



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 74 OF 2017

REPUBLIC.....PROSECUTOR

-VERSUS-

JOHNSTONE MULUILA MBATI.....ACCUSED

JUDGEMENT

Introduction:

1. The accused, Johnstone Muluilu Mbatu, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 of the Laws of Kenya.
2. The particulars are that on 25/03/2013 at Wote Township Location in Makueni District within Makueni County, the accused murdered Christine Nzilani.
3. The prosecution called nine (9) witnesses in support of its case.

Prosecution's Case:

4. **PW1** was **Kavindu Nzioka**, the deceased's mother. She testified that on 24/03/2013, the deceased called her using a different telephone number and asked her to go to Wote town where she lived and worked. The deceased told her that she had disagreed with her boyfriend and he had taken her clothes, shoes, ATM card, mobile phone and certificates. PW1 knew the said boyfriend, the accused herein, because the deceased had visited her with him. She also knew the accused's house. The accused's brother, one Mr. Kieti had informed PW1 that the deceased had used his phone and that she was at her boyfriend's place. PW1 proceeded there and found the deceased seated and crying outside the gate.
5. They got into the house where the accused was. The deceased explained that they had disagreed over the issue of her continued education. The accused wanted to marry her but as parents, they insisted that the deceased had to complete her computer course before marriage. The deceased also told her that the quarrelling had happened in her house (*deceased's*) and the accused had burnt the items outside the gate. She was shown the remnants of the burnt items. By this time, Mr. Kieti had joined them and she had a separate discussion with him whereupon they agreed that the deceased could get new clothes.
6. The accused, his brother and the deceased bought new clothes and then PW1 and the deceased went to the deceased's place for the night. PW1 went back to her home the following day. At about 8.00pm, Mr. Kieti called and asked her to rush back to Wote because the accused had injured the deceased badly on the head and hand. The accused was also said to be at the hospital, she told him that she could only travel in the morning. She then received another call from Kieti informing her that her daughter had passed away. She went to the mortuary the following morning where she saw her daughter's body. It had cuts on the head and the hand was almost severed.
7. On cross examination, she agreed that the accused and deceased were lovers, had disagreed and the accused had burnt the deceased's properties. That the issue of burnt clothes was partly resolved but they did not report the issue to the police. That on the night of 24/03/2013, the accused had poured water to the deceased's house and had promise to buy a pair of shoes for the deceased. That he was also to assist the deceased in replacing the burn sim card. That there was the issue of another young man in the relationship who was a former boyfriend of the deceased. That Kieti informed her that it was the accused who injured her daughter.
8. **PW2** was **Julius Luli Kimilu**, a taxi driver. He testified that on 25/03/2013, he was at Makueni bus stage when a boda boda operator called and told him that a young man had taken poison and needed to be taken to the hospital urgently. He proceeded to 'slaughter area' at about 7.30pm, took the young man, Johnstone, and rushed him to the hospital. He was not sure of the name of the man who he had taken poison. When he said 'Johnstone', he was referring to the man who called and paid him. He confessed that he could not recall the person he took to hospital.

9. On cross examination, he said that he was called between 7 and 8pm but could not confirm whether the person he took to hospital had taken poison or whether he was sick. He did not know the person he rushed to hospital.

10. **PW3** was **Benson Kieti Mbat**, the accused's brother. He testified that on 24/03/2013 at about 7.00am, the accused went to his house and was shortly thereafter followed by his girlfriend, the deceased. They explained that they had quarreled the previous night and that the accused had taken the briefcase containing the deceased's clothes. The accused denied having taken the clothes. According to the deceased, they had quarreled over a telephone call.

11. PW3 told the deceased to call her mother (PW2) who came and the issue was discussed. The mother however called and told him that they had been unable to resolve the issue. He went to the accused's house and listened to the issue but were unable to tell where the suitcase was. He suggested that the matter be referred to the police but the deceased said that the suitcase had been set on fire by the accused. The accused said he would buy few clothes for the deceased and he accompanied the two to town where new clothes were bought. The deceased left with her mother.

12. On 25/03/2013, he was called by a member of the public and told that the deceased had been stabbed with a knife. The accused also called him and he rushed to the deceased's house. She was alone and had cuts on the head. He then rushed to the accused's house and found that he had fainted on the bed. He called PW2, the taxi driver and the accused was rushed to the hospital. He then proceeded to the police station to make a report.

13. On cross examination, he said that on the night of 24/03/2013 he had dinner in his house with the deceased, her mother and the accused. That there were allegations that the deceased had another house and the problem was triggered by a phone call that the deceased was found making. That he went to the accused's house because he (accused) had said that he had had enough of this world. That he only took about a minute to reach the deceased's house and four minutes to reach the accused's house where he found him lying unconscious on the bed. He suspected that the accused had taken poison because there were some white bottles on the table.

14. They took the bottles to the hospital but did not do a follow up. That he was not sure who killed the deceased but he received a telephone report about the deceased having been stabbed and then the accused called him. That the two phone calls followed each other and he didn't know what was happening. That the distance between the deceased's and accused's houses is about 4 minutes while running. That he found the deceased bleeding but breathing. That he did not know the alleged lover of the deceased.

15. **PW4** was **Kisusia Mulwa Nzeki**, the deceased's father. He testified that on 11/10/2008, he testified that on 25/03/2013 between 8 and 9pm, he was with PW2 when she received a call informing her that the deceased had been stabbed. They proceeded to the scene but found that the body had been moved to the mortuary. The deceased worked in Makueni town as a computer operator in a cyber café and was not married. They proceeded to the mortuary. The deceased's neck was almost completely severed and had cuts on the head, hands and hips.

16. He knew the accused because he had been introduced by the deceased as somebody who wanted to marry her. He saw the accused at a ward in Makueni hospital where he had been admitted. He was unconscious and many people had gathered around him. The police said that he had taken some drugs.

17. On cross-examination, he said that he was not aware of what the accused had ingested. He agreed that the accused was the deceased's fiancée but didn't know whether the relationship between them was good or not. What he knew was that the relationship was okay when the accused was taken home by the deceased. That according to the police, a panga was used to cause the injuries but he did not see the panga.

18. **PW5** was **Judith Musenya**, she testified that the accused was her neighbour in Kasarani estate of Wote and she knew him as Mrefu. That she lived in the same plot with the deceased and that on 25/03/2013, she arrived home at about 7.30pm and found the lights in the deceased's house on. That the deceased was the accused's girlfriend and both of them had rooms in the same plot. That the accused had however moved to another estate and the deceased had moved into the room previously occupied by the accused. That the plot had about six rooms with a common toilet and bathroom.

19. That she went to the toilet and while returning to her house, she saw the accused in front of her. He was from the direction of the gate and was carrying a bag. He got to the deceased's house and she saw him handing the bag to the deceased. She greeted him and passed. At about 8.30pm, he went to the shops to buy toilet paper and found a neighbour by the name Mbithe taking her clothes from the line. Mbithe told her that she had heard the deceased letting out some sounds as if she was unwell.

20. They went and knocked on the deceased's door but it was bolted from inside and there was no answer. She pushed her hand through the space on the door and opened. They found the deceased on the floor near the kitchen area. She was bleeding from the neck and lay on her back. They made phone calls to relatives of the accused to inform the accused of the matter. A relative of the deceased arrived and said it was a police case. Many people gathered. Shortly thereafter, the police arrived and removed the deceased's body from the scene.

21. On cross examination, she said that she saw the accused at the deceased's door between 7.30 and 8.30pm and when she saw Mbithe, it was about 8.30pm. That from the time she saw the accused at the door to the time they knocked on the door was one hour apart. That when she saw the accused and deceased at the door, they were talking in a normal way without bitter exchange of words. That her room was at the end of the building and that of the deceased was on the other extreme end. That Mbithe's house was 2nd and that of the deceased was third from the gate and if there was a quarrel of people talking in raised voices, Mbithe would have heard.

22. That she didn't know where the accused had moved to after leaving their plot. She didn't know if the deceased had other boyfriends and didn't know if it was the accused who killed the deceased.

23. **PW6** was **Alex Musyoka Wambua**, a taxi driver. He testified that he knew the accused as he used to be a boda boda rider in Wote town. That on 25/03/2013 at about 7pm, he received a call from PW3 who required him to take the accused to hospital as he had poisoned himself.

He went to slaughter area of Wote, picked the accused and took him to Wote General Hospital.

24. On cross examination, he said that he did not see the poison but the accused was unconscious.

25. **PW7** was **Jacob Oduor**, a forensic documents examiner. He testified that on 08/04/2013, he received exhibits from Cpl. S. Githinji of Makueni police station. Exh A1 was a suicide note in a single ruled exercise book (1/2), Exh B1 was a full exercise book from St. John Malivani Secondary school containing known handwriting of accused, Exh C1 (i)- C1 (vi) was specimen handwriting of the accused. There was a request that “ascertain whether suicide note A1 was made by the same person who made writing in B1 and C1 (i)- C1 (vi).

26. He conducted forensic examination on the documents and formed the opinion that they were all made by the same hand writing. He produced all the documents as exhibits.

27. On cross examination, he said that he didn't know how the items were recovered. That C1 (i) - C1 (vi) are not complete like A1 because they do not have the end like the suicide note. That there was no specimen signature for 2nd page of A1 and that B1 has no name and no date.

28. **PW8** was **Dr. Makau Alex**, a medical practitioner in Makueni Referral Hospital. He said that he had a postmortem report prepared by Dr. Fredrick Okiyo, a pathologist, but he had left public job for private practice. He also said that he was able to read Dr. Okiyo's handwriting. Counsel for the accused objected on the ground that the witness had not said that he knew the handwriting or that he had worked with Dr. Okiyo. The Court however allowed him to testify and produce the post mortem report.

29. The doctor proceeded to testify that the body had pale injuries, multiple cuts on scalp, cut on left elbow joint respiratory system, slit cut cardiovascular system, blood in the breathing system upto lungs, cut on neck, de-oxygenated in blood vessels, internal organs were swollen and multiple cut on head upto covering of brain. The cause of death was multiple injuries to the head and throat caused by a sharp object.

30. On cross examination, he said that blood was taken for matching with the blood on weapon and the report was to indicate whether the blood matched. He didn't know whether the panga was recovered.

31. **PW9** was **Cpl. Cleophas Nyongesa**, the Investigating officer (IO). He said that he had taken over the investigations from Cpl. Njage who had been transferred to Nyeri. He had a panga, kitchen Knife and pair of trousers. He went through the file and found that on 25/03/2013, IP Makavila received a report via mobile phone from Kasarani Estate Makueni and proceeded to the scene where he found Cpl. Njogu and Kibet. The deceased's body was lying in her room. The officer from scene of crime took the relevant photos. PW9 produced the panga, kitchen knife, trouser, exhibit memo form, forensic report and Government chemist report.

32. On cross-examination, he said that he didn't know when the former I.O left the station but could confirm from the records. He agreed that he never investigated the case. That first I.O was IP Makavilla who recovered all exhibits and then Njagi took over.

33. The prosecution case was closed at that juncture and the accused was placed on his defence. He elected to give a sworn statement and not to call any witnesses.

34. **DW1**, the accused testified that before his arrest, he was working as a boda boda rider in Wote. That the deceased was his fiancée for 2 years and they had visited both families. That they both lived in rental houses 1 km apart.

35. That on 25/03/2013, a customer had given him a bag so that upon being ready, he would take him home. That before he could take the customer home, the deceased called and asked him to take her home. They passed by the market and bought some items. He dropped both the deceased and his brother as they stayed nearby. He was then called by the customer to take him home.

36. While leaving the deceased's house, he received a call from his brother, PW3 but went to his house first as his phone charge was low. He then told his brother that he had never been tired like that day. He then received a call from PW3 asking whether he had received a report that the deceased had been injured. He was shocked and passed off. On recovering, he was in hospital and handcuffed. He didn't know what had happened and how deceased was injured.

37. He denied writing the notebook (*exh 1A*). He agreed that exh 2 was his exercise book but denied that the handwriting in it was his. He denied giving any samples. He also denied taking poison. He also said that he was charged with attempted suicide in Machakos and acquitted. Further, he said that no exhibit on poison was produced.

38. Further, it was his evidence that he had no problem with deceased before death and that there were allegations that deceased had another friend but the same was not investigated. He denied killing the deceased or knowing who did it.

Analysis and determination:

39. I have keenly looked at the evidence on record and duly read the submissions of the accused person. To secure a conviction for the charge of murder, the prosecution has to prove three ingredients. The offence of murder has 3 elements to be established for prosecution to secure a conviction. See **ANTHONY NDEGWA NGARI VS REPUBLIC [2014] EKLK**. These are:-

(a) The death of the deceased occurred.

(b) That the accused committed the unlawful act which caused the death of the deceased; and

(c) That the accused had malice afore-thought.

Proof of death:

40. The deceased's parents, PW1 and 4 saw the body at the mortuary and identified it as that of their daughter. PW8 produced the post mortem report prepared by the pathologist which showed that the cause of death was multiple injuries to the head and throat. Photographs showing the body were also produced in evidence. I am therefore satisfied that the death of Christine Nzilani occurred.

Proof that the death was caused by an unlawful act committed by the accused:

41. This case is purely based on circumstantial evidence as there was no eye witness. In *Abanga alias Onyango vs Rep Criminal Appeal No.32 of 1990 (UR)* the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. These are:

“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.”

42. It is not in dispute that the deceased and accused were lovers (hereinafter 'the couple'). The evidence shows that a day before she was murdered, her mother (PW1) and the accused's brother (PW3) had mediated over a disagreement between them. PW1 testified that she was shown the remnants of the deceased's properties which had been burnt outside the gate.

43. PW3 accompanied the couple to town and the accused bought new clothes for the deceased. PW1 confirmed that indeed the new clothes were bought. From the evidence, the accused agreed to buy new clothes when PW3 suggested that the issue of the missing briefcase be referred to the police. In my view, this is an indication that he was involved in the disappearance of the briefcase which contained the deceased's properties.

44. On the night of the murder, the accused was seen by PW5 entering the plot's gate and heading to the deceased's house. He was carrying a bag. PW5 saw him handing the bag to the deceased and even greeted him on her way back to her house. In his defence, the accused said that he had been given a bag by a customer and had dropped the deceased home before going back to pick the customer who owned the bag.

45. This essentially corroborated PW5's version and placed the accused at the crime scene. He was the last person seen with the deceased before she was found dead in her house. The proximity of the couples' houses made it possible for the accused to commit the murder and rush back to his house.

46. The prosecution's suicide theory was rebutted by the accused who testified that he was acquitted of the offence of attempted suicide by the High Court in Machakos. However, this does not negate the fact that he was found unconscious in his house by PW3 shortly after the deceased's murder. In light of the preceding events, I am not convinced that the unconsciousness was caused by shock due to the news of the deceased's death.

47. The evidence of the prosecution witnesses was corroborative and the cumulative circumstances of this case formed a chain so complete that the only logical conclusion is that the death of the deceased is attributable to an unlawful act committed by the accused.

That the accused had malice aforethought (mens rea):

48. The evidence shows that prior to the murder, the couple had a disagreement which attracted the attention of the deceased's mother and accused's brother. Although they had temporarily solved the problem by buying new clothes for the deceased the evidence shows that by the time PW1 was going back to her home, the issue had not been fully resolved.

49. In my view, the evidence brought out the picture of a jealous and violent boyfriend who could not stand the thought of another man in the deceased's life. He had the motive and the fact that he went to the deceased's house on the material night and killed her almost discreetly shows that he was conscious of his actions.

50. Accordingly, I am satisfied that the ingredients of murder were established and the case was proved to the required standard.

Conclusion:

The court thus makes the following orders;

i) The accused is found guilty of murder and thus convicted accordingly.

ii) The sentence to be tendered after mitigation.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

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C. KARIUKI

JUDGE