



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL CASE NO. 3 OF 2018

REPUBLIC.....PROSECUTOR

=VERSUS=

RUTH KAWAWA.....ACCUSED

RULING

1. This is a ruling on the question arising at the ***Close of case for the prosecution***, whether, on the evidence presented before the court, there is established a ***prima facie*** case to warrant the calling of the accused to make his/her defence for the charge of murder contrary to section 203 as read with 204 of the Penal Code.

2. Section 306 of the Criminal Procedure Code provides therefor as follows:

“306. Close of case for prosecution

(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

(3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence.

[Act No. 33 of 1963, First Sch., Act No. 20 of 1965, s. 33, Act No. 5 of 2003, s. 86.]”

SUBMISSIONS

3. The Counsel for the accused when invited by the court to make submissions under section 306 of the Criminal Procedure Code indicated that he did not wish to make any submissions on case to answer and the Counsel for the DPP urged the court to consider the evidence presented before it.

The evidence

4. The Prosecution case is set out in the evidence of Investigation Officer PW6 Cpl. John Kajara alleging attack on the complainant by the accused by knife stabs in the stomach with retaliation by the deceased as follows:

“The deceased had gone to the accused to collect 20/- for alcohol (Changáa) which the accused owed the deceased. The deceased was a Changáa dealer. They started quarrelling and then accused went into her room and took a knife and stabbed the deceased. They struggled and the deceased took the knife from the accused and stabbed the accused on the right eye.”

5. As material, the evidence of the prosecution is set out in relevant parts as follows:

1. PW1, Chepasup Mongin alias Wangechi, the deceased's friend testified as follows:

“On 17/11/17 at 6.00pm, I was at the home of Cheposoges. I had disagreed with my husband and I gone to seek refuge at Cheposoges's home. I spent the night at the home of Cheposoges and in the morning I decided to go back home to find out whether my husband cooled off.

I went home and I found my husband who did not say anything to me. I stayed at our home. In the evening at 4.00pm 18/11/17, we come together with husband to Loruk centre to buy food. On reaching the Loruk centre, we found people screaming at the Centre. There were many people. We went with my husband to see what was happening and found that two people had stabbed each other. My husband is called Josiah Kariwo.

We found the accused (pointing) Ruth Kawawa and the deceased had stabbed each other. we found out that they had already stabbed each other. I do not know what they used to stab each other. Ruth had a stab near her eye.

I do not know whether the deceased had been stabbed.

The deceased was a person from home she was our neighbor. The accused is also a neighbor from the same area. When the police vehicle came we ran away. We do not know what caused the disagreement.

Cross examined by Mr Chepngoswo for accused

I left my husband's home in the evening at 6.00pm and I stayed for the night at Cheposoges house.

It is not true that I was present when the two Ruth Kawawa abd Florence Cheposoges were quarrelling.

We went to Loruk town at 4.00pm, we went with my husband. There were many people. I was with my husband. I was called to testify because I slept at the deceased's house. My husband was not present when the fighting was going on. I was called because I was at Cheposoges house. I do not know why they fought.

When I arrived we found Ruth was staying. She was bleeding.

[witness appears to dodge the question as to how thewas at the time of her arrival.]

Florence was seated on the ground. The accused was the one who was bleeding. I did not see Cheposoges was not bleeding. She was seated on the ground.

Reexamination by Ms Kitilit

I slept at Cheposoges house but I left in the morning. I later came and found the two had already injured each other.

Court

The home where I had spent the night is the same place where the fighting occurred.”

2. PW2, Sally Chemongot Kipkot, the Deceased's sister testified that the deceased's child had informed her of the sister's killing, as follows:

“I reside at Loruk. I work as a casual labourer.

On 18/11/17 at 8.00pm, I was at home. I was washing clothes when a child called KK came and told me that his mother had been killed. My home is far from the deceased's house. When I went to see, I found that they had been taken by the police. The police had taken the accused (pointing) name Akinyi and Florence Kibet, I saw the police vehicle leaving and I went back with the deceased's child KK is about 7 years old when he came to me he told me that his mother had been stabbed.

I know Florence, the deceased, she was my sister. The accused is the wife of my brother.

Cross examined by counsel for the accused

I know the deceased and the accused. The accused is my sister in law and the deceased sis my sister. I have never had disagreement with the accused. I did not see what happened at the scene. I cannot tell where the knife was.

Re-examination by Miss Kitilit

Nil.”

3. PW3, KK, the deceased's 7-year-old son who was the sole eye-witness gave an unsworn evidence upon a **voire dire** examination

in which the court found him to be “a child of apparent age of 6-7 years” possessed of sufficient intelligence to justify the reception of his evidence despite lack of knowledge of the nature of the oath, as follows:

“I live at Chepilat. I live with my father. I do not live with anyone else. My mother has been buried. She was stabbed with a knife below the ribs on the right side. I know who stabbed her [pointing at the accused]. I do not know her name. She is our neighbor. Her place is next to ours. The accused drunk beer she became drunk and stabbed my mother on her ribs. I was there. I cried. People came. The people did not do anything. The person who stabbed my mother is before court [he points at the accused]

Cross examination by Mr. Kipkulei for accused

I am KK. Y is my father’s name. It was in the evening after the sun had gone down. The accused stabbed my mother when they were outside. My mother was lying on the ground.

The accused asked my mother to give her traditional with 20/-. It was the chang’aa that looks like water. My mother used to drink beer. On that date she was not drunk.

I know the person who stabbed my mother. I know her as Mama Akinyi. I was at the center in the morning. I went home when the sun went down. I did not find the accused when I came home. I saw the accused drinking beer. I saw the accused drinking beer at our home. She drunk a little beer. She bought beer using 100/-. She got change of 40/-. She drunk a little beer and started making noise. The accused started beating my mother using a knife. She got a knife from inside her house.

My mother stabbed the accused on the eye. It is the accused who stabbed my mother first. When my mother was stabbed she fell down. She never rose again. The accused took my mother’s mattress and tore it up. It is my mother who stabbed the accused.

My mother went to pick a knife from the house. I have never drunk beer. It is true that my mother wanted to stab the accused and as the accused tried to snatch the knife, my mother stabbed her in the eye. The accused and my mother quarreled for long. The accused took beer worth 20/- and the accused told my mother that she would stab her.

Reexamination by Ms Macharia

My mother was stabbed on the ribs and my mother stabbed the accused on the eye. The knife used to stab my mother was snatched from my mother. The knife that stabbed the accused in the eye belonged to Mama Akinyi, the accused. I do not know where the knife came from.”

4. PW4, Samuel Barchobo, a national police reservist related his observations upon being informed of the stabbing incident as follows:

“I know the accused. She used to reside at the Loruk centre. The deceased lived with the accused in the same plot.

On 18/11/2017 at 5.00pm, I was coming from the Kibich Village. I came to the center and I heard people screaming and saying that some persons had stabbed each other.

I went to the place where the accused and the deceased lived. We were the only persons who lived on the plot. The two owned the plot.

When I went there, I found the deceased on the ground. The accused was sitting on the ground. I saw blood on the face of the accused. I did not see any injury on her.

The deceased was lying on the ground he was covered under a blanket. I did not open the blanket. There were many people who had come to witness.

I called for help from Loruk police station to come and take the person to hospital.

Police came and took the deceased and the accused. At the time they were being taken even the deceased was alive.

I did not see where the deceased had been injured.

I had known the deceased for 3 months and the accused for longer as she hailed from our village. I know her for over 18 years.

The relationship between the deceased and the accused is one of in-law. The deceased was a sister to the accused’s husband.

The accused is the person I saw at the scene (pointing)

Cross examined by Mr Kipkulei for accused

I was alighting from a vehicle near the road when I heard the screams. The persons who were screaming were at the road. The

persons who were screaming were the spectators. The accused and the deceased were not screaming. I did not open the blanket covering the deceased. The accused was sitting so I saw her clearly. I was very near the two. There was blood on the face but I did not see where she had been injured. It looked like the blood was coming from her nose. I do not know how the incident started. I do not know where the deceased had been injured. I only saw blood on the accused's face. I did not see where the accused had been injured.

Re-examination:

Nil.”

5. PW5 Douglas Kasoro Kipkot, a brother to the deceased and boda boda operator at Loruk town testified as to what he heard people say about two people fighting and what he observed when he went to the scene as follows:

“On 18/11/17 at about 4.00pm I was at the center. I heard that some people had been fighting. I heard people talking. I went to the place where I found that Ruth Kawawa (accused pointing) and Florence Kibet were at the home of the Kibet.

I found them outside the house in the compound. Ruth and Florence lived together on the compound.

The deceased is my elder sister. The accused is the wife of my elder brother. The plot where they lived belonged to my grandmother. It was Ruth Kawawa and Florence who lived on the plot. No one else lived on the plot only the 2 of them.

When I arrived at the scene, I found that they had stabbed each other with a knife. The deceased Florence had been stabbed in the stomach. Ruth had been stabbed on the left eye.

I told Samuel Kalya Police Reserve that there had been a killing that had occurred, I called him from the Centre.

The police came and we took the deceased to Marigat she was alive at the time. We also took Ruth Kawawa to Marigat hospital.

When I went to the scene, I found a knife on the ground. We left the knife on the scene when we took the deceased to hospital. I do not know whether the police took the knife. I did not know who the knife it was.

Ruth and Florence had lived on the plot for 1 month. It was Florence who found Ruth living on the plot. I do not know where Florence lived before she came to the plot.

At Marigat Hospital, we left Florence and Ruth and went back to Loruk.

Florence was later taken to Eldoret Hospital. I do not know who took her to Eldoret. I later learnt that she had died.

Ruth Kawawa who is my brother's wife is the accused before court (pointing at the accused).

Cross examined by Mr Kipkulei for accused

I lived far from Florence. I never used to meet Florence. I only met her on that date, I heard they had fought. It was many people who told me. I cannot tell who told me. It is at the center. I heard from the passerby.

Florence is my sister. I had not gone to visit her. She used to sell beer at the place where the incident happened at Loruk centre.

My sister sold beer and also drunk beer. When I arrived at the scene, I found both injured but I could not tell who started. The deceased was not talking. The two did not appear drunk. From my observation of the two, they did not appear drunk.

The two lived on the same plot in different houses.

The deceased used to make beer at her place. I opened the blanket covering the deceased.

Ruth had been injured on the eye. I took them to Marigat hospital. I did not follow up on the matter after Florence was taken to Eldoret. I did not hear what happened to the accused.

I recorded a statement at Loruk centre. (witness is shown a statement)

I do not know how to read. I told the police that Ruth Kawawa was also taken to Eldoret Hospital.

Ruth and Florence are in-laws. They did not have any discrepancies before. It was an incident that just happened on that date.

Re-examination

Nil.”

6. PW6 Cpl. John Kajara the Investigation Officer testified on information obtained from his investigations as follows:

“On 18/11/2017 at about 17.30 hrs, I was informed that there were two women Ruth Kawawa the accused and Florence Kibet alias Cheposoges Kipkot who had stabbed each other with knives at the Loruk centre.

I together with other askaris went by police vehicle from Loruk and went to the scene. We found the deceased – Florence Kibet with stab injuries in the stomach and the accused has an injury on the right eye above the eye. We took both the women to Marigat District Hospital as they were in critical condition. On arrival the doctor examined them and they were placed in ambulance and taken to Eldoret Moi Teaching and Referral hospital.

During my investigation, I recorded statements from the witnesses and I learnt that the deceased and the accused were members of the same family and they lived in the same house, different rooms. The deceased had gone to the accused to collect 20/-n for alcohol (chang’aa) which the accused owed the deceased. The deceased was chang’aa dealer. They start quarrelling and the accused went into her room and took a knife and she stabbed the deceased on the stomach.

They struggled and the deceased took the knife from the accused and stabbed the accused on the right eye. We tried to get the weapon used in the stabbing but because the people who were there and family members, it appeared they had hidden the weapon and we did not get it.

After sometime, the accused was discharged from hospital and when she was discharged she went into hiding, later we were able to arrest her and charged her before the court.

The other lady passed on. On 25/11/2017, the deceased died out of injuries that she had received from the stabbing by the accused.

After going at hiding upon discharge the accused later brought her and she was arrested at Loruk trading Centre. The members of the public started beating her and we rescued her from the public. She had disappeared for 3 weeks. The accused is before the court (pointing at the accused)

That is all.

Cross examined by Mr Kipkulei for accused

I did investigation before I brought the accused to court.

I got a report from Reserve police Samuel Barchobo that the two had fought. Barchobe was a witness. I also got a statement from a child of the deceased who was present.

Investigation diary reads the process of investigations.

I went to the scene with other police officers.

After I was informed of the incident I took about 30 minutes. I found the deceased lying down and bleeding severely. The accused was also bleeding and she been arrested by members of the family. She was sitting and members of the family were holding her. She had been injured on the top eye. She was bleeding. She was sitting on the ground. She had 3 people holding on to her. It is recorded in the diary.

It was urgent to take the suspect as one had her stomach intestines oozing. The deceased and the accused were drinking. We know them at the Centre. They usually drink at the center.

When we arrived, I was not able to establish whether they had drunk. Before that date we knew them as person involved in drunkardness.

I was informed that the accused went into her room and she came out with a knife.

The accused is the one who stabbed the deceased first. This was according ti the statement of KK.

[witness is referred to his investigation diary dated 18/11/2017]

“A report by Samuel Barchobo at the station that on 18/11/2017 at about 5.30 om 2 women namely Ruth Kawawa and Kibet Cheposoges Kapkot were involved in a fight with the residence in Loruk whereby one Cheposogs who had armed herself with a knife stabbed her on the right of the eye and nose. In turn Ruth Kawawa stabbed her severely on her stomach.”

It is an initial report by the said Samuel Barchobo and that report was subject to investigation. Barchobo only reported but he was not at the scene. I followed up and investigated the matter and I found information by the persons who were at the scene and informed me that the person who came with the knife was the accused.

(Referred to his witness statement)

That the deceased was stabbed on the stomach. She lied on the stomach and never woke up. It is not true.

He call the deceased? Strong, malnourished?

As I used to see her. She was strong. She was okey

Did you arrest Ruth after going at large or she was arrested by people?

When she was discharged from hospital at Eldoret she never came back. She went into hiding and did not come back to Loruk until after about 3 weeks.

(When Ruth was found at Loruk for the first, she was attacked by rowdy crowd)

It is true and we took her for hospitalization

After the incident the community was hostile to accused.

It is true.

When she was discharged she never went back to the community at Loruk.

[Minor called KK]

How many times did KK say the deceased was stabbed?

The deceased was stabbed once.

[Witness referred to statement of KK]

When KK made his statement he said she had been stabbed at the stomach and had but after doctor's examination it was established that she had been stabbed once.

I did not rely on only with witness statement.

How many people were present at the scene when fighting

There was one eye witness the child and the other came as he went on.

Did you take into consideration what the accused said during investigation?

Re-examination

Nil."

7. PW7 Dr. Walter Narianya testified on the injuries and cause of death of the deceased as follows:

"On 7/3/2018, I conducted post-mortem on the body of Florence Kibet, a lady of about 31 years old height 11/2 metres.

Examination

She had an injury cut of 10 cm. there were 3 other wounds on the left side of the stomach. The doctor had stitched the 2 wounds. Her eyes were white.

Upon dissection of the body there was an injury going into the stomach which had took the intestines out the intestines had been stitched by the doctor. There was pus in the stomach.

Cause of death

Sepsis due to stab wound in the abdomen.

Post-mortem Report dated 7/3/2018 id marked P.Exh 1.

Cross examination by Mr Kipkulei for accused.

There was poor nutrition

(Post-mortem Report form)

I had incident it is poor nutrition.

The deceased had 3 wounds. There was no wound on the head. I did not see any.

The 3 wounds were on the left side of the abdomen penetrating from 3 different.

On dissection, I only saw one which had cut into the abdomen.

Re-examination

Poor nutrition. The body was wasted. Person who is not well fed.”

6. Considered as a whole, it is clear that there was a quarrel between the accused and the deceased over payment for illicit drink Changaa which the deceased is alleged to have bought from the deceased but it is unclear whether the accused had drunk it; there was an ensuing fight in which, not necessarily in this order, the accused was stabbed at the right eye and the deceased in the stomach to which she succumbed; and it is unclear whether the stabbing was started by the accused as alleged by the Investigation officer or by the deceased as conceded by the eye-witness child of the deceased in testimony before the court. It is unclear, however, whether the accused was acting as the assailant or in self defence as the victim of a knife attack by the deceased. The question before the court, therefore, only remains whether the evidence is sufficient to call on the defence to make her defence to the charge of murder c/s 202 as read with section 204 which the accused is facing before the court.

DETERMINATION

Duty to acquit

7. As said in KBT HCCRC No. 13 of 2017, **R v. Benson Kipngetuny Boiywo** -

“A trial Court is under a duty, as held by the Court of Appeal in **Murimi v. R.** (1967) EA 542, to acquit an accused if the Prosecution “failed to make out a case sufficient to require the accused to enter a defence” and further that such a case is made out when a prima facie case is established being “one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.” See **Ramanlal T. Bhatt v. R.** (1957) EA 332, 335.”

Finding of the Court

8. Medical evidence of PW7 Dr Walter Nairanya, established the cause of death of the deceased was sepsis due to stab wound in the abdomen. The Investigation Officer PW6 testified largely on what he claimed to have been informed by the witness statements and investigations with other not called as witnesses. However, from the evidence on the incident of the stabbing, it is not clear whether the accused attacked the deceased with a knife, as charged, with the latter only retaliating in defence. The child eyewitness said the mother did not rise up after she was stabbed by the accused, and could not, therefore, have retaliated. The said eye-witness also admitted in cross-examination and re-examination that it was his deceased mother who attacked the accused with the knife first and when accused attempted to snatch the knife, she was stabbed in the right eye and thereafter the accused managing to take the knife and stab the deceased in the stomach where upon she fell and never rose up. It would, therefore, appear that the Investigation Officer’s version of events, on which the charge of murder was based had no foundation in the evidence of the only eye-witness.

9. The unsworn evidence of the minor eye-witness’ evidence required corroboration as a matter of law by extra-polation of the provision on evidence of **alleged victim** who is a **child**. See section 124 of the Evidence Act which provides as follows:

“124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for any offence, **the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

10. The evidence of the other witnesses PW1, PW2, PW4 and PW5 could not corroborate the evidence of child eyewitness (PW3) as they all testified to what their evidence as regards the stabbing incident were based on information by the minor himself in the case of the sister to the deceased PW2, and by members of the public who did not testify, that the two people - the deceased and the accused - had stabbed each other according to police reserve officer PW4 who “heard people screaming and saying that some persons had stabbed each other” and “some people had been fighting” according to the deceased’s brother (PW5), and according to the deceased’s friend PW1 she “found that they had already stabbed each other [and] I do not know what they used to stab each other.” The doubt as to whether the accused was the aggressor

or the victim of a knife attack by the deceased in self-defence of which she stabbed the deceased, must be given to the benefit of the accused.

11. In addition, the crucial ingredient for murder of *malice aforethought* is not established merely by the statement of the eye-witness that the accused had told the deceased that she would stab her, when other evidence was that the two sisters in law had not had prior disagreement and only quarreled when the deceased went to claim payment for illicit brew "**Changaa**" that the accused had taken from the deceased vendor and when the two who were locally notoriously known as drunkards may have been drunk at the time of the incident.

12. On the evidence presented by the Prosecution to this court, I consider that there is no evidence to prove to the required standard of proof beyond reasonable doubt that the accused **murdered** the deceased. The accused and the deceased, had she survived her injury, might have been charged for affray c/s 90 of the Penal Code, and the accused in the event of the deceased's death may have committed the offence of manslaughter c/s 202 as read with section 205 of the Penal Code.

13. On the evidence before the court, it may be that, the accused committed the offence of manslaughter; but the accused was not charged with manslaughter but with murder, which for want of *malice aforethought* cannot be sustained, and there is, consequently, no legal basis for calling upon the accused to make her defence to the charge of **murder**, which is before the court.

14. Accordingly, in accordance with the duty of the trial court under section 306 (1) of the Criminal Procedure Code, the court shall, therefore, **record a finding of not guilty** and acquit the accused of the charge of murder contrary to section 203 as read with 204 of the Penal Code.

Orders

15. Accordingly, for the reasons set out above, I find that the Prosecution has **not** established a *prima facie case* to warrant the calling on the accused to make her defence in accordance with section 306 (2) of the Criminal Procedure Code.

16. Consequently, pursuant to section 306 (1) of the Criminal Procedure Code, the court records **a finding of not guilty** and the accused is acquitted of the charge of murder contrary to section 203 as read with 204 of the Penal Code.

17. There shall, therefore, be an order for the immediate release of the accused from custody, unless she is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 6TH DAY OF MAY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kipkulei, instructed by M/S Chebii & Co. Advocates for the Accused.

Ms. Kitilit, Prosecution Counsel for the Respondent.