



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 52 OF 2015**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**BENARD KIBET RONO.....ACCUSED**

**JUDGEMENT**

1. The accused was charged with the offence of **Murder Contrary to Section 203 as read with section 204 of the Penal Code**. The particulars of the offence are stated that on the 13/7/2015 at Kiptendee Village, Barut Location in Nakuru District within Nakuru County, he murdered Ann Cherotich. He denied commission of the offence

2. The prosecution called (9) nine witness.

**Section 203 of the Penal Code defines murder** as the unlawful homicide committed with “malice aforethought”, the killing of a human being by another by any unlawful act or omission.

3. Under **Section 206**,

**Malice aforethought** is deemed to be established by evidence proving anyone of the following circumstances:

(a) *an intention to cause the death or to do grievous harm to any person whether that person is the person actually killed or not.*

(b) *knowledge that the act omission causing death will probably cause the death or grievous harm to some person, whether or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is cause or not or by a wish that it may not happen.*

(c) *an intent to commit felony.*

4. Against the above legal provisions, I proceed to analyse the evidence adduced before the court.

**Dr. Nyalungua** – PW5, a government pathologist at Nakuru Provincial Hospital produced the post mortem examination report as PExhibit.

His opinion on the cause of death of the deceased was hypoglycemic shock due to massive blood loss due to injury to the left artery due to a sharp force.

5. **PW1 CA**, eight years old daughter of the deceased testified that the accused was their neighbor and therefore knew him well, that on the fateful night, he went to their house and stated that he wanted to kill her mother, took a knife from the house and pushed her out of the house. She testified that she followed the accused and her mother (deceased) out of the house, and saw the accused stab the deceased. She identified the knife and the shirt he was wearing. It was her evidence that the accused used a telephone handset light in the house from which she was able to identify him as he had gone to the home before and had entered therein through a window.

It was her firm evidence that she knew the accused well.

6. **PW2** was the father of the deceased. He testified to have known the accused as a neighbour. It was his evidence that he was sleeping in the same house with the deceased and her children including PW1 when he was woken by screams from the children and upon going out, found the deceased lying down with blood shouting “Benard ameniua” (“Benard has killed me”). He testified that there was moonlight and

he could see, and saw the accused run past him. It was his evidence further that the deceased's children told him that it was Bernard the accused who cut the deceased.

7. **PW3, PW4, PW7 and PW8** were all neighbours of the deceased and the accused. They answered the deceased's children screams and went to their house where they found her lying outside home with cut wounds on the hands and head. They took her to hospital where she died. They did not see the accused that night.

PW7 and PW8 testified to have heard the deceased shouting that it was Ben who had stabbed her.

On cross-examination, PW8 testified that she knew three people called Ben, and that the deceased did not specify which of the three people called Ben stabbed her.

8. **PW5** accompanied the police officers to the accused house who was also a neighbor. He testified that under the accused's bed, they recovered a white shirt with blood stains, upon which the accused was arrested. This was also the testimony of **PW8** who accompanied the police officers to the accused's house where the shirt with blood stains was recovered.

9. **PW9** was the Investigating Officer, Cpl Peter Atek. With other officers they visited the scene of crime about 3:00AM on the 3/7/2015. He testified that they found the accused having been arrested by the public from allegedly stabbing the deceased; then proceeded to his house where upon a search, found a blood stained shirt under his mattress. They arrested him and booked him at Kaptembwa Police Station. They went back to the scene and recovered a blood stained knife hidden at the shamba.

10. **PW 10, Sgt. Edwin** attended the post mortem examination. He also produced to court the blood stained shirt and the knife as exhibits 1 and 2. He testified that the said items were not put through a DNA profile examination.

11. It is upon the above prosecution evidence that the accused was placed on his defence. He elected to give an unsworn statement of defence. His evidence was one of innocence of the events that took place during night of 29/7/2015.

He denied knowledge at all of the death /murder of the deceased who he testified to have been his neighbor, but denied meeting or seeing her on the material day or night.

12. **The issues that present themselves for determination are:**

- (1) *Whether the accused was positively identified as the person who stabbed the deceased to death.*
- (2) *Whether the ingredients of murder were proved against the accused person to the required standard of proof.*

13. The accused advocate Mr. Nanda relied on his written and filed submissions and authorities provided to the court.

At all material times, the legal onus is always on the prosecution to prove its case beyond reasonable doubt. An accused person is, under our legal system presumed to be innocent until the Contrary is proved.

**Section 107(1)** of the Evidence Act, Cap 80 provides that

*“Whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts, must prove those facts exist”*

**See Republic – Vs- Joseph Shitandi & another (2014) e KLR** where the court held that the duty or burden of proof is on the prosecution to establish or tender evidence that connects the accused to the crime.

14. From the totality of the evidence on record, it is evident that the deceased and the accused were not strangers to each other, and to the prosecution witnesses, all having been neighbours and known to each other prior to the incident hereof.

However, the only witness who testified to having been present, and saw the act that lead to the deceased's death was **PW1 the eight year old daughter** of the deceased.

The rest of the 9 witnesses answered to the deceased's children and family screams who came to the scene and found the deceased lying outside the door of her house, in a pool of blood and shouting that she was dying from injuries inflicted by one “Ben/ “Ben of Jessica”.

15. **Evidence of Identification.**

The Court of Appeal in the Case **Francis Kariuki Njiru & 7 Others Vs. Republic Cr. Appeal NO. 6 f 2001 (UR)** rendered that

*“the law on identification is well settled, and the court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity at all.....”*

16. Identification of a suspect and a positive identification is central to conviction of an accused on any criminal charge. It is pivotal element that must be proved beyond any reasonable doubt – **Anthony Mutua Nzuki Vs. Republic (2018) e KLR, Republic Vs. Frankline Mugnchi Miriti & Another (2019) e KLR.**

I have rendered earlier that the only eye witness to the commission of the offence was **PW1** an eight (8) year old daughter of the deceased. The minor was taken through a voire dire examination by the court (Odero J). She was a class 4 pupil at (particulars withheld).

The court was not satisfied that she understood the nature of an oath, thus she gave unsworn evidence and was duly cross examined by the defence counsel.

17. Her evidence was plain, straightforward and cogent. She testified to the events of the fateful night, the 13/7/2015 as follows:

*“I know Anne Cherotich deceased. She was my mother. I know the accused Bernard Kibet. He is here in the dock (points at accused). He was my neighbor. I recall 13/7/15 at night. I was asleep. The accused came and pushed our door. I was in the house with my mother and other siblings. Accused entered the house and sat on the bed. I was not asleep. The accused removed his phone and shone it. He removed a knife. Accused said he wants to kill my mother she refused. He held my mother’s hand and pulled her outside. I followed. He stabbed my mother. I heard my mother cry. The accused stabbed my mother and ran away. I screamed and called “guka” my grandfather. Other neighbours came. They put my mother in a vehicle and left. We remained at home. Later my mother died. The accused had a knife. This is the knife. The accused had a white shirt, long stripped sleeves. I can identify the shirt – MFI 2... I know Ben. I saw him. The lights were off. The accused has come to our house before. I know his voice. He is Ben. The accused had a phone. He shone it in our house and I saw him.....”*

18. On cross examination, this minor witness averred that

*“I know Ben the accused. He lives in Kiptende. I lived with my mother and siblings. Ben was our neighbor. The accused had a phone, he shone it inside our house. I saw him. The accused picked the knife in our house. It was our knife. He kicked my mother’s hand and pulled her out of the house. One time accused came into our house through the window. I was at home”.*

19. The above evidence was corroborated by several witnesses – PW2, PW4, PW7 and PW8. They testified to having heard the deceased mention the name “Ben” as the person who stabbed her. A blood stained white shirt was recovered at the accused’s house by PW7 and 8 to which the minor witness (PW1) identified in court as the one the accused was wearing on the material time.

20. The defence submitted that no prima facie case was established to link the accused to the commission of the offence. This was in reference to the fact that the phone that the accused used to torch while in the deceased house was not produced as evidence to prove how PW1 recognized or identified the accused.

Further, the matter of existence of two or so persons named “Ben” in the neighborhood was raised, alluding to no concrete evidence as to which “Ben” committed the crime.

21. In addition, it was submitted by the defence that isolation of the accused was suspicious as he was not arrested at the scene of crime but from his house. Evidence was lead that one other neighbour called “Ben” came out to answer to the screams, while the accused did not do so. One may then wish to ask, why Ben, the accused, being a neighbour, failed to come out when the other neighbours did, in the face of commotion and screams from the deceased’s house.

22. Even if that were not so, what explanation could be given to finding of the blood stained white shirt in the accused’s house, under the bed/mattress?

The accused steered away from explaining the above, only stating that he had not seen the deceased on the material day and night.

The defence submits that there is no clarity on how the accused was singled out as the murder suspect, and submits it was out of malice, yet no evidence of malice was adduced by any of the witnesses, or ill-will, known to exist between the accused and the deceased.

23. Malice is the desire to harm someone, ill-ill, wrongful intention to cause pain, injury or distress to another.

**Section 206 of the Penal code** gives the legal definition and ingredients of malice aforethought – see paragraph 3 of this judgement.

24. There having been no evidence of malice from the witnesses who were all neighbours to the accused, I find that submission misplaced.

Evidence of the star witness, **PW1** was not challenged in substance or at all. She knew the accused person, not just as a neighbor, but someone who had been in their house before this unfortunate incident, and one she saw pull out the deceased from the house, and stab her with a knife that he picked from their house. Her evidence cannot be wished away.

The minor having been in class four, and nine years old could not, in my considered opinion, have held any grudges or ill-will or malice against the accused, and none was testified to.

25. I am minded that minor contradictions and inconsistencies that do not go into the root of the prosecution’s evidence ought not invalidate valid findings or judgment. **Simon Ekaredi Omoto Vs. Republic (2019) e KLR, and in RE: Estate of Julius Mimano (deceased) (2019) e KLR.**

26. The court is enjoined to carefully examine evidence of identification or recognition, and to satisfy itself that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of conviction – **Wamuuga Vs. Republic (1989) e KLR 424, Hassan Abdalla Mohammed Vs. Republic (2017) e KLR.**

Ultimately whether or not the murder weapon, the kitchen knife was picked from the deceased’s house, or that the accused removed it from his pocket, the said knife was used to stab the deceased. The said contradictions in my view are minor and not grave enough to invalidate the cogent evidence tendered by PW1 and other prosecution witnesses.

27. Further, the court in **John Nyaga Njuki & 4 others Vs. Republic (2002) e KLR** rendered that what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”

28. In his unsworn defence, the accused admitted having known the deceased as a neighbor, but denied committing the offence.

29. The offence of **Murder as defined under Section 203 Penal Code** is the killing of a human being by another by unlawful means or omission with malice.

The intention of the offender to cause the death or grievous bodily harm, as well as the knowledge that the act of omission would probably cause death must be proved to sustain a conviction – **Section 206, Penal Code.**

30. The events leading to the commission of the offence are material. The accused visited the deceased house late at night, about 1:00 AM on the fateful night. He had earlier been in the said house, and had entered through the window (PW1). The deceased and her family were asleep. The deceased grandfather (PW2) was also in the house, asleep. He was heard shouting in the house that he would kill the deceased, and indeed pushed her outside where he perfected the threats by stabbing her with the kitchen knife. He knew or ought to have known that the knife was a dangerous weapon that would cause harm to any person upon whom it is used.

31. The **Court of Appeal in Nzuki Vs. Republic (1993) KLR 171** rendered “*that before an act can be murder it must be aimed at someone and in addition it must be an act committed with*

*(a) An intention to cause death or grievous harm and knowledge that by the offender that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse-----”*

Intention is deduced from the conduct of the offender. I have already stated the accused’s conduct above.

32. As held in the case **Nanyonjo Harriet & Another Vs. Uganda Cr. Appeal NO. 24/2002**, the Supreme Court of Uganda,

*“In cases of homicide, the intention and/or knowledge of the accused person at the time of committing the offence, is rarely provided by direct evidence. More often than not the court finds it necessary to deduce intention or knowledge from the circumstances surrounding the killing, including the mode of killing, the weapon used and the part of the body assaulted and injured”.*

33. The post mortem examination report on the cause of the deceased’s death, as stated by the pathologist (PW5) was shock due to massive blood loss due to injury to the left artery with a sharp object. This in mind confirms that the accused had the intention and knowledge that a knife stab at the left side of the deceased’s arm would cause grievous harm. No contrary intention and/or knowledge can be deduced from such an act that was perpetuated without any proven provocation or defence.

It was thus unlawful and voluntary, and the accused could foresee the natural consequences of his action – **Republic Vs. David Njoroge Njogu (2019) e KLR, and Republic Vs. Ruth Wanjiku Kamande (2018) e KLR.**

34. For the foregoing, I find that the prosecution has discharged its burden of proof to the required standard, beyond reasonable doubt, that the accused, and no other, murdered the deceased, with malice aforethought.

The accused is therefore convicted for the offence as charged Mitigation by the accused shall be taken on a date to be taken.

**Delivered, signed and dated at Nakuru this 20<sup>th</sup> Day of February 2020.**

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**J.N. MULWA**

**JUDGE**