wangu, (PW1)** resided at Runda Estate Thika. She lived on the 4<sup>th</sup> floor. She was familiar with the accused as a resident although she did not know her name. PW1 also confirmed that she met the deceased on that apartment. The deceased lived on the same floor as her, the 4<sup>th</sup> floor.

7. At 7.30 am on 24<sup>th</sup> December, 2014, PW1 was informed of a lady who had stabbed a man in that building. PW1 was informed that the incident occurred at the accused's apartment. This is what she stated:-

***“When I got there I found the door partly open. I found the deceased seated leaning near the door behind it. He had slumped backwards. On the ground there was a lot of clotted blood. On the left side of his chest there was blood oozing. The man (deceased) was in a shirt and jacket...”***

***The accused was in the house. She was seated opposite the deceased. I asked her if she had done it and she just nodded her head...***

***At the scene there was a blood-stained knife on the table. There was also a broken Smirnoff broken (sic) bottle.”***

8. PW1 further stated that the Smirnoff bottle was empty and that other than (the broken bottle) the house was very neat.

9. PW1 also stated:-

**“... the accused looked drunk - she appeared drunk and was speaking like a drunk person.”**

10. On being cross examined, this witness confirmed that she did not find any other person in that house. Further, she re-emphasised that accused appeared drunk, she looked sleepy and her speech was slurred.

11. The post-mortem report showed that the accused died following one stab wound on the left between the 3<sup>rd</sup> and 4<sup>th</sup> ribs. The government analyst report confirmed that the knife recovered at the scene was stained with human blood and the DNA profile generated from that blood matched the DNA of the deceased.

12. The accused in her defence stated that it was the deceased who grabbed the knife which was on the table and as they struggled she realised the deceased had stopped struggling and was holding his chest. It was then accused said she saw blood stains on accused's chest.

13. I find that from the evidence adduced the prosecution proved that the deceased died and that that death was caused by the deceased. It will be recalled that when PW1 went to the scene he inquired from the accused whether she had stabbed the deceased and she, the accused nodded her head. I might add nodding is a sign of agreeing.

14. The accused raised the defence of self-defence or provocation.

15. PW2, who spent the best part of the night, or early morning hours of 24<sup>th</sup> December, 2014 in the company of the accused and deceased, while they 'made merry' stated while being cross examined that he did not get the impression that the accused and deceased had a romantic relationship.

16. The accused narrated, in her unsworn defence that at 4.30 pm on 23<sup>rd</sup> December, 2014 the deceased, who was her neighbour residing on the 4<sup>th</sup> floor of the apartment, went to her house on the 2<sup>nd</sup> floor. He found her watching a movie. Deceased, who had earlier on talked to accused on phone, arrived at her house with a bottle of Smirnoff whisky. They drank while they watched the movie. Later, they both went to Porkies Club. Accused confirmed that PW2, at her request did join their table. The deceased purchased for her, the accused, two bottles of Heineken. They all drunk alcohol and also ordered for food. Accused also confirmed that PW2 gave her and the deceased a lift back to their apartment accused then stated:-

***“Zachary (deceased) lived on 4<sup>th</sup> floor while I lived on 2<sup>nd</sup> floor. Deceased went to his place...***

***Eventually I went to my house. I was drunk. So was Zachary.”***

17. Accused said that on entering her house she did not lock the door. The deceased came to her house and retrieved his drink that was in her fridge. She said she sat down on the sofa-bed and fell asleep. She said:-

***“I slept completely then I realised that someone was on top of me, my trouser unbuttoned and the deceased inserted his fingers in my private part. He was naked waist down.”***

18. Accused stated that she then pushed the deceased away from there and that the deceased said:-

***“You can't have my drinks for free.”***

19. That the deceased picked the Smirnoff bottle and she too grabbed it. The bottle fell and broke. The accused said:-

***“He pushed me and then pulled hard on my trousers. There was fruits on the table and a knife which the deceased grabbed and we struggled as I wanted him out...”***

***Suddenly, I saw he had stopped struggling and held his chest. He went to the door and sat down. I did not know what was happening. I saw blood stains on his chest and blood oozing from his chest.”***

20. Self-defence was discussed by the Court of Appeal in the case of **LUCY MUENI MUTAVA VS. REPUBLIC (2019) eKLR** thus:-

***“Our position is further fortified by the case of VICTOR NTHIGA KIRUTHU & ANOTHER VS. R [2017] eKLR wherein this Court while discussing self defence stated:-***

***“The principles that have emerged from these and other authorities are as follows:-***

***(i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or one's property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.***

***(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be***

reasonable.

(iii) *It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.*

(iv) *The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.*

(v) *What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.”* [Emphasis added]

21. The accused also raised the defence of provocation. Provocation, as a defence to a charge of murder, is provided under **section 207 and 208** of the Penal Code, Cap 63 which is as follows:-

*"207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.*

*208(1) The term 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.*

*(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.*

*(3) A lawful act is not provocation to any person for an assault.*

*(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.*

*(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.”*

22. The Court of Appeal in the case of LUCY MUENI MUTAVE VS. REPUBLIC (supra) considered the defence of provocation and stated:-

*“Provocation is a defence available to a person who by his/her actions causes the death of another and is faced with a charge of murder. Provocation was succinctly defined in the case of DUFFY [1949] 1 ALL ER 932 as:-*

*“Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...”*

*See also Section 208 of the Penal Code. The person relying on the defence simply states that at the time he committed the offence he was under a diminished capacity and acted in the heat of anger or passion. See ELPHAS FWAMBA TOILI VS. R [2009] eKLR.*

*It therefore follows that for such a defence to suffice two conditions must be satisfied as deduced by this Court in PETER KING'ORI MWANGI & 2 OTHERS VS. R [2014] eKLR namely:-*

*‘The “subjective” condition that the accused was actually provoked so as to lose his self-control; and*

*The “objective” condition that a reasonable man would have been so provoked.’”*

23. Provocation as a defence was also considered in the case of VMK V. REPUBLIC (2015) eKLR where the Court of Appeal sitting in Mombasa discussed the defence of provocation in great detail and as follows: -

*“Provocation was defined in the case of DUFFY {1949} 1 ALL ER 932 as:-*

*‘Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind...’”*

24. Does the accused's defence stand the scrutiny of the evidence before court?

25. It will be recalled that the accused stated that after she was aroused from her sleep she said the deceased was naked waist down. That, however is not supported by the prosecution's witnesses and nor was it the subject of cross-examination of those witnesses.

26. **Clement Munyua Mureithi, (PW3)** who went to the scene on the 24<sup>th</sup> December, 2014, at 8.00 am together with **Lewin Njagi Itumbi, (PW4)** found the deceased dead inside the accused house but how they described the deceased is significant. They found deceased was fully dressed, his clothes were intact and PW4 said that the deceased was belted up and his jacket was unzipped.

27. That evidence by the prosecution witnesses was not subjected to cross examination. Having not been subjected to cross-examination the court is entitled to presume that it was not disputed by the accused. That evidence, in my view, was not displaced by the accused's unsworn testimony that the deceased was naked waist down. That defence by accused that she was warding off the deceased's unwarranted sexual advance is for that reason unsustainable.

28. The knife, the murder weapon was found by PW1, the police corporal, on the table. Indeed, this witness stated that apart from the broken bottle the accused's house was "very neat".

29. It should also be recalled that PW2, who spent the better part of the night and early morning of 24<sup>th</sup> December, 2014 in the company of the accused and the deceased did not detect a romantic relationship between the two of them.

30. The most significant and incriminating evidence which I note is that, the deceased was stabbed to the chest with a knife which the accused accepts was on her table, in the sitting room; and the evidence adduced by the accused does not suggest she was in danger, this is in view of the fact that the deceased was found fully clothed and belted up. There therefore was no reason for accused to seek to defend herself nor to feel provoked.

31. The next issue to consider is whether the defence of intoxication is available to the accused. **Section 13** of the Penal Code provides:-

***"(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.***

***(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -***

***(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or***

***(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.***

***(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.***

***(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence***

***(5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs."*** (note emphasis)

32. The evidence before court does not show the accused was intoxicated to the sense seen in **Section 13(2)(a) or (b)** reproduced above.

33. Although PW1 stated that the accused was drunk and her speech was slurred the accused had the sense of mind, after stabbing the deceased to go to her next door neighbour, who was known as baba Allan. This neighbour, **William Mbuti, (PW7)** said that the accused on calling for him three times she told him:-

***"Please come I have stabbed him."***

34. PW7 on going to accused's house found deceased on the floor. He later requested someone else to assist on that situation.

35. PW3 stated that when he went to accused's house and found deceased had died he said the accused was standing at the corner of her house.

36. What the above shows is that the accused's intoxication does not fall within the provisions of **Section 13** of the Penal Code. Her intoxication did not affect her *mens rea*. A case in point is **JOHN KABERIA NJOROGE VS. REPUBLIC (1988) eKLR** as follows:-

***"In the case of MICHAEL SHEEHAN AND GEORGE ALAN MOORE, (1975) 60 Cr. App. R. 308 at page 312 Geoffrey Lane, L.J. observed:-***

***"In cases where drunkenness and its possible effect upon the defendant's mens rea is in issue, ...the mere fact that the***

*defendant's mind was affected by drink so that he acted in a way in which he would not have done had he (sic) been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent. The jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."*

37. The fact the accused had taken alcohol does not assist the accused. I make a finding that the accused in stabbing the deceased, she must have known that, that act would cause death or grievous harm. I am therefore satisfied that malice aforethought was established in this case.

38. I find that the prosecution has proved the case against **TERRY TERESIA ROSELINE NYAMBURA MBURU** beyond reasonable doubt and I accordingly convict her of murder.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KIAMBU THIS 6<sup>TH</sup> DAY OF JULY, 2021**

**MARY KASANGO**

**JUDGE**

Coram:

C/A

Accused: Present

For the Accused : Mr. Mbiyu

For the Prosecution : Ms. Kathambi

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**