



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 133 OF 2014

REPUBLIC.....STATE

VERSUS

JAMES GITAU NJOROGE.....ACCUSED

JUDGMENT

1. The Accused Person, James Gitau Njoroge (“Accused Person”) is charged with murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars contained in the information are that on the 28th day of December, 2014, the Accused Person is alleged to have murdered Susan Wanjiru Mwaura (“Deceased”) at Rhonda Estate in Nakuru District within Nakuru County.

2. The Accused Person pleaded not guilty and the case proceeded for hearing. The Prosecution called six witnesses and closed its case. All the six witnesses testified before Honourable Justice M. Odero who had the conduct of the case before she was transferred out of the station. Before her transfer, the Learned Judge delivered a ruling placing the Accused Person on his defence.

3. When I took over the matter, I complied with the provisions of Section 200(3) of the Criminal Procedure Code and informed the Accused Person of his options thereunder. He elected to have the case proceed from where it had reached. I then complied with the provisions of section 311 (as read with section 306) of the Criminal Procedure Code and informed the Accused Person of his options on defence. The Accused Person elected to give a sworn statement without calling any witnesses. He gave his testimony in defence on 27/02/2019. Neither the Defence nor the Prosecution elected to make submissions.

4. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

5. To successfully obtain a guilty verdict in a murder charge, the Prosecution, therefore, is required to tender sufficient proof of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by *malice aforethought*.

6. On the other hand, under section 206 of the Penal Code, *malice aforethought* is established, when there is evidence of:

- a. *Intention to cause death of or grievous harm to any person whether that person is the one who actually died 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;*
- c. *Intent to commit a felony; or*
- d. *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.*

7. The Prosecution case was quite straight-forward. The Deceased was a live-in girlfriend to the Accused Person – this was a point of convergence for all the witnesses – Defence and Prosecution alike. The Deceased and the Accused Person had lived together for approximately four years. They had no children. PW4 was a lady by the name, Joyce Nyambura. She was a neighbour to the Accused Person and the Deceased: they shared a plot and a compound with seven other households. She testified that the relationship between the two was stormy: the two used to fight quite frequently.
8. On the 28/12/2014, Joyce told the Court, she was home at around 9:00pm at night. She heard a commotion outside. She peeped outside and saw Stanley Kahoro Njunge outside. He was with the Accused Person. Joyce said that when she went outside, the Accused Person told him that the Deceased had run into Mr. Kahoro's house. When she checked inside Mr. Kahoro's house, she did not see the Deceased. However, the Accused Person pushed Joyce away from the door, and made his way into Mr. Kahoro's house. He soon thereafter came dragging the Deceased out. Joyce swore that he saw the Accused Person hitting the Deceased at least twice: once with his open hands; and another with his legs. Joyce told the Court that by this time the other neighbours had come out but none intervened. This was because, Joyce explained, the couple had a history of quarrelling whenever they were drunk. On this occasion, Joyce told the Court, the Deceased was visibly drunk.
9. Like the rest of the neighbours, Joyce went back to her house and slept that night. In the morning, she was prompted by her daughter to go call the Deceased. Her daughter had reported that the Deceased was not responding to her calls. So, Joyce made her way to the house the Deceased shared with the Accused Person. She found the Deceased lying on the ground covered with a blanket. She panicked and went into shock. She called the other neighbours. The Accused Person was, reportedly, still standing outside the house. Joyce told him to go report that he had killed his wife. Someone then called the authorities – the Village elder and the Police. They came and took over investigations.
10. Mr. Kahoro – the man to whose house the Deceased ran into the night of 28/12/2014 – testified as PW5. In material terms, he corroborated Joyce's story about what happened on that day. He testified that the Accused Person pulled the Deceased from his house while beating her. He dragged her to the house he (the Accused Person) shared with the Deceased. That was the last Mr. Kahoro saw the Deceased alive.
11. One of the elders who was called after the body of the Deceased was discovered was Mr. Wilson Kipkoech Arap Terer. He testified as PW2. He testified that he got a call from a fellow village elder about the incident. He went to the scene and found the body. He questioned Joyce who was at the scene about what had happened. He then placed a call to Rhonda Police Post to report.
12. At Rhonda Police Post, it was Corporal Peter Washuli who picked up the call. He became the Investigating Officer in the case. He booked the report and went to the scene where he found the body of the Deceased. He interrogated the neighbours where he learnt that the Accused Person had been beating the Deceased the previous night. He took over the scene. He noted that there had been attempts to conceal evidence because the house had been cleaned. However, he was able to recover a pair of red trousers which hang outside on the clothes' line and which the neighbours said was what the Deceased was dressed in when she was last seen alive. It was produced as Exhibit 2. Corporal Washuli also produced a piece of white cloth as Exhibit 3. This, he said, was soaked in blood when they found it at the scene. Lastly, Corporal Washuli produced pieces of a hair wig which the neighbours said was the wig the Deceased had on on the last day she was seen alive. James Mwaura Chege (PW1) confirmed that he also saw the pieces of the wig at the scene when he went there and that it was the wig the Deceased had.
13. Mr. Chege, the father to the Deceased, also testified as PW1. He, too, got a call the morning the body was discovered. He was in Gilgil where he lives. He rushed to the scene where he confirmed that his daughter was, indeed, dead. He found her lying on the ground in the house she shared with the Accused Person. He identified the Accused Person as the person who lived with her daughter even though they had not married officially. Mr. Chege also identified the body during the autopsy.
14. The autopsy was conducted by Dr. Biketi. He was not available to testify and produce the Post-mortem Report. With the concurrence of both parties, Dr. Magdaline Munyao testified on his behalf. She confirmed that she is familiar with Dr. Biketi's handwriting and signature having worked with him for more than four (4) years. She presented the Post-mortem Report which was carried out on the body of Susan Wanjiru Mwaura (the Deceased) by Dr. Biketi on 31/12/2014. Dr. Biketi found a female adult body of African origin. Externally, the body had injuries in the region above the eye and bruises on the back humbar region. It also had multiple vascular injuries on the scalp. There was haematoma on the right temporal parietal and occipital regions. The doctor also noted subdural haematoma on the nervous system and that the lungs had retracted and atrophied. Dr. Biketi concluded that the cause of death was traumatic brain injury. Dr. Munyao stated in cross-examination that given the injuries, the trauma must have been caused by a blunt object.
15. When put on his defence, the Accused Person gave a straight denial. He contradicted the narrative given by Joyce and Kahoro and flatly denied that he was seen assaulting his lover on the night in question. Instead, he testified, Joyce and Kahoro brought the Deceased to his house at 9:00pm that night. The Accused Person testified that when the Deceased was brought, she was completely intoxicated. He said that he prepared a place on the bed where they lay her and that he asked Joyce where he had sold alcohol to the Deceased while she knew that she (the Deceased) was already drunk; and that Joyce said that she had not sold her any alcohol.
16. The Accused Person's narrative is that he tried to give the Deceased food but she was not able to eat; and that she was not able to sleep the whole night; that she was making guttural sounds the whole night. The Accused Person testified that the Deceased started vomiting at night and that the vomit smelled alcohol. In the morning, the Accused Person said that he decided to go get her milk and that it was while he was making his way back from getting milk that he met Joyce that morning. He flatly denied killing the Deceased. He testified that there was no bad blood between him and Joyce and Kahoro but that he does not understand why they chose to lie in Court about what happened.
17. The task of the Court is simple enough: it is to decide if on the evidence adduced, the Prosecution has established the three elements of the offence of murder beyond reasonable doubt.
18. There is no question that the Deceased died. Her body was found lying on the ground in her house on 29/12/2014 in the morning. The Prosecution and Defence witnesses converged on that point. Dr. Munyao confirmed that Dr. Biketi carried out an autopsy and the Report

was admitted to evidence. It established that the Deceased died of traumatic brain injury. Hence, the *actus reus* for the offence of murder was sufficiently established.

19. The critical question then becomes: who committed the *actus reus*? The Prosecution arrayed five witnesses to persuade the Court that it was the Accused Person who committed the Act. Two of the witnesses – Joyce (PW4) and Kahoro (PW5) – were the crucial witnesses: they claimed they saw the Accused Person dragging the Deceased from Mr. Kahoro's house while beating her. By their account, the Accused Person dragged the Deceased into their house where he was found dead the following morning.

20. The Prosecution's theory is, therefore, straightforward: it is the Accused Person who beat the Deceased to death. He was seen by two witnesses savagely assaulting the Deceased.

21. The Accused Person vehemently denies that version. He flatly calls Joyce and Kahoro liars although he has no clue why they would lie to get him in trouble since he admits there were no disagreements between him and them.

22. This case, in the main, turns on the credibility of Joyce and Kahoro as Prosecution witnesses as well as the other surrounding evidence. Does it support the version presented by the Accused Person or does it ineluctably point to the Accused Person as the person who committed the murder?

23. I will begin by pointing out that I found the testimonies of Joyce (PW4) and Kahoro (PW5) as candid and straightforward. The narrative was consistent and credible. They had nothing to gain from lying about the events of the night. They were truthful that they did not see the Accused Person beat the Deceased to death; but were categorical that they saw him beating her as he dragged her to their house.

24. It is readily obvious that neither Joyce nor Kahoro saw the Accused Person killing the Deceased. What they saw was him assaulting her which would leave open the question if it is the Accused Person who assaulted her to death. That inference must rely on circumstantial evidence to be established.

25. It is true that circumstantial evidence is, often, the best evidence. So said the Court of Appeal in *Neema Mwandoro Ndurya v. R [2008] eKLR*, where it cited with approval an English Case, *R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20* where the English Court stated that:

Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.

26. In *Joan Chebichi Sawe versus Republic [2003] eKLR* the principles that guide the Court in evaluating circumstantial evidence were laid out in three tests as follows:-

- a. *The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;*
- b. *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;*
- c. *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.*

27. Earlier on, *Kipkering Arap Koske versus R. [1949] 16 EACA 135*, long considered a *locus classicus* on this issue, had compressed the principles into two thus:

- (a) *The inculpatory facts must be incompatible with the innocence of the accused.*
- (b) *The facts must be capable of no other conclusion or explanation except the guilt of the accused.*

28. However, as several Courts have pointed out, even where the Court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above threshold to the facts before it. As the Court of Appeal remarked in *Simon Musoke versus Republic [1958] EA 715* while citing *Teper versus R. [1952] AC 480,489* before drawing the inference of an Accused Person's guilt from circumstantial evidence it is necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

29. Applying these principles to the present case, can we truly say that the "*circumstances taken cumulatively... 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 Person and none else*"? I am persuaded that this is the case here.

30. The narrative by the Accused Person does not add up for at least four reasons. First, indeed, he went out of the house in the morning to buy milk for the Deceased, and was only surprised to find that she had died when he came back, there is the question of why it took him up to 4:30pm that day to report the death. That it took him that long to report is confirmed by Corporal Washuli.

31. Second, there is no mention of what happened to the milk he allegedly went to buy. This is a minor detail of the kind that often illuminates a narrative for its credibility or lack of it. None of the witnesses saw the Accused Person with the milk he allegedly went to buy; and neither does the Accused Person say what happened to it after he came back to discover that the Deceased had died.

32. Third, the Accused Person's narrative is made implausible by the autopsy report. The Report is quite categorical that the death was due to traumatic brain injury. This is consistent with the beatings that PW4 and PW5 saw the Accused Person administering on the Deceased the previous day. Moreover, the wig which the Deceased had on was recovered in the house. This points to the fact that the assault happened inside the house. It is only the Accused Person who had the opportunity to cause the injuries to the Deceased as they were only two in the house.

33. Fourthly, the Accused Person did not explain the suspicious attempts to conceal evidence – in particular the cleaning of the house and the washing of the red pair of trousers that the Deceased had on when she was last seen alive. Even by the Accused Person's own narrative, the Deceased was near-unconscious and would have been unable to wash her clothes and hung them out to dry. Similarly, she would have been unable to clean the house. Neither would it have made sense for the Accused Person to wake up in the morning to clean up the house if his narrative is in fact true: he would have been rushing to get the milk to rescue his lover that early in the morning. It is unlikely that his first chore would have been to clean their house.

34. I noted that there was no scientific evidence linking the blood on the white cloth found at the scene with the blood of the Deceased and discounted that piece of evidence. Even then, the Prosecution proved beyond reasonable doubt that it was the Accused Person who caused the death of the Deceased.

35. The last question to consider, therefore, is whether the Accused Person had the requisite *mens rea* of malice aforethought. In a case such as this one where the act of death is established by circumstantial evidence and there is no further evidence or circumstances either in the Prosecution narrative or arising out of the defence by the Accused Person which would introduce the reasonable or plausible possibility which could negative malice aforethought, the Court is entitled to infer that the homicide was committed by the Accused Person as part of his pattern to assault the Deceased and cause grievous harm to her. As such, the *mens rea* for murder is established. This is borne out by two factors: first that the Accused Person was seen assaulting the Deceased Person earlier in the night. Second, that the wig was found in the room attesting to the violence with which the Accused Person must have assaulted the Deceased. The Accused Person must have used such violent force that he plucked out the wig from her head in pieces. That is enough to establish *mens rea*.

36. In the circumstances of this case I conclude, upon appropriate evaluation of the evidence presented that it can properly be said that the "*inculpatory fact is incompatible with the innocence of the Accused, and is incapable of explanation upon any other reasonable hypothesis than that of his guilt.*" See ***R v Kipkering Arap Koske & Another*** 16 EACA 135.

37. It is, therefore, my finding that the Prosecution has proved beyond reasonable doubt all the three elements of murder. The Deceased was killed by the Accused Person; and the killing was without any justifiable excuse. Consequently, I find the Accused Person guilty in the murder of Susan Wanjiru Mwaura contrary to section 203 as read together with section 204 of the Penal Code. I hereby convict him accordingly.

38. Orders accordingly.

Dated and Delivered at Nakuru this 13th day of June, 2019.

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JOEL NGUGI

JUDGE