



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 18 OF 2013

REPUBLIC.....PROSECUTION

VERSUS

MARY MUTHONI MUTURI.....ACCUSED

J U D G M E N T

1. The accused faces a charge of murder, contrary to **Section 203** as read with **Section 204 of the Penal code**.
2. The particulars of the offence are that on the 16/09/2013, at Gikiiro Village, Mbeere South District in Embu County the accused murdered one **Anthony Muturi**. The accused pleaded not guilty to the charge.
3. The prosecution lined up a total of eleven (11) witnesses who testified in support of their case while the defence had one (1) witness.
4. Precisely, the prosecution's case was that on 16/09/2013 between 9.30 to 10.30 am the deceased who was the husband of the accused was at Gikiiro Bar at Gikiiro market with his friend PW3 enjoying a meal when the accused went there. She picked a quarrel with the deceased alleging that he had taken too long to deliver cigarettes and bread that she had sent him to buy for her.
5. The accused pulled the deceased from the bar open place where he sat and pushed him towards the outside of the premises. In the course of pushing, the deceased was stabbed with a knife on the left side of the stomach before PW3 snatched it from the accused. The deceased collapsed and was rushed to the hospital where he succumbed to the injuries. PW4 who had prepared the meat for the deceased was also present.
6. The accused accompanied the deceased to hospital as ordered by the crowd that gathered at the scene. She was thereafter arrested and charged with the offence of murder after being certified mentally sound to plead.
7. The accused in her sworn statement of defence denied the offence she testified that the deceased left her at home in the morning. Someone later called her and asked her to rush to Gikiiro market urgently. She hired a boda boda and went to the market which is about 3 km away from her home.
8. On arrival at a meat joint, she found people surrounding her husband who had been injured. She was directed to hire a vehicle to take her husband to hospital. She was arrested by the police at Kabondori market and taken to Kiritiri police station where she was charged with murder of her husband.
9. The accused denied stabbing the deceased with a knife as alleged and said she was not there when he was injured.
10. DW1 testified that he was hired by the accused to take her to Gikiiro market at around 9.45 am. He picked the accused from her home and dropped her at Gikiiro market about 200 metres from the bar. He said he saw more than five (5) people standing outside the bar.
11. The evidence of PW3 who was with the deceased at the bar having a meal was that it was between 9.30 and 10.30 am on 16/09/2013 that the accused went there. PW3 knew the deceased and his wife for about three (3) years before the incident since they were neighbours.
12. PW3 said that the first thing the accused did when she arrived was to demand from the deceased her cigarettes which she had sent him to buy. When the deceased said he had not yet bought them, the accused seemed infuriated from her conduct. she pulled and dragged the deceased from where he sat taking him towards the outside about 15 metres away.
13. PW3 said that he then heard the deceased screaming and followed the couple. The deceased was saying, "I have been stabbed with a knife". PW3 rushed to where the couple was and found the deceased holding the left side of his stomach with his hand. It is PW3 who intervened by holding the accused who held a knife in her right hand which fell down on the ground during the struggle. People gathered at

the scene.

14. PW3 said that the accused was arrested as she tried to run away.

15. The evidence was corroborated by that of PW4 an employee at the bar who had received the food order on phone from the deceased. He had already served them with some roast intestines to eat as they waited for the meat that was yet to be ready when he saw the accused come to the scene.

16. PW4 said he was at the kitchen about 10 metres from the veranda where the deceased sat. He testified that he heard the accused demand for her cigarettes complaining that the deceased had overstayed with them. He went outside the kitchen towards where the couple was. He said he saw the accused dragging the deceased from his seat as she held a knife and he shouted "she has a knife". The deceased made a distress call immediately. He then saw PW3 come to the scene and overpower the accused.

17. The evidence of the doctor PW8 was that the deceased had a ruptured spleen and pancreas as a result of the penetrating injury on the chest. He died of cardio-respiratory arrest due to internal bleeding at the injury site.

18. The investigating officer PW9 recovered the murder weapon, a blood-stained knife which he sent for analysis. PW10 the Government analyst found the blood on the knife matching that of the deceased.

19. The ingredients of the offence of murder that the prosecution must prove are as follows: -

a) The death of the deceased;

b) That the death was caused by the unlawful act of the accused; and

c) That the accused had malice aforethought at the time of executing the unlawful act.

20. The defence filed submissions to the effect that the prosecution have not proved the case against the accused. It was submitted that the evidence of the key witnesses was contradictory.

21. I have analysed the evidence in chief of PW3. He narrated the incident in detail from the time the accused arrived at the scene and immediately confronted the deceased before pulling him out of his seat. He said that he then heard a scream and went to where the couple was about 15 metres away where he found the deceased with a stab wound and he managed to overpower the accused.

22. PW4 was at the kitchen overlooking the open area of the bar where the deceased and PW3 sat as they ate their food. He said that he saw the accused arrive and heard what she said. He also said he saw the accused holding a knife before moving near where the deceased had been dragged.

23. Both witnesses did not lose sight of the couple as the two struggled together. Both said that they heard a distress call from the deceased and upon moving to the scene found the deceased already stabbed and the accused holding a knife in her right hand.

24. I do not find any contradiction in this evidence on the main details of the incident and how it occurred. It was in cross-examination that PW3 said that he did not record in his statement that he struggled with the accused and overpowered her. This bit of evidence was corroborated by PW4 who was also at the scene who said: -

"immediately the deceased shouted, I saw PW3 one Munyi ran to where the couple was and held the accused who had a knife in her hand."

25. It is trite law that minor contradictions are not fatal to the prosecution's case it was held in the case of **Erick Onyango Ondeng' v Republic [2014] eKLR** the Court of Appeal stated that not every contradiction would cause the evidence of witnesses to be rejected. There would need to be more to the contradiction. The Court cited with approval the findings in Court of Appeal case **Twehangane Alfred vs. Uganda, Crim. App. No 139 of 2001, [2003] UGCA**. As noted by the Uganda Court of Appeal in **Twehangane Alfred vs. Uganda, Crim. App. No 139 of 2001, [2003] UGCA**, it is not every contradiction that warrants rejection of evidence. As the court put it:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

26. The defence further argued that the report of the Government Analyst was to the effect that the murder weapon had blood that matched that of the deceased. In this regard, the accused had not shed any blood for she received no injury. It is the deceased who was stabbed and shed a lot of blood even internally. The knife could only have contained the blood of the one and only injured person, the deceased.

27. PW9 said he could not recall who took the knife to the police station. PW9 being the investigating officer ought to have investigated and confirmed who the person was.

28. I have carefully perused the evidence on record and find no evidence to contradict that the knife produced in court was not the murder

weapon. It was positively identified by PW3 and PW4 who were present at the scene.

29. The evidence of PW9 was supplemented in that regard by that of PW3 and PW4.

30. I have analysed the defence carefully. There is no doubt that the accused was left at home in the morning by the deceased. There is evidence that the deceased was sent by the accused to buy her cigarettes and bread which he took too long to deliver. It was because of that delay that the accused got infuriated and decided to go to Gikiiro market to look for the deceased.

31. The court believed the accused that she hired a boda boda and went to Gikiiro market and walked straight to the bar where the deceased was. It may have been a joint the deceased often visited or that the two had talked before the accused came. This is supported by the evidence that the accused went straight to the bar as confirmed by DW2.

32. I have observed from the evidence of the defence that is not at variance with that of the prosecution that the accused went to Gikiiro market, specifically Gikiiro Bar that morning. This is the material time (9.30 am – 10.30 am) as confirmed by the prosecution's evidence that she went and attacked the deceased. This leads me to believe DW2 that he dropped the accused about 200 metres from the bar and then left. He does not know what followed after that.

33. From the evidence of the prosecution, it is clear that the accused went to the bar only once that morning and was she the aggressor to the deceased for delaying to deliver the cigarettes and the bread she had been waiting for, for quite a while at home.

34. In conclusion, I find the defence of the accused untrue that she went to the scene after the incident and found her husband surrounded by a crowd. It is her act of stabbing the deceased that attracted the crowd at the scene. DW2 said that as he dropped the accused near the bar, he saw about five (5) people standing outside. PW3 said that the accused was arrested at the scene as she attempted to run away.

35. I take judicial notice that the bar was situated at a market and it is common in such a place to find a handful of people standing outside a shop or a bar. DW2 did not say that he saw a crowd like the accused tried to make the court believe.

36. It is my considered opinion that the evidence of PW3 and PW4 is overwhelming and credible that the accused is the one who stabbed the deceased with a knife at Gikiiro bar. This was direct evidence in that the witnesses saw the accused confront the deceased, drag him out of his seat towards the outside of the bar. They immediately heard the deceased make a distress call and found him already injured and the accused still holding the knife in her hand.

37. The witnesses especially PW3 knew the couple well and positively identified the accused in the incident that took place in broad daylight.

38. I found the defence of the alibi not plausible but a mere defence in the face of the evidence of the eye witnesses whom the court found consistent and truthful. PW8's evidence on the cause of death is consistent with that of the eye witnesses.

39. I reach a conclusion that the accused is the one who caused the unlawful act that caused the death of the deceased.

40. I proceed to analyse the evidence to establish whether the accused had malice aforethought.

41. The prosecution's evidence was to the effect that the knife originated from the accused. It was not in the possession of the deceased and neither was it picked from the bar following the short lived exchange of words. This means that the unlawful act was premeditated since the accused came armed. The nature of the injury was of grave nature which led to the death of the deceased on the same day.

42. **Section 206 of the Penal Code** describes malice aforethought 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;

(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.

43. It is my considered opinion that the accused had knowledge that the grave injury she inflicted using a lethal weapon would either cause death or grievous harm. The act of the accused fits the description of malice afore thought as described by the law.

44. It was held in the case of *Nzuki v Republic [1993] KLR 191* that: -

“Malice aforethought is a term of art and emphasized that:

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

i. The intention to cause death.

ii. The intention to cause grievous bodily harm.

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of those acts, it does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert homicide into a crime of murder. (See also Hyman v DPP [1975] EA 55).”

45. My finding is that the accused had malice aforethought as she injured the deceased.

46. It is my finding that the prosecution have proved the offence of murder contrary to **Section 203 as read with 204 of the Penal Code.**

47. I find her guilty and convict her accordingly.

48. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 16TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muthoni for accused

Ms. Mati for State

Accused present