



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 18 OF 2014

REPUBLIC

VERSUS

SHEM WACHIRA NGUBIRU.....ACCUSED

JUDGMENT

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code; he is accused of having murdered **Paul Maingi Wachira** on the night of the 18/19th day of September, 2014 at Chorongi Village within Nyeri County; the accused person had a mental assessment test conducted by a Dr. M. Ricu Mwenda of Nyeri PGH and at the trial he produced the report which was marked as '**PEXh.2**' and he was found fit to plead and to stand trial; upon taking plea the accused entered a plea of **NOT GUILTY** to the charge.

2. At the hearing hereof the accused was represented by Learned Counsel Mr.Kingori whereas Mrs. Gicheha was the Prosecuting Counsel for the State; the prosecution called a total of five (5) witnesses in support of its case; upon the prosecution closing its case this court found the accused had a case to answer and he was placed on his defence; after his rights had been explained to him he elected to give a sworn statement of defence. Hereunder is a narration of each party's case.

THE PROSECUTION CASE

3. The prosecution submitted that it had the burden of proving all the elements of the offence of murder; which are the fact of death, that the death was unlawful, that the accused person participated and caused the said death and lastly the accused had malice aforethought;

4. The body was identified by Paul Maingi and Wachira Maingi two relatives of the deceased; **PW4** Dr Moses Njue confirmed that he conducted the post mortem on the deceased who died on 19/09/2014 and the cause of death was due to massive head injury occasioned by a blunt force; he produced the Post Mortem Report as '**PEXh.1**'; the prosecution submitted that the fact and cause of death of the deceased was proved beyond reasonable doubt by expert medical evidence;

5. The evidence of **PW1** Anne Wanjiru was on the night of 18/09/2014 at 2am whilst sleeping she received a call from one Samuel Ngatia and in the background she could hear screams and persons trying to break the door; Though scared she stepped outside and heard the screams were coming from her sister in laws

6. place; she managed to access the house and found the deceased lying in the bed in a pool of blood; he was taken to hospital but later succumbed to his injuries; she narrated to the court how the deceased's wife had no injuries yet she was also in bed; that the two had matrimonial problems and the deceased wanted to leave his wife since she used to beat him up.

7. **PW2** Christopher Wachira Maingi stated that whilst on duty he was called by his wife and informed about the deceased; upon finishing his shift he proceeded to the hospital and found that the deceased had succumbed to his injuries; the accused was a suspect because the previous night he had gotten into a fight with the deceased; he to confirmed that the deceased and his wife had matrimonial problems and the wife used to mistreat him and had at one time threatened the deceased with a knife;

8. **PW3** the wife of the deceased testified that the accused had issues with his wife who was the deceased's sister and when he had tried to intervene he had ended up being beaten by the accused; on that material night they had retired to bed for the night and at about 1am someone pointed a torch at her face and commanded her to wake up; by the torchlight she was able to see the accused who was accompanied by two other persons; they told her that it was her husband that they had come for; she also managed to touch the accused's head which had dreadlocks; she was led to the table room and heard the deceased screaming; nothing was stolen from the house and of the three persons she did not know who killed her husband;

9. **PW5** (No.61677) was the Investigating Officer and his evidence was that they received a report of a robbery at a village called Chorongi where a man and his wife had been attacked; the man had been rushed to Nyeri PGH but later succumbed to his injuries; on the 19/09/2021 accompanied by the DCIO they proceeded to the village and arrested the accused who had been identified by the deceased's wife as one of the persons who had attacked them; the wife had identified the accused and another suspect by the name Njogu who was never found; the wife identified the accused by his physical appearance in that he was thin and had dreadlocks and also through voice recognition; at the time of his arrest he was indeed sporting dreadlocks and he had a pending case in court CMCR Number 702 of 2014 where he had been charged with assaulting the deceased which case was later withdrawn.

10. On the participation by the accused person the prosecution's evidence was premised on the evidence of the deceased's wife **PW3**; in this instance the evidence adduced demonstrated that the deceased did not die from a natural cause and the circumstances pointed to an unlawful killing and left no doubt that the accused actively participated in the commission of the heinous act that led caused the unlawful death;

THE ACCUSED CASE

11. Counsel for the accused submitted that the court found that the accused had a case to answer and placed him on his defence; the accused's testimony was that he was a taxi driver and had known the deceased for a period of two (2) years; he had been arrested with twelve (12) other persons during a swoop on suspicion of being members of Mungiki; the others were later released; he had never met the deceased's wife until the day they met in court and in his life he had never sported dreadlocks; he was only arrested because he hailed from the same area as the deceased.

12. Counsel submitted that the evidence adduced by the prosecution witnesses did not satisfy the conditions for circumstantial evidence and that even if the accused were to remain silent the available evidence could not form the basis for a safe conviction; he urged the court to find the accused Not Guilty and to acquit him; case law relied on **Sawe vs Republic (2003) eKLR**.

ISSUES FOR DETERMINATION

13. After hearing the final submissions made by both counsel and having evaluated all the evidence on record this court has framed only one issue for determination;

(i) Whether the prosecution proved its case to the desired threshold of beyond reasonable doubt.

ANALYSIS

14. There are four (4) crucial ingredients which the prosecution must prove beyond reasonable doubt in order to prove the offence of murder; these ingredients are as follows;

(i) The fact of death

(ii) The cause of death

(iii) The death of the deceased was as a result of an unlawful act or omission by the accused person;

(iv) The unlawful act was committed with malice aforethought.

15. **On the fact and cause of death:** **PW4** Dr Moses Njue confirmed that he conducted the post mortem on the deceased who died on 19/09/2014 and he found that the cause of death was due to massive head injury occasioned by a blunt force; he produced the Post Mortem Report as '**PExh.1**'; from this medical expert evidence this court is satisfied that the fact and cause of death of the deceased was proved by the prosecution to the desired threshold of beyond reasonable doubt.

16. **On whether the death of the deceased was as a result of an unlawful act or omission by the accused person;** The prosecutions' inference of the accused persons' guilt is based on the following circumstances. **PW2** told the court that the accused had been involved in a fight with the deceased and had also been charged with an assault case which case was later withdrawn; this court notes that the court records pertaining to the assault case were not produced as evidence during the trial; secondly no witness who witnessed the fight between the accused and the deceased, was ever called to testify;

17. **PW3's** evidence was on identification was the only link that implicated the accused person as one of the persons who attacked her and the deceased on the fateful night and also that he participated in the commission of the offence of murder; her evidence on identification was that she was able to see the accused from the torch light the robbers were carrying; she also was able to touch the accused dreadlocks and she also recognized his voice; she also stated that she had previously seen the accused around her home looking suspicious;

18. This court reiterates that the only evidence against the accused was that of identification by **PW3**; this court is guided by the case **Wamunga vs Republic (1989) KLR 426** where the court had this to say;

'...a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it a basis of a conviction.'

19. The incident is said to have occurred at night at about 1am when both the deceased and **PW3** were asleep; when she was woken up she found the torch light being pointed at her and that she was able to recognize the accused; she also recognized him from his dreads and voice

yet there was no evidence on record that either of them had previously had a one on one interaction before; she never testified to the witness being a familiar person to her neither did any of the other prosecution witnesses confirm whether the accused and **PW3** were related by virtue of being in-laws; as for the torch light it is this court's considered opinion that it was not sufficient lighting for favourable identification particularly for someone who had woken up suddenly from slumber and found a torch light pointing directly at her; this court opines that her vision would have definitely been blurry and impaired;

20. The ideal position for identification would have been for an Identification Parade to have been conducted for the positive identification of the accused; it is apparent that the Investigating Officer when conducting his investigations never conducted one;

21. From the evidence adduced by **PW3** questions and doubts abound on how she was able to recognize or identify the accused who was a person not familiar to her; the lighting is found to be insufficient and the conditions and circumstances for identification are also found to have been unfavorable; lastly in the absence of an identification parade being conducted this court can safely conclude that the accused was not positively identified by **PW3**;

22. The facts and evidence on identification brought forth by the prosecution are found to be insufficient to prove that the unlawful act that led to the death of the deceased was committed by the accused; this court is satisfied that the same has not met the threshold to justify or support a conviction;

23. This court finds no need to belabor itself in addressing the last crucial ingredient of whether the unlawful act was committed with malice aforethought.

FINDINGS AND DETERMINATION

24. For the above reasons this court makes the following findings and determination;

(i) The prosecution is found to have failed to prove its' case against the accused to the desired threshold;

(ii) The accused **SHEM WACHIRA NGUBIRU** is hereby found **NOT GUILTY** of the charge of Murder c/s 203 as read with 204 of the Penal Code;

(iii) The accused is hereby acquitted of the offence of murder under the provisions of Section 306(2) of the Criminal Procedure Code and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 12TH DAY OF NOVEMBER, 2021.

HON.A.MSHILA

JUDGE