



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HCCR MURDER NO. 8 OF 2016

REPUBLICPROSECUTOR

-VERSUS-

JAMES CHESIKALI JOHN NATO ALIAS JOSEE/JOSPAT.....ACCUSED PERSON

J U D G M E N T

Introduction

1. The accused person herein, **James Chesikaki John Nato alias Josee/Josphat** was charged with the offence of murder contrary to **Section 203** as read with **Section 204 of Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence were that on 29/04/2016 at Kagio Township in Kirinyaga west sub-county within the Kirinyaga County, the accused unlawfully murdered Rose Wamboi.

2. He pleaded not guilty to the charge and the matter proceeded to trial with the prosecution calling a total of nine (9) witnesses to prove its case against the accused.

Prosecution's case

3. In summary, it was the prosecution's case that the accused and the deceased were friends who were living together in Kagio Town. On 29/04/2016, for unknown reasons, the accused viciously assaulted the deceased using a knife and stabbed her on the chest. The deceased consequently passed on due to excessive loss of blood. The prosecution maintained that the accused acted with malice aforethought in causing the death of the deceased.

4. PW1 was Dr. Karomo Ndirangu based at Kerugoya County and Referral Hospital. He conducted the postmortem examination on the deceased's body on 07/05/2016. The body was identified to him by James Mwangi and Benard Kariuki. James Wachira and police officer P. C. Pius Wambua were also present to witness the postmortem examination. PW1 found that the cause of the deceased's death was cardiopulmonary arrest secondary to massive internal haemorrhage bleeding, caused by a sharp object. He filled the postmortem form and produced it as P.Exhibit 1.

5. PW2 was Rose Wambui Njogu, a friend and neighbour of the deceased. She testified that on 29/04/2016, she had travelled to Kangundo and returned home the same day at around 10.00 p.m. She went to her house and heard the deceased talking to her husband, the accused person herein. The deceased opened the door for her. PW2 and the deceased chatted briefly before parting ways. The deceased told PW2 that she would return to prepare for them a meal after she finished talking to her husband. Later on, PW2 heard the deceased calling her in a loud voice and when she opened the door, the deceased fell down at PW2's doorstep and died. According to PW2, the deceased had an injury on the chest.

6. PW2 then took the deceased's mobile phone from her pocket and called one of the deceased's brothers. Two of the deceased's brothers came and together with other neighbours, they decided to rush the deceased to the hospital. The deceased died before the vehicle came to take her to the hospital. The police came, took photographs and then took the deceased's body to the mortuary. PW2 cleaned the blood where the deceased had fallen and the following day, she went and recorded her statement at Kagio Police Station.

7. PW3 was Francis Igeria Rukungu, a brother to the deceased. He testified that he received a call from PW2 through the deceased's phone on 16/04/2016. PW2 told him to go take his sister (the deceased) to the hospital as she had been stabbed and had collapsed. PW3 then informed his brothers, Bedan Kariuki and James Wachira who then rushed to the scene but found that the deceased had already died. PW3 did not enter the house after finding her sister's body on the ground. They then went to report the matter to the police.

8. PW4 was Obadiah Gatimu Ngiri, the caretaker of the house where the deceased was living. He recalled that on 16/04/2016, he was telephoned by his brother who asked him to go to the house of the deceased because she had been stabbed. PW2 also narrated to him a

similar account of how the deceased had been stabbed. PW4 called a police officer who then advised him to go take the deceased to hospital. On reaching the scene, he found other people there and saw that the deceased had been stabbed on the chest and was bleeding profusely.

9. PW5 was Margaret Waithera Thinwa, PW2's mother-in-law. PW2 was married to PW5's late son. She recalled that on 29/04/2016, she was telephoned by PW2 at around 5.00 p.m. who told her that the children wanted to go and visit her. The children went to visit her alone without PW2. At about 9.00 p.m., PW5's received a call from PW2 who told her that the deceased had been stabbed with a knife. PW5 telephoned James Mwangi, his son, and told him to go and report the incident to the police station. The following morning, PW5 was called by the police and asked to go record her statement. They went to the deceased's house with the police and found a knife with a blue handle. The police took the knife. According to PW5, the house was locked, and everything was in its place inside. They then went and viewed the deceased's body at the mortuary.

10. PW6 was Nahashon Kariuki Wanjohi. He recalled that on 02/05/2016 at around 10.00 p.m., the accused went to his house and told his to open the door. On asking him why he had come at night, the accused allegedly stated that he had disagreed with the person he was living with. The accused was known to him for a period of about seven (7) years. The accused spent the night in PW6's house and the next morning they went to till land together. Later that day at about 8.00 p.m., policemen went to PW6's house and arrested the accused as well as PW6. The policemen told him that the accused was a murderer and could stab him the same way he had stabbed his wife. PW6 stated that he did not know that the accused had a wife.

11. PW7 was CPL Joshua Mwongera who was the investigating officer. He recalled that on 29/04/2016 while on duty at Kagio Police Station, he received a call from PW4. PW4 informed PW7 that somebody had been stabbed at their plot and he wanted PW7 to go and take her to hospital. PW7 then advised him to get a vehicle and take her to the hospital. He then informed the OCS. He walked to the scene but before he got there, PW4 informed him that the person had died. PW7 proceeded to the scene with a colleague, P.C. Abdi Kadir. At the scene, he found a body next to the door of her house. He noticed that the deceased had a stab wound on the chest. There was a pool blood but there was no murder weapon. According to PW7, items like plates and cups were scattered inside the house and appeared as there was a commotion. The OCS then came, and the deceased's body was removed from the scene to Kibugi Funeral Home. On 30/04/2016, PW7 received a call indicating that there was a knife that had been found lying on the grass outside about one metre from the door of the house. He produced the knife as P. Exhibit 2. He also produced as exhibits a cream white bedsheet that they used to carry the deceased's body and a green t-shirt that the deceased was wearing. The government analyst report was produced as P.Exhibit 3.

12. PW8 was Dr. Joseph Thuo, a psychiatrist at Embu Level 5 Hospital. He recalled that on 09/05/2016, the accused was brought to the hospital by officers from Kagio Police Station with a request from the OCS to examine his mental status as he was a murder suspect. PW8 examined the accused and found that he was normal. He concluded that the accused was fit to stand trial. He compiled a report which he produced together with the request for the report as P.Exhibit 4a & b.

13. PW9 was Henry Kiptoo Sang, a government analyst based at Government Chemist Nairobi. He analyzed the body tissues and fluids for DNA analysis. He received a torn green t-shirt with pinkish flowers in a khaki envelop; a bedsheet, a knife wrapped with newspapers, a blood samples of the accused and the deceased's child in separate cotton wools. He was tasked with determining whether they had a relationship. He examined the items and found that the t-shirt was heavily stained with blood that was not of human origin. The bedsheets were had red spots which were tested, and they turned out not to be bloodstains. The knife was not bloodstained. PW9 prepared the report dated 20/06/2018 which he produced as P.Exhibit 4.

14. The prosecution then closed its case. This court considered the evidence tendered by the prosecution and on 13/02/2020 it found that a prima facie case had been established and the accused was put on his defence.

Defence case

15. The accused gave an unsworn statement. He stated that 26/04/2016 he had left his work and met the deceased at the market at about 1.00 p.m. The deceased was his girlfriend at the time. He stated that they were not living together and that they left and went to his house for 30 minutes before parting ways. According to the accused, he did not see the deceased again on that day until at later when he visited her in her house but did not spend the night. They then parted ways peacefully. The accused alleges that he does not know how the deceased died and that he is not the one who killed her.

Submissions

16. At the close of the defence case, both parties opted to rely on their respective submissions of no case to answer. The written submissions by the defence were filed on 12/11/2019 through his advocate on record. He maintained that the prosecution had not proved its case to the required standard. He submitted that there was no evidence that connected him to the crime and that suspicion by itself is not enough to make him a suspect let alone the perpetrator of the crime. On the other hand, written submissions by the prosecution were filed on 19/11/2019 in which the prosecution maintained that they had proved their case against the accused beyond reasonable doubt.

Issues Arising for Determination

17. **Section 203 of the Penal Code (Chapter 63 of the Laws of Kenya)** defines the offence of murder and requires proof of the following ingredients if a conviction on the charge of murder is to be secured:

- a. Proof of the death of the deceased and establishment of the cause of the death,
- b. Evidence of an unlawful act or omission on the part of the accused resulting in the death of the deceased, and
- c. Proof of malice aforethought on the part of the accused.

18. Guided by the above provision, it follows that the main issues for determination by this honourable court in this case are:

- a) Whether there is proof of the fact and cause of death of the deceased;
- b) Whether the accused caused the death of the deceased, and if so,
- c) Whether the accused had malice aforethought.

19. Before delving into the analysis of the above issues, I have noted that the evidence of PW3 and PW4 point to a different date with regards to when the subject offence was allegedly committed. Although the difference in dates was not brought out as a contentious issue by the accused, I am of the view that the same should be considered by this court to avoid occasioning a failure of justice.

20. As per the information dated 18/05/2016 and the testimonies of PW2, PW5, and PW7, the offence took place on 29/04/2016. On the other hand, the testimonies PW3 and PW4 indicate that the offence took place on 16/04/2016. I have perused the postmortem form and the P3 form that were produced as P. Exhibits 1 and 4(a) respectively. The two forms also indicate that the offence took place on 29/04/2016 and was reported to the police on the same day. I am therefore of the view that the offence took place on 29/04/2016. I am also of the view that the variance brought out by the testimonies of PW3 and PW4 are not fatal in the circumstances of this case and will not occasion injustice to the accused as the two were not the key witnesses in this matter and the prosecution's case would have still stood without their testimonies. The test is whether the accused has suffered any prejudice. I find that he has not as he has not raised it in his submission. The error on the date by the two witnesses has not occasioned a miscarriage of justice and is therefore ignored.

Analysis of Issues

a. Proof of the fact and the cause of death of the deceased

21. The death of the deceased was proved by the testimonies of PW1, PW2, PW3, PW4, PW5, and PW7 who all saw the lifeless body of the deceased. It is therefore not in dispute that the deceased died.

22. On the issue of the cause of death, PW1 produced a postmortem form dated 07/05/2016 as P. Exhibit 1 which confirmed that the deceased died of cardiopulmonary arrest secondary to massive internal haemorrhage bleeding, caused by a sharp object. From the nature and severity of the injuries that the deceased suffered before her demise, it is my view that there is no way she died lawfully. As such, the prosecution successfully proved the proximate cause of the deceased's death was an unlawful act caused by unlawful means.

b. Whether the accused caused the death of the deceased

23. It was the prosecution's case that the deceased had a domestic dispute with her boyfriend, the accused herein, who got annoyed and attacked her with a sharp object which inflicted a fatal injury on her chest. The basis of the prosecution's case against the accused was hinged on the evidence of PW2, the deceased's neighbour and friend. The law on the identification evidence of a single witness is clear. It has to be treated with the greatest care. In the case of **Kiragu v. Republic [1985] eKLR** the Court of Appeal held as follows:

"It is trite law that subject to certain well known exceptions a fact may be proved by the testimony of a single witness however in exercise of its duty this Court has to satisfy itself that in all the circumstances of the case, it is safe to act upon it."

24. This court is therefore called upon to determine whether there was any other evidence, be it circumstantial or direct, pointing to the guilt of the accused, from which the court can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error. (See: **Abdala bin Wendo and Another -vs- R (1953) 20 EACA166**)

25. In this case, the question that then begs determination is whether the testimony of PW2 is reliable and free from the possibility of error. She testified that her house was next to the deceased's house. On the material day, she returned home at around 10.00 p.m. and heard the deceased and the accused talking. She called the deceased who opened the door for her and they chatted briefly before parting ways. Later on, she heard the deceased scream and on opening the door, the deceased collapsed on the ground and died. Immediately after this, PW2 screamed for help and telephoned several people including PW3 and PW5. In my view, the response of PW2 in the circumstances makes her testimony believable.

26. It was also the accused's submission that since PW2 never saw him on the material night, her evidence was not enough to incriminate him. In my view, the conditions favouring a correct identification in this case are not difficult. The deceased was living with the accused and this fact was confirmed by the testimonies of PW2, PW3, and PW4. The accused also confirmed in his defence statement that the deceased was his girlfriend and that on the material day, he met with her during the day and later the same day, he went to her house at around 6.30 p.m. Noting that PW2 were friends and neighbours, it is believable that PW2 knew the accused and could recognize his voice. In addition, PW2's evidence was consistent and her testimony on what transpired after the deceased fell at her door was well corroborated by the evidence of PW3 and PW4 who arrived at the scene of the crime on the material night. In the circumstances, it is my view that PW2's evidence is reliable and that it is safe to act upon her testimony.

27. While neither PW2 nor any of the other prosecution witnesses saw how the deceased met her death, the circumstances of this case point to the culpability of the accused. The case against the accused is therefore purely based on circumstantial evidence. In the case of **Musili Tulo v. Republic [2014] eKLR**, the Court of Appeal stated as follows:

"Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with

the accuracy of mathematics.”

28. The case of **GMI v. Republic [2013] eKLR** which echoes the *locus classicus* case of **R. v. Kipkering Arap Koske & Another, 16 EACA 135** went on to set out the following principles as the requirements that the court should consider when the evidence linking an accused person to an offence is circumstantial. The court stated as follows: “

- a. **The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- b. **Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- c. **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 no one else.”**

29. This court must also consider a further principle set out in the case of **Musoke v. R [1958] EA 715** citing with approval **Teper v. R [1952] AL 480**, that:

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

30. Was the identification of the accused by PW2 through his voice sufficient to place him at the scene of the crime? Before considering the voice identification, this court must again be careful to ensure that the evidence tendered is safe and free from error. In **Simon Kiptum arap Choge & 3 others v. Republic [1985]eKLR**, the Court of Appeal set out the conditions for voice identification when it stated as follows:

“In relation to the identification by voice, care would obviously be necessary to ensure:

- (a) **that it was the accused person’s voice**
- (b) **that the witness was familiar with it and recognised it and**
- (c) **that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”**

31. Similarly, in *Karani vs. Republic,(1985)KLR 290*, the Court of Appeal addressed itself as follows:

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, than the complainant was familiar with the voice and that he recognized it and there were conditions in existence favouring safe identification.”

32. In **Vuva Mwachumbi Vs Republic (2016) eKLR** the Court of Appeal stated:-

“Of course in testing voice recognition in addition to considering the length of time the witness has not known the person and circumstances of their acquaintance one has to consider the words heard by the witness in order to determine whether they were sufficient to enable him correctly recognize his voice.”

33. In this case, the accused and the deceased were both known to PW2. They were all neighbours. It is therefore believable that the PW2 recognized the accused’s voice in the deceased’s house on the material night. After the deceased was stabbed, the accused was nowhere to be seen. The evidence of PW6 is of interest. The witness Nahashon Kariuki Wanjohi (PW6) testified that the accused had gone to his house at 10.00pm on 2/5/2016 and alleged that he had disagreed with the person he was living with and wanted to spend the night there. PW6 opened for the accused and he slept in his house until the next day. According to PW6 the accused informed him that he had disagreed with the person who he was living with. He went on to say that it is the accused who told him that he had fought with his wife. This evidence was not denied nor challenged. It is circumstantial evidence which shows that the accused had disagreed and fought with his wife. It shows that after the deceased was stabbed the accused avoided staying in his house. This is a fact which points to the guilt of the accused. The accused in his defence stated that he had his house at Kianjogu Plaza. He therefore had no reason to go looking for a place to sleep at the wee hours of the night. The accused was on the run after committing the murder. Considering the evidence adduced and circumstances of the case in totality, it is my view that the prosecution adduced sufficient direct and circumstantial evidence which was weighty and points at the guilt of the accused.

c. Whether there was malice aforethought?

34. Malice aforethought is the *mens rea* in murder. The prosecution had a duty to prove malice aforethought on any of the circumstances stated under **Section 206** of the Penal Code which **defines malice aforethought as follows:**

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- 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.

35. What can be deduced from **Section 206 (a) to (e)** of the Penal Code is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. The Court of Appeal in the case of **Bonaya Tutu Ipu & another v Republic [2015] eKLR** stated as follows:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in REX V. TUBERE S/O OCHEN (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...” ”

36. In the classic case of *Republic v Tubere S/O Ochen [1945] 12 EACA 63*, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used in causing death, the number of injuries inflicted upon the victim, the part of the body where such injury was inflicted, the manner in which the weapon was used, and the conduct of the accused before, during and after the attack.

37. The weapon used in this case was a knife and the body part targeted was the deceased’s chest. After the attack, the accused fled the scene. According to PW1 who performed the postmortem, the external body of the deceased had a deep small laceration, puncture wound on the left 2nd intercostal region that was about three (3) centimetres in length. Internally, the respiratory system had a massive haemothorax bleeding in the chest. The cardio-vascular system was punctured pericardio sac covering of the heart on the left anterior side. There was a punctured left petrical, one of the chambers of the heart with haemopericardial – bleeding covering the heart with some covering the chambers of the heart.

38. In addition, PW4 testified that the accused and the deceased were living happily together but would occasionally have small domestic quarrels in the house. According to PW5’s testimony, the accused went to her house on 02/05/2016, barely three days after the death of the deceased, and told her that he had had a disagreement with the person he was living with. It is not in dispute that the person he was referring to was the deceased. Taking all these facts into consideration, it is my view that the accused did intend to cause the death of the deceased or to cause her grievous harm. This connotes malice aforethought on his part. In the circumstances, it is my view that the prosecution proved malice aforethought against the accused within the meaning of Section 206(a) of the Penal Code.

Conclusion

39. From the foregoing, it is my view that prosecution proved its case against the accused beyond any reasonable doubt. Consequently, I find the accused person herein guilty of the offence of murder and convict him accordingly.

Dated, signed and delivered at Chuka this 4th October 2021.

L.W. GITARI

JUDGE

4/10/2021

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

4/10/2021