



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL CASE NO. 47 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CALVIN WAWERU.....ACCUSED**

**JUDGMENT**

1. Calvin Waweru is charged with murder contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence allege that on 23<sup>rd</sup> February 2014 at Isulu AP Camp, Isulu Sub-Location, within Kakamega County, he murdered Flavia Ongayo, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 9<sup>th</sup> September 2014. The hearing of the prosecution's case commenced on 8<sup>th</sup> July 2015. The prosecution called nine witnesses.

2. Violet Ayieta Ayuma testified as PW1. She stated that on 22<sup>nd</sup> February 2014, she was working at Bim's Bar at Khayega, with the deceased, when the accused person, who was a friend of the deceased, came to the bar at about 10.00 AM. They worked until 11.00 PM when they closed the bar. The accused then offered to take her and the deceased for an outing in Kakamega town. They travelled in two motorcycle taxis, which carried seven persons, including the riders. They got to Kakamega at about midnight, and went to a club known as Ripples. They remained at the club until 4.00 AM when they left on two motorcycles. The deceased rode on one with the accused, while the witness rode on another with her friend Peter. They parted with the deceased and the accused at Mukumu. She stated that their motorcycle was ahead of the other motorcycle throughout. The following day she got information, in the evening, that that the deceased had died.

3. Christopher Wendo testified as PW2. He was a motorcycle taxi rider. He stated that on 22<sup>nd</sup> February 2014, the accused who was his regular customer telephoned him, and asked him to pick him up at Khayega. He did not go, and a friend of the accused, called Peter, called him, and asked him to go to Khayega to pick the accused. He went there at 10.00 PM. He found him at Bim's Bar. They left at 11.00 PM, for Kakamega town. They were two women and two men. He took them to Ripples Club. They drunk and danced at Ripples until they left at 4.00 AM. All was calm at Ripples, for there were no incidents, no quarrels, nor fracas. He carried the deceased and the accused, and he took them to Isulu AP Camp. They arrived safely. The following morning Peter and asked him to take him to Isulu AP Camp, and when they got there he learned that the deceased had died in the house of the accused. He said that the accused asked him to record a statement with the police saying that they had had an accident on the way, but he did not do so. He later recorded a statement with the police at Malaika Police Station. During cross-examination, he denied drinking any beer or even soda at Ripples. When he took the deceased and the accused back from Ripples, they did not appear too drunk, and the deceased boarded the motorcycle without assistance. He denied causing any accident on the material night. He said that he was ahead of the other motorcycle and the same did not overtake him at any time.

4. Peter Ngoma Nyiro testified as PW3. He stated that he was an AP officer based at Ikolomani. On the material night he was at Bim's Bar with the accused. They decided to go to Kakamega town, and they left at 11.00 PM, after the bar closed. They were three women and two men. They travelled in two motorcycles. They ended up at Ripples Club, where they remained until 3.00/4.00 AM, when they left for home using motorcycle taxis. He stated that there was no problem of any kind at Ripples while they were there. One of the women was left at Kakamega. The accused and the deceased rode on one motorcycle, and he on the other, with the other woman. He stated that the motorcycle he was on overtook the motorcycle that was carrying the accused and the deceased at Mukumu. Each group went their own way, to Isulu and Ikolomani, respectively. He testified that the next morning at 5:00PM the deceased telephoned him, and informed him that he had sent a motorcycle rider to pick him up. The rider came, and took him to Isulu. The accused informed him, in the presence of another officer, that they had had an accident at Mukumu, where the deceased had fallen off the motorcycle, she got up and they had proceeded with their journey to his house. He stated that the accused told them that he saw blood oozing out of the deceased's ears, and he cleaned her up. The rider, PW2, also spoke, saying that the jacket that he had given to the accused had blood at the back. He stated that they later dispersed, with him going to work, and the accused later told him that he had discovered at 11.00 AM that the deceased had died. He said that he did not enter the house of the accused, and that he did not see the accused take PW2 aside.

5. Dr Dixon Mchana Mwaludindi testified as PW4. He was the pathologist who did the post-mortem on the body of the deceased. He said that the body had a blood stained blouse and no other clothes. There were three abrasions on the left eye bridge to the left, on the inner aspect of the left eye on the lower lid, and the left eye appeared dark. There were also non-extensive bruises on both upper lips. On the head, there

was extensive bleeding under the scalp from the middle to the back, and a hairline fracture from the right to the left side. There was bleeding under the covering of the brain involving both the front and back brain. He formed the opinion that the cause of death was severe head injury secondary to blunt force trauma. He stated that the blunt injury could have been caused by a fall or a blow.

6. Josephat Libusi Maina was PW5. He was the manager of Bims Bar at the material time. He was not at the scene on 22<sup>nd</sup> February 2014. He confirmed that he had information that the deceased had left the bar at 11.00 PM closing time, for Kakamega with the accused and others. She did not report to work the following day, and he got information she had died at one of the AP camps in Kakamega South.

7. No. 51639 Corporal Samson Otieno Awino was PW6. He was among the police officers who responded to a report that there had been an incident at the Isulu AP Camp, where a woman had lost her life. He proceeded there and confirmed that the report was true. He found the accused being interrogated by his superiors. The accused took PW6 and other officers to his house. They found the deceased lying on the bed dead. She had a blouse on the upper torso, and had nothing on the lower torso. When he looked closely at the body, he noted dried blood on her right ear. He did not see any visible injury on the body. Photographs were taken, and investigations commenced. The accused informed the interrogators that he had been together with the deceased at Khayega, during the night, atop a motorcycle they had hired. At one of the road bumps the deceased fell off the motorcycle, and sustained some bruises. They did not go to hospital; they simply went home instead. The accused had no blood on him. The witness did not see any weapon at the house of the accused.

8. No. 227903 APC Kenneth Matiba Machanure testified as PW7. He was on duty at Isulu Divisional Headquarters on 23<sup>rd</sup> February 2014. He noted that the door to the house of the accused was unusually locked at 8.30 AM. He went up to the house and called him out, and he answered that he had female company, and so PW7 left him alone. Later at about 11.30 AM, the accused came out of his house crying. When he and others enquired from him what was wrong, he invited them to go to his house to see his girlfriend as he did not know what was wrong with her. They proceeded to the house and found the deceased lying on her stomach. PW7 was with an officer called Corporal Musumba, who touched her right hand and announced that she was dead. He telephoned a Senior Sergeant Otieno and Inspector David, who also came to the scene. They contacted the regular police at the Malaika Police Station, and some officers came to the scene. He said that the upper part of the body of the deceased had a blouse on, while the lower part was naked, but covered with a blanket.

9. Mercy Ayuna Ongayo was PW8. She was a sister of the deceased. She had visited her on 22<sup>nd</sup> February 2014. They parted at about 6.30 PM. She was called the next morning to be informed that the deceased had died. She said that she did not know the accused person. She did not see him on 22<sup>nd</sup> February 2014.

10. The last witness was No. 1999014452 Corporal Ferdinand Musumba of the Isulu AP Camp. He got up on 23<sup>rd</sup> February 2014 at 5.00 AM. He left the camp for church at 6.00 AM, and did not come back until 10.00 AM. He sat around with PW7, when, at about 11.00 AM, the accused came out of his house running and crying, and invited them to go into his house to see what had happened to his girlfriend. When they entered the house they found the deceased lying on the bed dead. He touched her right leg and she did not respond. He saw a small blood stain on the pillow. Her body was cold, and he confirmed that she was dead. He summoned other officers to the scene, and later contacted the regular police at Malaika Police Station. A team from Malaika Police Station came to the scene. They took photographs of the body, and later removed it to the Kakamega General Hospital mortuary. He said that he did not see any blood on the accused person.

11. After PW9 testified, the prosecution indicated that it would be calling another seven witnesses. No other witness was availed by the prosecution, thereafter despite the matter coming up several times. Eventually the prosecution closed its case on 17<sup>th</sup> June 2019.

12. The accused person was found to have case to answer, and was put on his defence, in a ruling that was delivered on 29<sup>th</sup> November 2019.

13. The defence hearing happened on 4<sup>th</sup> February 2020. The accused person testified. He gave a sworn statement. He gave his name as Calvin Waweru Njoroge. He testified that on the material day, he was on duty at Isulu AP Camp. He checked out of duty at 6.00 PM. He met his friend, PW3, at Bim's Bar Khayega trading centre. He linked up with the deceased, who was his lover. When the bar closed at 11.00 PM, he left for Kakamega town with the deceased, two other women and PW3. They travelled in two motorcycle taxis. At Kakamega, they went to a club called Ripples. They drank and danced at the club until 4.00 AM, when they left. He testified that he had no dispute at all with the deceased, while at Ripples. They travelled back using the same motorcycle taxis. He rode on one with the deceased. PW2 was the rider. Near Mukumu Boys High School, their motorcycle hit a bump, and the deceased fell off the motorcycle, but she did not get hurt, and she said that she could go home. He stated that she fell on her left side. He stated that he could not tell whether her head hit the tarmac. The motorcycle taxi stopped, the deceased dusted herself. She had been sitting between the rider and him, but he said that he was not holding on to her. He said that at times she appeared to be falling asleep, and the rider would try to steady her. He said that the motorcycle did not fall, and that it was only the deceased who fell. He put the time at 5.00 AM. They got to the Isulu AP Camp safely. They were dropped at the gate, and he and the deceased got into the house and slept. He said that he did not have sex with her that morning, as both of them were too drunk. He was also not in a hurry as he was to spend the whole day at home, and he was to be off-duty the next day. He fell into deep sleep, only waking up again at 8.00 AM, when another officer called out at him. He did not wake up until 11.00 AM. When he tried to rouse the deceased he found that she was dead. He got out of the house and reported the matter to PW7. PW7 and PW9 came into his house, and confirmed that the deceased had died. He stated that he had had no disagreement with her. He said that all what he knew was that she fell off the motorcycle taxi. Police Officers from Malaika Police station came to the scene, took the body of the deceased, and removed a mattress and a pillow. He said that physically, the deceased did not have any injuries, adding that blood was coming out of her ears.

14. During cross-examination, he described the deceased as his lover and girlfriend. He said that they got very drunk that day, saying that he was the one buying the beer, and he spent between Kshs. 7, 000.00 and Kshs. 10, 000.00. He stated that the deceased fell off the motorcycle taxi near the Mukumu Hospital. He said he did not see her fall off, he only realised that she had fallen. He further said that he did not note any physical injuries on her, and after that she slept on the rider, and they went home. When they got to the house, she said that she was tired and wanted to sleep. He stated that the rider, PW2, did not talk about the deceased falling off the motorcycle taxi, saying that he lied. He said that the rest of the witnesses were not at the scene when she fell. He said that he realised that she had died when he tried to wake her up. He stated that he did not see any traces of blood on her clothes, and said he did not know where the blood PW4 talked about came from. The only blood that he saw was on his pillow. He conceded that he was the last person to be seen with the deceased, but denied injuring her. He said that he did not attend her burial, as he did not know where she came from, and, in any case, her family would not have wanted him to be

at the burial given what had happened.

15. At the close of the oral hearing, the parties agreed to file written submissions. The accused person did file his written submissions, complete, with the authorities that he relied on. I have gone through the same and noted the arguments made.

16. The elements of the offence of murder as defined in section 203 of the Penal Code, as the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought. Section 203 of the Penal Code states as follows:

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

17. The court in *Republic vs. Andrew Mueche Omwenga* [2009] eKLR,

(Maraga J) interpreted the provision as follows:

*“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. they are:*

*(a) The death of the deceased and the cause of it;*

*(b) That the accused committed the unlawful act which caused the death of the deceased; and*

*(c) That the accused had the malice aforethought.”*

18. On the fact of the death of the deceased, there is overwhelming evidence that she died. Her body was seen at the house of the accused by several witnesses. The accused himself confirmed it. PW4, the pathologist carried out the autopsy on her body. There is evidence beyond any doubt that she died.

19. On the second aspect of the crime, on the cause of the death, medical evidence was provided by PW4, the pathologist. He noted minor external injuries, which he described as abrasions on her face and non-extensive bruises on both her upper limbs. Internally, there was a hairline fracture on her head, and bleeding under the scalp. Cause of death was said to be a severe head injury, secondary to a blunt force trauma, consistent with a fall or blow.

20. The testimony of PW4, on the injury, appears to be consistent with that by the accused as emerged from his defence statement, as well as that of the officers who saw the body of the deceased in the house. There were no major external physical injuries, but blood oozed from her ears, or there was dried blood stains on her ears and minimal blood on the pillow. The only inconsistency was that PW4 said that the blouse he found on the body was bloodstained, the other witnesses did not see any blood on it. However, the said blouse was not put in evidence, so I cannot confirm the evidence of either of the two sides.

21. The third aspect is whether the death was caused by an act of the accused person. None of the witnesses connected the accused with the death. No one saw the accused attack the deceased, and inflict the injuries on her that caused her death. The only thing is that she died in his house, after she had been dropped there by PW2. None of the witnesses at the Isulu AP camp testified to hearing any commotion at the house of the accused person after PW2 left. No weapon was found in the house. None of the accused person's clothes were said to have been found bloodstained. There was no evidence of any struggle in the house. No injuries of any sort were found on the accused. There was nothing to suggest that the accused person visited any violence on the deceased.

22. The only worrying evidence is the testimony given by PW2. He was the one who ferried the accused and the deceased from Kakamega to Isulu. He denied that there was any accident along the way that would have led to fatal injury on the deceased. What the accused alluded to was not an accident as such. His case was that the deceased was quite drunk, she was sleepy and fell off the motorcycle after it hit a bump. The motorcycle itself did not lose control and crash. The accused and the deceased had been drinking since 10.00 PM up to 4.00 AM. That would suggest that they were quite drunk. The deceased had been at work for the greater part of 22<sup>nd</sup> February 2014, and was up and about to the wee hours of the morning of 23<sup>rd</sup> February 2014. The proposition that she was drunk and weary would be plausible, and that she could fall off a motorcycle upon it hitting a road bump in the small hours of the morning of that fateful day. The question would be, why PW2 would lie. Well, for self-preservation. If he admitted the incident, then he would be liable, both criminally and in civil law. It would place his job at risk. I find the defence statement consistent with medical evidence, which would make the testimony of PW2, on whether there was a fall or not, unreliable.

23. The fourth factor relates to malice aforethought. malice aforethought is defined in section 206 of the Penal Code, Cap 63, Laws of Kenya, 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, where 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.”

24. Malice aforethought is the intention to be inferred from either some conduct or facts. Malice aforethought is linked to the third factor, the role of the accused in the causation of the death of the deceased. In this case, the act or conduct leading to the death of the deceased is not directly linked to any conduct on the part of the accused person. The events from Bims Bar to Ripples Club, to the journey to Isulu do not disclose any form of misconduct on the part of the accused person with respect to the deceased person. As stated above, even after the two got into the house, no commotion was reported by any of the witnesses. There is no evidence from the house of the accused that suggested that the act that caused the death was committed in that house. As stated above, the only thing linking the accused to the death is that fact that the deceased died in his house. Beyond that there is nothing to prove that the accused had anything to do with her death.

25. It may be said that the accused had no motive to kill or injure the deceased. The evidence placed before me pointed to a cordial relationship or existence between the deceased and the accused on the material day, and no evidence was placed before the court of a history of hostile or frosty relations between them. It may be argued, therefore, that there could have been no motive at all for him to kill the deceased. Motive was said, in *Libambula vs. Republic* [2003] KLR 683, (*Tunoi, O'kubasu JJA & Onyango Otieno Ag JA*) to be what makes a person do a particular act in a particular way. However, motive is immaterial in criminal liability. That is stated in section 9(3) of the Penal Code, and has been pronounced to be so in several cases, including *Libambula vs. Republic*, [2003] KLR 683, (*Tunoi, O'kubasu JJA & Onyango Otieno Ag JA*) but it is relevant where the prosecution's case is built around circumstantial evidence. See *Kabiru vs. Republic* [2007] 1 EA 107 (*Bosire, Githinji & Deverell JJA*). The instant case is founded on circumstantial evidence, and, therefore, the need to find the motive for the accused person's conduct should arise. There is no plausible explanation for why the accused would have killed the deceased.

26. Overall, I am not persuaded that the prosecution has mounted a case that proved that the accused person was responsible for the death of the deceased. I am, in the circumstances, moved to find that he is not guilty of the offence charged, and I accordingly acquit him, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya, of the murder of Flavia Ongayo. He shall be set free from remand custody, if he is being held in custody, unless he is otherwise lawfully held.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10<sup>TH</sup> DAY OF DECEMBER, 2021**

**W MUSYOKA**

**JUDGE**