



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 2 OF 2017

DANIEL ONYONDI MOI.....ACCUSED

VERSUS

REPUBLICPROSECUTION

JUDGMENT

Daniel Onyondi Moi (the accused) is charged with the offence of murder c/s 203 as read with 204 of the Penal Code. It is alleged that on 29th April 2017 at Kiawara village within Mweiga Township Kieni West Sub County within Nyeri County he murdered **Regina Kiinyu (herein after Regina, the deceased)**.

The prosecution called 10 witnesses. The accused person gave a sworn statement of defence and did not call any witnesses.

The facts of the case were set out by PW2, PW3 and PW4.

According to PW2 **Jecinta Karanu Kithure** the deceased was friends with one Ndirangu, and at some point with the accused person. She, PW2 worked as a bar maid at Wazee Bar and Restaurant in Mweiga. On the 27th April 2017 about 8:00pm Regina went to the bar with the accused who PW2 knew as he was a customer in her bar. He bought them sodas.

The following day 28th April 2017 at about 7:00pm the accused went to the bar and told her that he had been trying to call Regina the whole day but her phone was being picked by a man. She offered to call Regina's phone –the said Ndirangu whom PW2 described as Regina's boyfriend picked the phone. He, Ndirangu asked her whether that "*mkabila mluhya* who was living with Regina" was in her bar. For some reason she did not tell him she was with him, instead she told him she did not know. He hang up.

Later on he came to the bar and found PW2 seated with the accused. PW2 realized that these two persons knew each other. Ndirangu even told her that he was aware the accused was living with Regina but asked her to tell the accused to leave Regina alone. At some point the two began to argue but one customer intervened and the argument ended. They settled down and continued to drink together. They later left.

It would appear, from the evidence of Damaris Mukechu PW4, whose house was adjacent to Regina's house, that this encounter between the accused and the said Ndirangu did not go down well with the accused. That night of 28th April 2017 there was commotion outside Regina's house caused by a man who was calling out to Regina, calling out to Regina's children to open the door for him. When that did not happen he hurled insults at her in which the term 'malaya' (prostitute) featured. Neither Regina nor her children responded or opened her door. The man continued to cause a raucous the whole night. She, PW4 never came out of the house but she heard neighbours telling him to stop.

The following day 29th April 2017, at 7:00am, is when she saw him outside. She knew he was the one who had been making noise the whole night when she heard him say he was going to get a hammer to come and remove the door. Neighbours who had come out at night to stop him also identified him as the one.

Around the same time 7:00am PW2 reported at work. She rang Regina just to find out how she was. Regina told her that they had not slept the whole night because Dan (the accused) had caused disturbance in the whole plot the whole night. That she had actually that morning sent her children to PW2's house.

PW2 told her to come to her place of work. When Regina arrived PW2's aunt one Josephine Muthoni called her to go to her pub. PW2 did not accompany her as she was taking stock. When she finished she also went to her aunt's pub where she found her aunt, the accused and Regina. It is there that Regina told the accused she did not want him anymore because of the way he was treating her in presence of the children. She said he had broken into her house and destroyed her curtains. PW2 left them there continuing with the discussion.

Around 9:30am Regina returned to PW2's place of work. While there she received a call that the accused was threatening to burn her house. She requested PW2 to go report to the police for her PW2 instead rang her aunt to report on Regina's behalf because she was at work. Apparently Regina also left.

Around 11:00am PW2 decided to go and check on whether the Regina's issue had been reported. On the way to the police station she met Regina's sister one Lucy Karimi. They went to the police station together and found Regina had already made the report and was waiting. Both decided to go to Regina's house leaving her at the station. But before they went far Regina joined them and told them she had just been told that one of her children was at the plot and she was fearful for the child's safety should the accused find the child there

So they decided to go to Regina's house. Between the police station and Kiawara they stopped to talk to some two ladies. That is when they heard Regina utter the words-

“Ngai, here he comes, he might beat me”

The ladies just stood. It is then that accused passed the PW2 and faced Regina while lifting his shirt and saying *“unanibeba aje kama mtoto”* (literally why are you carrying me like a child?)

In a flash he took put a panga. PW2, who was 8 months' pregnant took off in fear but on looking back saw the accused attacking Regina with the panga. She could see him lifting the panga but could not tell how he cut her but she saw him throw the panga and run away towards the police station with members of the public including a CID officer in hot pursuit.

She collapsed and was given first Aid in a nearby clinic. She later rang Regina's sister who told her Regina had been cut and was in hospital. That she learnt later that Regina had passed on.

PW3 Lucy Karimi testified that she was living with her sister Jecinta. On 29th April 2017 about 10.00am she was rang by Regina to accompany her to go and pick her child from the house because someone had attempted to set her house on fire. When Regina rang her she was in the company of Jecinta and Esther. They met Regina and as they walked they saw accused who even PW3 knew. She heard Regina say *“Ngai, this Dan, he will beat me here”*. Jecinta said she would talk to him but the accused just passed her and confronted Regina, who was standing behind PW3 telling her she was playing with him. She said she saw accused pull a panga out of his clothes and - Regina put up her hands in defence but the accused just cut and it fell off. He cut her head. Regina fell.

PW3 ran off to tell Jane as the accused ran off towards the police station. She was in shock and ran off and home. She said she saw the accused that day and that is how she could remember him.

No.100088 PC **Aaron Omenge** was in his house around 1100hrs when he heard screams- he rushed where the screams were and people pointed at a running man whom he immediately followed. The person jumped into the police station and he caught up with him at the report desk. Coincidentally PW9 No.230391 **Assistant Supt police Evans Omuga** was at the police station Mweiga where he was the OCS. He was having a lecture with his officers when he received a call that about 200m from the station a young lady had been seriously injured. Looking up from where he was he saw the accused jump into the police compound followed by an officer from DCI. He could also see people gathered at the open ground adjacent to the police station.

He learnt from the DCI officer PW6 that the person had injured a young lady. Together with PW6 and other officers they went to the scene where they found Regina lying on the ground, with one hand completely severed, with cut wounds on head and the other arm. She was rushed to hospital by a Good Samaritan but had died on arrival.

The severed hand and panga were collected from the scene the hand was taken to the mortuary and the panga taken over as the murder weapon.

PW10, No.235033 C.I **Daniel Nzioka** was the Investigating Officer. He received a call around 12 noon from PW9 about a murder incident approximately 100m from the police station. The suspect was collected from police station to Nyeri police station. He was presented for psychiatrist examination.

On 4th May 2017 he was found fit to stand trial by **Dr. Mwenda** who was PW1 and who produced the psychiatrist's report as evidence.

The postmortem was conducted on 4th May 2017 and PW5 Susan Mukami Kibue, a family friend identified Regina's body for postmortem.

PW6, Dr. John Muthuri pathologist at Nyeri County hospital conducted the postmortem. He found that the deceased had deep cut wounds on head- onto scalp, skull, brain complete traumatic amputation of the wrist joint -deep cut wound on mid forearm -right upper limb. Visible severed tendons.

Cause of death multiple injuries involving head, both upper limbs keeping with assault by a sharp object. He gave blood samples on request and produced the postmortem report.

PW8, **Henry Kiptoo Sang** the government analyst. He found that the panga had no blood stains.

The investigating officer testified that after collecting all the evidence he decided to have the accused charged with this offence. He confirmed that no evidence was found to connect the panga with the accused person or the deceased. Asked for names of the persons who gave chase to the accused person, he could not name even one.

In his defence the accused person made a sworn statement. He denied killing Regina. He said that on the material date he was an employee a labourer in some unnamed person's farm. Each Saturday he would fetch meat for dogs and goat heads for himself from Mweiga town.

On 29th April 2017 he was in Mweiga town in the morning, bought the goat head and meat, then went into a wines and spirits shop where he bought himself 2 bottles Napoleon. He went to the nearby County Council toilets made a short call after which he went behind the toilets, drank one of the bottles and threw the empty bottle away.

As he was leaving he was called by a person he thought he knew it turned out it was a police officer and who arrested him for taking alcohol in the morning despite his protest that he was not drinking in a bar and therefore it could not have been an offence. . The officer took him to the police station where he was locked up for 2 hours where there were two other prisoners. That is when he heard a commotion, and saw police officers leave with tear gas and guns with the people who were making noise entering the police station. About 1:00pm when he and the fellow prisoners were being served lunch the police officer who had arrested him came with three women up to the cells. He identified two of the women as Jecinta Karanu (PW2) and Lucy Karimi (PW3) Regina's cousins. The officer told him and his cell mates to look through the opening in the cell door, and asked Jecinta and Karimi in turns whether they knew any of them. The two identified him as a person known to them and left.

Around 5:00pm, the officer who had arrested him went and told him that he had killed Regina. He the accused protested asking how he could have done it yet he had been in the cells having been arrested for taking alcohol. The officer told him that Regina's cousins are the ones who had said he was the one. He testified that he argued with the officer that by the time the commotion was being heard outside he had been in the cells for two hours.

Later at 7:00pm that night he was removed to Nyeri Central Police station where he stayed for three days and returned to Mweiga Police Station.

He later saw Regina's cousins and two other women pass by the cells going to the Inspector's office. He testified that he heard the women being told by a person whose voice he did not identify to go and record statements that it was he who had killed Regina. He testified that he heard Regina's cousins refusing to record statements saying that they did not know who had killed her. He testified that he heard them being threatened that he would be released and they would be locked up if they did not record the said statements.

It was his testimony that it was lies that had landed him in this court facing these charges which he denied.

He said he knew Regina from 18th February 2016 but they separated on 27th December 2016 at 9:00pm in Kinyumba bar. That night he had joined his friends who he found seated with three ladies. When Regina found him there she began to accuse him of sitting with prostitutes and raised a fracas. He decided to leave but she followed to the bar where he escaped to and joined his male friend. She told him, the second time that night, that he would see, regardless of where he went. He did not know what she meant

It is then he decided to take a boda boda and go home and from that 27th December 2016 at 9:00pm their relationship had ended.

On cross examination he conceded that he knew the deceased's cousins and they knew him. He denied that he was running at the time of arrest. He denied being angry with Regina. He denied cutting her. At the close of both the prosecution and the defence case, the issue for determination is whether the state has proved the charge against the accused person beyond a reasonable doubt. In the case of **Joseph Kimani Njau V Republic [2014] eKLR** the Court of Appeal stated: -

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard.

The ingredients for the offence of murder are set out under s. 203 of the Penal Code:

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

The prosecution must prove beyond a reasonable doubt:

1. *The fact of death*
2. *The unlawful act or omission of the accused person*
3. *Malice aforethought on the part of the accused person.*

Malice aforethought is defined under s. 206 of the Penal Code thus:

*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.

In his final submissions counsel for the accused urged the court to find that prosecution had failed to establish a case against the accused as he had testified that he had been arrested due to intoxication and locked up at Mweiga Police station. Relying on **Uganda Vs.Sembanya & Others (1969) EA 204** that the accused had no obligation to establish his alibi but only to create a doubt in the mind of the court as to the strength of the case for the prosecution against him. . That the issue of his intoxication had not been brought up in cross-examination and that the prosecution had not exhausted the issue.

He also relied on **Nyakite s/o Oyugi Vs.Republic (1959) EALR** that

“...the burden of raising a defence of intoxication so that to negative intent to kill or cause grievous harm is not in an accused person”

It was further submitted that the prosecution had not dislodged its burden of proof relying on **Victor Mwendwa Muchinje Vs. Republic (2014) eKLR** that prosecution had also not dealt with accused person's alibi and defence.

?On its part the state was of the view that the prosecution had proved its case to required standard. That the incident happened in broad day light, that the accused was at the scene of crime, and was well known to the deceased and her relatives; that the witnesses were consistent; that there was no evidence of intoxication on the part of the accused who was chased by members of the public in broad daylight and sought refuge in the police station. That the accused had a motive.

Having considered the submissions and evidence on record I found that the fact of death of Regina was not in dispute. The pathologist confirmed that she died as a result of injuries sustained from cuts by sharp object. PW5, PW7, PW9 and PW10 also confirmed that she died.

The testimonies of PW2 and PW3 as to who committed the offence were those of eye witnesses who saw the accused person at very close distance confront the deceased and flash out a panga from under his shirt and cut her like firewood, completely cutting off her right arm. The injuries to both upper limbs appear consistent to the testimony of PW3 that when accused flashed out the panga Regina raised her arms.

The accused defence is that these testimonies were all lies because he was not at the scene at that time but in the police cells.

On cross examination PW2 told the court she had known the accused for about four months, and about his friendship with Regina for two days, and about the relationship with one Ndirangu for about five months. That when the accused and one Ndirangu met in her bar and began to quarrel, they settled to drink together after one person told them in her presence, to accept they were sharing a woman and the reality would be to share out the days each could be with her. Not a single question was put to her about the alleged identification of the accused at the police station or the undue pressure to implicate the accused person. Her testimony as to what she knew about the accused and the deceased and what she witnessed on the material date remained intact. She was there when Regina expressed fear that the accused would harm her, she testified she saw him cut her.

Similarly, for PW3 was present when it happened. She heard the deceased express the fear: that Dan might beat her. She witnessed him confront her and then cut her. Not a single question was put to her about finding the accused in the police station and being coerced to record a statement.

Hence the testimony of these witnesses coupled with that of PW4 and the arresting officer all place the accused at the scene of crime and give him the motive to commit the offence. They also render his defence an afterthought as none of it was put to the witnesses.

Was there malice aforethought?

This was established by the evidence of PW2 and PW3. First the expression of fear by the deceased that the accused could cause her harm was very vividly expressed by the two. It gave the impression that the accused had made the threats to harm the deceased earlier. The accused appeared to have built up rage from the incident in PW3s bar, the testimony of PW4 and the words he uttered- *unanibeba aje kama mtoto?* Getting a panga, and walking around walking with it concealed in his clothes until he found the Regina. That was malice aforethought fueled by his desire to teach her the lesson that she could NOT “*kumbeba kama mtoto*” anymore.

I am alive to the fact the accused has no obligation to establish his innocence. The presumption of innocence runs throughout the trial until he is proved guilty. However, having been fund to have a case to answer the accused put out a defence. I have considered the same. Does it create any doubt as to whether or not he committed the offence?

I have pointed out the fact that it bears the characteristics of an afterthought. During the submissions on no case t answer the accused's defence appeared to be that he had been provoked by the deceased. In the final submissions, that he had been arrested for intoxication and was not at the scene. To be tenable the defence has to be believable in the first place. The witnesses had no reason to implicate him falsely.

All the evidence points at the accused and no else. Even if this was a case of circumstantial evidence, (see **Joan Chebii Sawe vs. Republic (2003) eKLR**) the chain is so tight that there is no doubt that the accused committed the offence.

Hence in my view the evidence before me sufficiently established both on the part of the accused person, the *actus reus* and the *mens rea* as envisaged by s. 206 of the Penal Code, for the offence of murder c/s 203 as read with s 204 of the Penal Code.

I find the accused person guilty as charged and convict accordingly under s. 322(2) of the CPC.

Dated and delivered and signed in open court at Nyeri this 17th May 2019.

Mumbua T Matheka

Judge

In the presence of:-

Court Assistant: Jerusha

Mr. MAGOMA for the prosecution: The accused has no records. He be treated as 1st offender.

MS. MIRITI: We pray for leniency. The Accused is a 1st offender and is remorseful and at the prime of his life. He comes from a very humble back ground.

Court: I order that a PRE-SENTENCE and Victim Impact statement be availed by the County Director Probation and After Care Services, Nyeri on or before the 3rd June 2019.

The order be served for compliance.

Mention on 3rd June 2019.

Accused Remanded in custody.

Judge