



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 87 OF 2015

REPUBLICRESPONDENT

VERSUS

SUNDAY MACHARIA KAMAU.....ACCUSED

JUDGEMENT

1. The accused **SUNDAY MACHARIA KAMAU** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that on the 29th day of August 2015 at Kambi Moto Estate in Huruma Area within Nairobi County murdered **FLORENCE WANGECHI**.

2. He pleaded not guilty to the charges and to prove its case against him the prosecution called a total of eleven (11) witnesses. When put on his defence he tendered in unsworn statement of defence without calling any witnesses.

PROSECUTION CASE

3. The prosecution case was that the deceased who had been living at Zimmerman moved into Huruma where most of her family members and friends were. In the process of moving in she linked up with the accused, whose sisters were her friends and her sisters'. The deceased informed **PW2 JENNIFER WANJIKU NJERI** that the accused wanted to be in a relationship with her and she advised her against the said relationship. The deceased had further informed her that it was the accused who had helped her put her items into the new house and after that he was pestering her for a relationship.

4. On 28th she was together with the deceased who was in good health at Tervan Bar, together with their friends who had come from Zimmerman upto 10.00 p.m. when she left them. On 29th at 1.30 a.m. the accused went to the house of **PW1 ANN WANJIRU WAITHERA** his sister and informed her that he was fighting with the deceased and had stabbed her with a knife and requested her to go and check on her. **PW1** then went to the house of **PW2** and reported to her what she had been told by the accused. **PW2** then proceeded to the house of the deceased where she found the door locked from outside.

5. It was **PW2's** evidence that when they opened the door and gained entry, they met a basin and a rug on a seat with the deceased lying on the bed. She left the room crying attracting **PW3 SARAH MUTHONI** who was a neighbour and an aunt of the deceased, who then ran to the house of the deceased where they found blood stains on everything, the body of the deceased was on the bed with stabbed wounds on her thighs, her clothes and beddings were burned, her hair weave cut and left on the bed together with a knife. Her evidence was corroborated by **PW5 KELVIN KANYANGO** who was with them in her house when **PW1** reported the stabbing of the deceased by the accused. It was his evidence that he knew the accused whom he saw on 30/8/2015 and arrested and took him to Huruma Police Station. He last saw the deceased alive on 28/8/2015 at 5.30 p.m.

6. **PW4 TOPISTA NJOKI** a sister of the accused stated that on 29/8/2019 her sister **PW1** went to her house and reported that the accused had told her that he was fighting with the deceased while they were drunk and he stabbed her with a knife. She called a sister of the deceased with the said information and reported to the police who told her that the case had already been reported. She stated that they could not reach the accused on phone. **PW6 JOSEPH MWANGI MUTHONI** escorted a brother of the deceased to her house and took the body to Kenyatta University Mortuary and attended to post-mortem examination. **PW7 PC LAMECK NGAO** re-arrested the accused at Huruma Police Station and booked him into the cells. **PW8 ANNA WANGECHI NDEMEU** a Government Analyst examined exhibits and confirmed that the high vaginal swab generated from the deceased did not have semen or spermatozoa, while the knife, T-shirt of the accused and finger nails had DNA profiles matching the deceased.

7. **PW9 PC MANAVA MUSAMUSI** attended to the post-mortem and confirmed that the body of the deceased had twelve (12) stabbed wounds. He collected a light blue T-shirt under the bed belonging to the accused. **PW10 CI. GEORGE JOBANDO** visited the house of the deceased where he conducted a search and recovered a blood stained kitchen knife and bolted club on the bed. He recorded a statement under

inquiry from the accused. From his investigations he confirmed that the accused and the deceased were lovers and on the material day the deceased requested the accused to allow her go have fun with one 'Shamba'. The accused later on found them before leaving the two to go to the house of the deceased who followed him thereafter and a fight ensued leading to the death of the deceased.

8. PW11 DR. J. ODUOR performed post-mortem examination on the body of the deceased who had a slash wound on the index finger, left hand, left forearm, left elbow joint, abrasion on the left breast, upper arm, stab wound on the left chest, left flank, left thigh. Her left lung had collapsed, the heart and colons were punctured. As a result of the said examination, he formed an opinion that the cause of death was multiple injuries due to penetrating trauma. The accused was found fit to stand trial on 22/9/2015.

DEFENCE CASE

9. The accused denied committing the offence and stated that on 30/8/2015 he received a call from his sister **TOPISTA NJOKI** that something had happened at Huruma on 29th and that he was being sought for it. She therefore told him to go to Huruma. On his way to Huruma at a car wash he met a group of people who wanted to mete out mob justice upon him. It was agreed that he be taken to the police station. He saw his sisters **ANN WAITHERA**, **TOPISTA NJOKI** and **JIM WAMBUGU** his uncle who he called but they refused to respond to his call. He was locked in the police cells before being charged. It was his evidence that there was a grudge between him, his sister and their uncle as a result of the death of his younger brother.

SUBMISSION

10. On behalf of the accused, written submissions were filed in which it was stated that the prosecution had not proved its case beyond reasonable doubt. There was no eye witness account on how the deceased met her death and that the accused was only implicated by **PW1 ANN WANJIRU WAITHERA** his elder sister. It was submitted that the accused was staying in Kariobangi and not Huruma as stated by the prosecution witnesses. It was submitted that the case was based purely on circumstantial evidence which ought to point to the guilt of the accused and without any reasonable explanation of innocence. It was submitted that there was no evidence to prove motive to commit the offence and that no evidence was submitted to rebut the accused's claim that he had been implicated by his sister because of personal differences. It was submitted that the information given by the accused to his sister did not amount to a confession and if it was then it did not comply with **Section 25 (1)** of the **Evidence Act** for which the case of **REPUBLIC v ELLY WAGA OMONDI [2015] eKLR** was submitted.

11. On behalf of the prosecution it was submitted that the evidence of the sister of the accused should be viewed with the other prosecution witnesses. It was not confession but evidence pointing at a certain direction.

ANALYSIS AND DETERMINATION

12. To sustain a conviction in a murder trial the prosecution is under both legal and evidential obligation to prove beyond any reasonable doubt the following elements of the offence:-

- a) The fact and the cause of death.*
- b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.*
- c) That the said death was caused with malice aforethought as defined under section 206 of the Penal Code.*

13. The fact and cause of death of the deceased is not in dispute. The same was proved beyond any reasonable doubt through the evidence of **PW6 JOSEPH MWANGI MUTHONI** who was with the brother of the deceased when **PW1** called him with information of the death of the deceased and proceeded to Huruma Police Post where they found the body of the deceased. He proceeded to Kenyatta University Mortuary where post-mortem was conducted on the body in the presence of **PW9 PC MANAVA MUSAMUSI**. The cause of death was proved by the evidence of **DR. J. ODUOR PW11** as multiple injuries due to penetrating trauma. The cause of death was corroborated by the evidence of **PW1, PW2, PW3, PW4, and PW5**. It therefore follows that the fact and cause of death were proved beyond any reasonable doubt.

14. On whether the said death was caused by unlawful act on the part of the accused:- as submitted by the same, the prosecution case against him is based purely on circumstantial evidence. There is no direct eye witness to the murder. The law on circumstantial evidence in Kenya seems to be now well settled. The following test as stated in **PADALA VEERA REDDY v STATE OF A.P. & OTHERS, (AIR 1990 SC 79)** by the Supreme Court of India is applicable in Kenya:-

- “(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
- (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
- (3) 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; and,*
- (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”*

15. Sir Alfred Wills in his book "**Wills' Circumstantial Evidence**" (Chapter VI) lays down the following rules specially to be observed in cases of circumstantial evidence:-

"(1) The facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

(2) The burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

(3) In all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;

(4) In order to justify 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;

(5) If there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

16. The above position has been restated in Kenya with the Court of Appeal in the case of **ABANGA alias ONYANGO v REPUBLIC, CRIMINAL APPLICATION NO. 32 OF 1990 (UR)** stating 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."

17. I do not need to add to the above save for self glorification to state that in the case of **REPUBLIC V ELIZABETH ANYANGO OJWANG [2018] eKLR**, the court stated as follows:-

"22. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances get snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions."

18. In this cause the following circumstantial evidence stands out linking the accused to the commission of the offence. The accused and the deceased were placed together on the night of 28th August 2015 through the evidence of **PW10** the Investigating Officer whose evidence was that they were together at a drinking joint when the deceased was joined by her other boyfriend a **Mr. Shamba**. The evidence is corroborated by that of **PW2 JENNIFER WANJIKU NJERI** who stated that she was with her on the night of Friday the 28th of August 2015 upto 10.00 p.m. when she left her together with her friends, who had come to see her from Zimmerman. The deceased had told her that the accused was 'tunning her'. She further confirmed that the accused had helped the deceased put her items in her house when she moved to the new place and **PW3 SARAH MUTHONI** an aunt of the deceased confirmed that she knew the accused who had moved into the house of the deceased and had stayed with her for two weeks.

19. The accused went to **PW1 ANN WANJIRU WAITHERA** his sister and confessed to her having stabbed the deceased with a knife. She confirmed that the deceased and the accused were living together for about one month. She stated that when the accused went to her house he was in a state of confusion and was crying. **PW1** immediately called the sister of the deceased **PW2 JENNIFER WANJIKU NJERI** before proceeding to the house of her sister **PW4 TOPISTA NJOKI WANGARI** and gave her the same information that the accused had stabbed the deceased with a knife. **PW5 KELVIN KANYANGO** corroborated the evidence of **PW3** and stated that **PW1** had told her that the accused had stabbed the deceased and left a stove burning in her house.

20. The scene at the house of the deceased and the evidence of **PW11 DR. JOHANSEN ODUOR** corroborated the evidence of **PW2, PW3** and **PW4** thereby linking the accused to the scene. Further the T-shirt which was identified by the witnesses as belonging to the accused was found under the bed of the deceased and the blood stains thereon as per the evidence of **PW8 ANNA WANGECHI NDEMEU** matched the DNA profile generated from the blood of the deceased thereby placing the accused at the scene.

21. The other chain of circumstantial evidence linking the accused to the offence is his conduct immediately upon giving **PW1** information of what he had done. According to **PW4 TOPISA NJOKI** his elder sister, the accused went under and they could not get hold of him. He would call them on phone and indicate where he was but he would change location thereby indicating a guilty mind. There is also the issue of the time between when the accused went to the house of **PW1** and when **PW2, PW3** and **PW5** went to the house of the deceased to find her lying in a pool of blood confirming that there could not have been any other person other than the accused who inflicted the fatal injuries upon the deceased. **Section 25** of the **Evidence Act** defines confession as:-

“Confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

22. The accused was a brother to **PW1**, there is no evidence that the said witness had a grudge against the accused as alleged in his defence as he did not put the same to the said witness during cross-examination. I therefore find the accused’s account of an alleged grudge an afterthought and unbelievable. **PW1** was very consistent in her evidence. She informed **PW2** the sister of the deceased who was her neighbour. She immediately went to **PW4** her elder sister **TOPISTA NJOKI** and gave her the same information. She had no reason to implicate the accused.

23. The other chain of circumstantial evidence linking the accused with the commission of the offence is the murder weapon which according to the evidence of **PW8** had blood stains which matched the DNA profile generated from the blood of the deceased. There was also the fact that the deceased’s beddings and clothes were burned thereby corroborating the accused’s confession to **PW1**. It therefore follows and I find that the chain of circumstantial evidence herein cumulatively points to the accused person and nobody else as having caused the death of the deceased thereby linking her beyond any reasonable doubt to the unlawful death of the deceased.

24. On whether the said death was caused by malice aforethought as defined under **Section 206** of the **Penal Code** 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.”

25. As per the evidence of **PW11** the Investigating Officer, the accused had left the deceased with her other boyfriend **Shamba** at the Pub and when the deceased followed him to the house she raised the issue of the smell of another woman in the house whom the accused alleged had had sex with and that is what led to the fight between the two. It is therefore clear that the accused had motive.

26. The injuries inflicted upon the deceased as per the post-mortem report clearly established that the accused had the necessary malice aforethought to cause the death and or grievous bodily harm to the deceased and indeed succeeded in causing the death of the deceased. In the case of **REPUBLIC v TUBERE S/O OCHEN [1945] 12 EACA 63** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

27. Having taken into account the nature of the injuries inflicted upon the deceased, the state of the house and the conduct of the accused, I am satisfied that malice aforethought on the part of the accused was established beyond any reasonable doubt.

28. I have looked at the accused’s defence tendered before me, though under no obligation to do so, the same was silent on what happened on the 28th and 29th of August 2015. He only gave an account of the 30th August 2015 when his sister **PW4** called him but this is contradicted by the evidence of **PW1** and **PW4**. He has raised the issue of a grudge in the family but weighed against the evidence before me and the creditability of the evidence of his two sisters who appeared before me, I find his defence hollow and an afterthought which I hereby dismiss. His T-shirt was found at the house of the deceased blood stained. He went to his sister **PW1** upon the commission of the offence and that was how the deceased was found in her house injured only for her to die on the way to hospital.

29. I am therefore satisfied and find that the prosecution has proved beyond any reasonable doubt all the elements of the offence of murder contrary to **Section 203** of the **Penal Code** and accordingly find the accused guilty of murder and convict him thereof and it is so ordered.

Dated, signed and delivered at Nairobi this 18th day of July, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Edward Holy for Nyachoti for the Accused

No appearance for the family

Accused present

Court assistant- Karwitha