



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HIGH CRIMINAL CASE NO. 12 OF 2018**

**LESITT, J**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH MWANGI GITHINJI...ACCUSED**

**JUDGMENT**

1. The accused **JOSEPH MWANGI GITHINJI** is charged with one count of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the charge are:

**“On the 4<sup>th</sup> February 2018 at about 6.30 hours, at Huruma Corner in Huruma Area within Nairobi County murdered MARY ATIENO MISIKU.”**

2. The Prosecution called a total of 7 witnesses. The defence of the other hand opted to keep quiet and offer no evidence or statement.

3. The facts of the prosecution case are that PW5 and 6, PC Egesa and PC Wahome reported to work that early morning and were collecting firearms at the Armoury when the Armoury Officer directed them to accompany reportees who had gone to the station with a report. Both officers, who were new at the station, accompanied a big group of people to a scene not far from the police station.

4. The two officers were taken into a compound of a plot with two rows of houses facing each other. In the first house next to the gate was a Posho Mill. That was the scene of attack. They found the Posho Mill locked and inside through the window they saw the accused holding a blood stained knife in the right hand and a teenage girl with his left hand.

5. When both officers asked the accused what the matter was, the accused asked the girl he was holding in Kiswahili words to the effect.

**“Have I done anything to you? The girl answered by shaking her head to signify nothing had been done to her.”**

6. PW5 and 6 said that they noticed blood flowing out from under the door. They then requested the mother of the accused who was one of the reportees to persuade the accused to surrender the knife and release the girl. She did so to which the accused demanded that everybody must first leave. It is when the police officers promised to protect him that he gave out the knife and PW6 took it. It was P.Exh.6.

7. PW5 and 6 testified that they pulled the wire mesh covering the window of the Posho Mill creating enough room for the girl victim to squeeze through. After she came out is when police reinforcement arrived. The accused then opened the door to the Posho Mill and inside the body of a woman was seen lying near the door with slash wounds on the neck and stomach. PW5 and 6 also recovered a jacket next to the body of the woman. It was P.exh.7.

8. The scene of crime officer summoned to document the scene was PW3. He described the scene as captured on the photographs he took. They were P.exh.2 and his report P.exh.3. among the features captured were slash wounds on the neck and stomach; a pool of blood where the body lay and the jacket (P.exh.7) next to the body mental assessment and report of physical status of accused at the time of examination, which was February 19, 2018. That was 7 days after the incident. He was found to have no physical injuries. His mental assessment was that he was “Fit to Plead”.

9. PW4 the Government Analyst analyzed and examined the knife, P.exh.6, the jacket P. exh. 7 and the blood sample of the deceased and concluded that both items had blood stains whose DNA analysis matched the DNA generated from the deceased blood. Her report was

P.exh.5.

10. The Investigating Officer was PW7. He took over investigations on the same day of the incident, and even got a chance to visit the scene of crime before the deceased body was removed from the scene. He said he noted 3 or 4 stab wounds on the neck, stomach and ribs of the deceased. He had the scene photographed and also recorded some statements from potential witnesses.

11. PW7 later saw the accused in the police cells and eventually escorted him to the Police Surgeon for Mental Assessment. He also had the post mortem done. The Post Mortem Report which he produced was P.exh. 8.

12. According to the report, the cause of the deceased death was exsanguination due to slash wounds on the neck. The Post Report indicated that the body of the deceased had multiple bruises on the face around the eyes with sub-conjunctival haemorrhage on both eyes, 2 superficial slash wounds on the neck front to right side horizontally and one deep slash wound to the neck from front to the anterior measuring 14x5cm, with severed carotid and jugular vessels on the right neck. The pathologist also noted a penetrating wound to the anterior abdomen above the umbilical cord but which caused no injury to internal organs and a stab wound on each upper thigh (left and right). Internally the deceased had a subdural haematoma on the left temporal parietal region with no significant brain swelling and no obvious skull fractures. Also noted was that the deceased had no defence injury.

13. After the Prosecution closed its case, the court ruled that the prosecution had established a prima facie case against the accused to warrant the court to place the accused on his defence.

14. On the date set for the defence hearing, the accused was informed of his rights under **section 30** of the **Criminal Procedure Code**. He opted to say nothing and to call no witness in his defence.

15. After the close of the prosecution case both the defence and the prosecution counsels promised to file their written submissions on the same day the defence closed its case. However only the prosecution filed theirs which are on record.

16. In the written submissions, the Prosecution framed four issues for determination thus:

- i. Whether death occurred;
- ii. Whether death resulted from the unlawful act or omission on the part of the accused;
- iii. Whether the accused was positively identified;
- iv. Whether malice aforethought was established.

17. The accused faces a charge of murder contrary to section 203 of the Penal Code. That section provides that:

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

18. Malice aforethought has been defined under **section 206** as follows:

**“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;”**

19. The burden of proof lies on the prosecution to adduce evidence to prove the three ingredients for the offence of murder, that is; that it was the accused who persons caused injury to the deceased by either an unlawful act or an omission; that the unlawful act or omission was perpetrated by malice aforethought and that the deceased died as a result of the injuries he suffered.

20. I have considered the submissions by the State and what they have proposed to be the issues for determination. Whether death occurred and whether the accused was positively identified are not issues to be determined due to the circumstances of the case. The deceased was dead already inside the room where the accused was where the body was. In the circumstances the issues for determination which I will consider in no set order, which are:

**I. Whether death resulted from the unlawful act or omission on the part of the accused;**

**II. Whether malice aforethought was established;**

**III. Whether the circumstantial evidence adduced is sufficient to found a conviction;**

#### IV. Whether the prosecution established the motive for the offence and to what effect; and

#### V. Whether the prosecution failed to call crucial witnesses

21. There was no eye witness account of how the deceased met her death. Further the only other witness who may have offered an account of what happened was a minor. That minor returned to her home area after the incident and despite efforts by the investigating officer and his colleagues, they were completely unable to trace her. Prior to this, the court had declined accused bail until the testimony of the minor was received following report that the minor felt that her life was threatened if the accused was released on bond.

22. The minor was a crucial witness because PW5 and 6, the first police officers to get to the scene of incident, found the accused holding a bloodied knife in his right hand and the said minor with his left hand. The body of the deceased was not seen until the minor was rescued through the window of the Posho Mill and the door opened. She was lying dead on the floor in a pool of blood and several injuries on her body. The minor would have explained how she was inside the Posho Mill with the deceased and the accused. Since she did not testify the court does not have the benefit of her evidence and has to rely on circumstantial evidence to determine the case.

23. For the prosecution to sustain a conviction on circumstantial evidence the Court of Appeal in the case of SAWE v REPUBLIC [2003] eKLR had this to say:

**“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”**

24. To constitute the basis for conviction on the basis of circumstantial evidence it must satisfy several conditions designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v. Republic, Cr. App. No. 32 of 1990 the Court of Appeal identified the conditions that must be established as follows:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) 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 none else.”**

25. From the line of authorities on circumstantial evidence, both those quoted above and many others, the court has to judge the total cumulative effect of all the proved circumstances each chain of facts which reinforces the conclusion of the guilt of the accused person and if the combined effect of such circumstances is taken to be conclusive in establishing the guilt of the accused, the conviction would be justified.

26. The circumstantial evidence in this case is fact the accused was holding a freshly bloodied knife, (P. Exh. 6) with the body of the deceased lying dead in a pool of blood. The prosecution has proved crucial evidence regarding the knife found with the accused. After analysis by the Government Chemist, PW4, the DNA of the blood (stains) found on the knife matched the DNA of the deceased blood.

27. The injuries found on the deceased gives further crucial evidence in this case. According to the Post Mortem Report, P. Exh. 8, the cause of the deceased death was exsanguination due to slash wounds on the neck. The Post Report indicated that the body of the deceased had multiple bruises on the face around the both eyes, 2 superficial slash wounds on the neck front to right side horizontally and one deep slash wound to the neck from front to the anterior measuring 14x5cm, with severed carotid and jugular vessels on the right neck. The pathologist also noted a penetrating wound to the anterior abdomen above the umbilical cord a stab wound on each upper thigh (left and right). Internally the deceased had a subdural haematoma on the left temporal parietal region with no significant brain swelling and no obvious skull fractures. Also noted was that the deceased had no defence injury.

28. The injuries were fresh when PW5 and 6 the arresting and initial law enforcers to arrive at the scene arrived at the scene. The two testified that fresh blood was flowing from under the Posho Mill behind closed door when they arrived at the scene. They saw the deceased after the door was opened. The accused was holding a very shaken youth, the proposed minor witness whom they rescued through the window wire mesh which they lifted for her to pass through.

29. These are the circumstances that the accused was found in when he was arrested. He has a statutory evidential burden to explain what he was doing in the Posho Mill with the dead body of the deceased lying in a pool of fresh blood, with him holding a shaken youth with one hand and the knife, P. Exh. 6 which was the murder weapon with the blood of the deceased on it in the right hand. This is rebuttable presumption of fact created under **sections 111(1) and 119 of the Evidence Act. Section 111** provides that in criminal cases, an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his knowledge. The section is silent on what would happen if he fails to do so but **section 119** entitles a Court to raise a rebuttable presumption of fact from the circumstances of the case.

30. In the case of Douglas Sila Mutuku & 2 others v Republic [2014] eKLR the Court of Appeal held that:

**“Although none of the witnesses identified the 3rd appellant, the fact that shortly after the robbery, he was found in possession of some of the items stolen from the victims there is a rebuttable presumption of fact under Section 119 of the Evidence Act, that he was either the robber or a guilty receiver, unless he offers a reasonable explanation as to his possession of those items.”**

31. Even though this is not a robbery case, the legal position as far as rebuttable presumption of fact is concerned is that an accused person is legally duty bound to explain matters or facts which are peculiarly within his knowledge. In this case, the accused was found holding the murder weapon with the deceased blood still dripping from it, and with the deceased lying dead from slash and stab wounds.

32. The accused chose to keep quiet and to give no explanations in defence. Having chosen to keep quiet, the court has to weigh the evidence as presented before it by the prosecution to determine whether it is sufficient to sustain a conviction or not. The evidence adduced by the prosecution has created a chain of events. First that the police were called from their Station to go to the scene by among others the mother of the accused. He was found having detained the minor whom he held with his left hand while holding the knife which he had lifted with his right hand. The circumstances under which the accused held the victim was clear that the minor was a victim. She was rescued through the wire mesh of the window of the Posho Mill.

33. The other events were that the knife the accused was holding had the blood of the deceased and the deceased was lying dead on the floor of the Mill. The cause of death was the other link in the chain of events. The deceased died of a slash wound to the neck. She also had several other slashes and stab wounds found on other parts of the body, and a significant head injury. Furthermore, the deceased had no defence injuries, a fact the accused should have explained since the injuries found on the deceased could not have been self-inflicted.

34. I find that the only logical conclusion that can be arrived at is that the accused is the one who attacked the deceased causing her serious injuries from which she died at the scene of attack. The nature of the fatal wound, a slash stab on the neck from anterior neck to the right side of the neck which severed the jugular and the carotid blood vessels of the neck are proof of malice. The accused should have known that cutting the deceased on the neck from one end to the other was most likely going to cause death or grievous harm to the deceased.

35. Additionally, the prosecution is obliged to establish that there are no other co-existing circumstances which would weaken or destroy the inference of guilt. The Court of Appeal in Dhalay Singh v. Republic, Cr. App. No. 10 of 1997 expressed itself thus:

**“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”**

36. I am aware of my duty as the trial court to satisfy myself that there are no co-existing circumstances that may weaken or destroy the inference of guilt. (See Venanzio Naive v. Republic, CA No. 81 of 2003 and Kimeu v. Republic [2002] 1 KLR 756) I have cautioned myself of this need and I have carefully examined the evidence before me for any co-existing circumstances that could weaken or destroy the inference of guilt. Having done so, I am satisfied that the evidence on record unerringly points to the accused as the perpetrator of the murder of the deceased in this case.

37. Regarding reason for this attack, the motive for the offence is unknown. Libambula v. Republic [2003] 1 KLR 683 the Court of Appeal stated as follows:

**“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See section 8 of the Evidence Act cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”**

38. The prosecution adduced no evidence to support a likely hood of malice having existed between the deceased and accused as to lead to such act. Neither could any motive be deciphered from the evidence before the court. Under **section 9** of the **Penal Code**, motive need not be established in order to prove murder.

39. As to failure by the prosecution to call crucial witnesses, the prosecution failed to avail the minor witness as alluded to earlier. Others not called are the mother of the accused who was among those who went for the police and led them to the scene of murder.

40. In Bukenya v. Uganda [1972] EA 549 the Court of Appeal for Eastern Africa held:

**“28. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”**

**29. The prosecution’s burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. It is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not.”**

41. This case makes it clear that there is no statutory number of witnesses who can establish a fact, and further that it is not in each and every instance that the court is required to make an adverse inference where crucial witnesses are not called. By dint of **section 143** of the **Evidence Act**, in the absence of a provision of law requiring a specific number of witnesses, no particular number is required to prove any fact. (See Suleiman Otieno Aziz v. Republic [2017] eKLR). It is only where the evidence called by the prosecution is barely adequate, that the court is entitled to draw an adverse inference from the prosecution’s failure to call important and readily available witnesses. In Donald Majiwa Achilwa & 2 Others v. Republic, Cr. App. No. 34 of 2006, the Court of Appeal stated as follows as regards adverse inference:

**“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is**

**not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution with-holds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case.”**

42. Regarding failure to call the minor witness and the mother of the accused, the question to ask is whether they were material witnesses and whether they were readily available, and further whether the evidence adduced is hardly sufficient to establish the prosecution case. The minor witness was definitely crucial however, following the efforts made by the investigating officer to trace in order to avail her, it is a fair conclusion to make that she was not readily available. For the mother of the accused, she was only referred to by PW5 and 6. It is not apparent whether she knew anything material regarding this case. In my view, given the circumstances, failure to call the two does not justify the drawing of an adverse inference against the prosecution.

43. I find that the prosecution cogently and firmly established the circumstances from which an inference of guilt was sought to be drawn, and that those circumstances were of a definite tendency unerringly pointing towards the guilt of the accused, and that taken cumulatively they 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 none else

44. Having carefully considered the evidence adduced in this case, I am satisfied that the prosecution has proved that it was the accused who attacked the deceased causing her fatal injuries. I am satisfied that the accused act was driven by malice with an intention to cause death or grievous death to the deceased. This falls within the provisions of **section 205 (b)** of the **Penal Code**.

45. In the result I find that the prosecution has proved that the accused murdered the deceased contrary to **section 203** of the **Penal Code** as charged beyond any reasonable doubt. I accordingly find the accused guilty of murder contrary to **section 203** of the **Penal Code**, under **section 322** of the Criminal Procedure Code and convict him accordingly.

**DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY, 2020**

**LESIT, J.**

**JUDGE**

**DELIVERED THROUGH TEAMS THIS 10<sup>th</sup> DAY OF NOVEMBER, 2020.**

**LESIT, J.**

**JUDGE**

**In the presence of**

**Mr. Kinyua .....Court Assistant**

**Ms. Maina .....For the State**

**Mr. Muchiri .....For the Accused**

**Accused present**

**Lesiit, J.**

**Judge.**