



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 82 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

KASYOKA MUNYILU.....ACCUSED

JUDGEMENT

1. The accused was charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap. 63 Laws of Kenya).
2. Particulars being that on 6/9/2015 at Kasengeini village, Kibwezi District within Makueni County unlawfully murdered Agnes Kanza Nyamai.
3. The accused denied the charge and the matter went into full trial.
4. The prosecution called 6 witnesses and closed its case. The accused was found to have a case to answer and was put on his defence. The accused tendered sworn evidence, no witness.

PROSECUTION CASE:

5. **PW1 KK** is a son of deceased and accused 1 – Form 3. On the material day at 3 pm on 6/9/2015 he was in school to play football when his mother the deceased called him. She told her she rushed to meet him, his sister and a brother. She called while at her place of work at Kanyunyu. He told her that he was to inform his father over the intended meeting. He called his father and told him to inform his brother (PW1) and sister to join him in meeting their mother and assist in taking luggage home. By then the parents had separated for a month.
6. PW1 took cart and with Mwikali neighbour went to Humala a market center. As they were returning while at Kamunyuni he saw blood on the road and his mother being supported while seated. There were already people at the scene. He tried to talk to her but she could not be able to talk. PW1 was told by one Nduku Masila that it was his father who attacked her and ran into the bush. This time it was about 4 pm. PW1 was told by his maternal grandmother to go for his brother and sister at Katilamuni. They proceeded to their grandfather's place. The attack was at Katilamuni where they were to meet their mother.
7. The women merry go round group was to meet at Rose's place at Katilamuni. He saw next his mother's body during the postmortem. The parent had bad blood and had separated.
8. On cross examination PW1 stated that when he saw his mother, she could not talk but was told by Nduku that it was his father who attacked her. The deceased moved to stay at the market thus accused was not happy about it.
9. On re-examination, PW1 said deceased started living in the market after separation with accused.
10. **PW2** was **Simon Ngovi Mwanzia**. On the material day he took his wife to a merry go round meeting group. While there his aunt Ndumbu called him and told him to run as his sister was injured at Kamunyuni. The deceased was his cousin.
11. At the scene he found the deceased lying down bleeding by the road side. There were other people. His aunt Ndumbu was crying. She told him to take deceased to hospital by a boda boda. He saw injuries on deceased rib cage (left) and (left) hand. The boda boda could not carry her as her situation was bad thus looked for a car and took her to hospital accompanied by 2 women. They took her to AMREF Hospital and by then she had fainted around 5 pm.
12. PW2 was told at the scene by Wanza and Masila wife that deceased was injured by the accused. She had earlier told PW2 that they had separated with the husband due to their problems. PW2 witnessed the postmortem exercise.

13. On cross examination PW2 said that he was told accused injured the deceased.

14. **PW3 Ageline Wanza Kimilu** testified that on 6/9/2015 she was going to attend women group meeting. The deceased was also to attend same meeting. While there the accused came and asked one of the women Dorcas after greeting them “*what does your friend tell you she does at Kanyunyuu?*” Dorcas replied “*she is coming and she will tell you.*” Agnes called deceased and she confirmed she was coming to the meeting.

15. When one of the women Mueni asked him where he was going, he said he was still around. Deceased was secretary to the group. Women saw her afar coming. The accused walked towards the directions she was coming from. The two met at the river place. PW3 saw accused hold deceased by hand and moved towards the miller. The women told a young girl N to go and see what was happening. There was a person with a boda boda who was passing by the river place. He came and told the women whether they knew a woman being killed. He told the women to go and help her.

16. After about 15 minutes women saw deceased coming from river with blood oozing from her left side. Also boda boda person came to them. Deceased said Kasyoka has killed me (*Kasyoka ameniua*). PW3 did not see Kasyoka then. After above utterances she laid down and fainted. Dorcas took her own lesso and covered her. Motor vehicle was found which took her to AMREF Hospital.

17. On cross examination she said that accused came to women group place of meeting at Mueni Ngumbo’s home. PW3 saw accused meet deceased at the river as she came down hill. When women went to the scene, they did not see the accused. While going to the scene PW3 saw deceased walking holding the injured part of her body. While with Dorcas deceased said “*Dorcas Kasyoka ameniua*”. Dorcas Kasyoka has killed me. The women did not know the boda boda person nor did he know them.

18. **PW4 Dorcas Muthini Kanini** testified that at 3 pm on 6/9/2015 she was at women group meeting at Mueni Ngumbo’s home. Accused came and asked her whether his wife was coming to the meeting. PW4 called deceased and she confirmed she was coming. Then he asked PW4 whether deceased tells her what she does at Kanyunyuu. PW4 told him to wait and ask her in person. Then the women and also accused saw deceased coming from afar. Accused said there was something he was looking for and he left.

19. PW4 saw accused hold deceased hand and moved deceased to the river. Accused had one stick about 1m long. PW4 saw deceased pull herself from the accused. It is at this moment women sent a young girl N to go and see what was happening. The girl came and said she heard deceased say “*Kasyoka why do you want to kill me*”. The women went to the scene and saw deceased and said to them “*Kasyoka has killed me*”. The boda boda person had come before they went to the scene and told them that there was a man who was killing a woman.

20. When she said “*Dorcas Kasyoka ameniua*”, PW4 told her “*hapana utapona*”. PW4 saw multiple injuries on the right arm, left side of stomach where fresh blood was oozing. PW4 tried to stop blood oozing using a lesso but deceased fainted. Boda boda person left without living contact without, women knowing. Earlier deceased had told PW4 that they had separated with the accused. The women took deceased to hospital where she was pronounced dead.

21. On cross examination, PW4 said that accused left where women were meeting when they saw deceased coming and himself also saw her coming. When women went to the scene they did not find the accused.

PW4 however saw accused walk away into the forest which bordered the road. He was literally running away.

22. **PW5 Dr. Kelvin Maua** a medical doctor conducted postmortem of the deceased and found injuries to left arm, abdomen (left), cut (right) palm, spleen had laceration. The cause of death was due to cardio vascular arrest secondary to hemorrhage or bleeding from multiple penetrative injuries to the spleen and severing upper limb vessel.

23. PW6 investigating officer testified that he received call from the DCIO and was informed of murder incident and was instructed to go to the scene to attend to the same. The report had already been made. He enquired the scene of the incident and visited the same but found nobody. By then PC Gitonga had already taken suspect to the police station. Accused had taken poison and was taken to Kibwezi hospital where he was treated. PW6 did investigations and gathered the evidence and accused was charged with the offence.

24. On cross examination, he stated that the accused was arrested by members of the public.

25. When prosecution closed its case, the court put accused to his defence. He gave a sworn statement that on the material day while at home PW1 told him he was going to play football and him, he remained with other children. The deceased was working. He cooked food and went to the forest with his animals.

26. At 2.30 pm people with his son found him in the forest and were saying deceased had a problem as she went to women meeting. The people said they were looking for a person who attacked her. They told him to accompany them to the road. They went to the place near where his wife was lying home of Mueni Ngumbo and found deceased she had been taken to hospital. They also took motor vehicle to go to hospital. They saw motor vehicle coming and people started saying he was arrested in the forest thus he was taken to the police station and was questioned over the incident of his wife attack. He was locked up and charged.

27. On cross examination he stated he was living well with the deceased. She asked to come home weekly though she worked 20 Km away.

28. After arrest by police, he was taken to hospital due to ulcers and admitted in hospital. He denied taking poison. He denied having bad blood with the deceased. He closed his defence at this stage.

SUBMISSIONS:

29. The parties agreed to canvass the submissions via writing which was filed and exchanged.

30. After going through the submissions and evidence on record, I find the issues are:

i. Whether the ingredients of offence of murder have been established?

ANALYSIS AND DETERMINATION:

The offence of murder has 3 elements to be established for prosecution to secure a conviction. See **ANTHONY NDEGWA NGARI VS REPUBLIC [2014] EKL.R.** 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.

31. In the first element, PW5 Dr. Kelvin Maina conducted postmortem of the deceased body and observed injuries on the left arm, abdomen, cut right palm, his spleen had laceration. He made opinion that the cause of death was due to cardio vascular arrest secondary to hemorrhage or bleeding from multiple penetrative injuries.

32. The death and the cause is not contested. Thus the court finds that the first element was established as required by the law.

33. On the second element, PW3 Angeline Wanza Kimilu on the material day 6/9/2015 while awaiting deceased to place they were to hold a meeting the accused came enquiring about her. PW3 saw her afar coming. The accused walked on the direction deceased was coming from they met at a river, PW3 saw accused hold deceased hand and moved towards the river.

34. The women with PW3 told a girl one N to go and see what was happening. A boda boda rider who was passing by came told them whether they knew a woman is being killed. He told the women to go to the scene. As they headed towards the scene they met deceased who told them ***"Kasyoka ameniua"***. Kasyoka has killed me. PW3 didn't see Kasyoka (accused) then. After above statement she fainted and fell down one Dorcas took less and covered her.

35. PW4 corroborated PW3's evidence as they were together and also went to the scene. PW4 saw accused hold deceased hand near the river and deceased pulling herself from him. That is the time a small girl was sent to check what was happening. The girl came and said she heard deceased say ***"Kasyoka why do you want to kill me?"*** while women were headed to the scene, they met deceased on the way who told them ***"Kasyoka has killed me."***

36. Prior to that a *boda boda* person had told the women that there was a man killing a woman.

37. After deceased uttered the words ***"Kasyoka has killed me"***, PW4 saw blood oozing from left side of the stomach and she had injury on the left arm. She fainted and fell down.

38. The accused denied that he killed the deceased who was his wife. He claimed he was arrested grazing his animals at 2.30 pm while the offence was committed at 3 pm. He never denied the prior to attack he had met the PW3 and 4 and enquired about the deceased.

39. His defence is an alibi. He never called any witness on his defence. He has not shown any reason why PW3 and PW4 would fabricate evidence about him killing his wife in broad day light. No witness saw him attack the deceased but he was put on the scene of the attack at the moment and time it occurred. The deceased person statement that ***"Kasyoka has killed me"*** amounts to a dying declaration which was not challenged by the defence. Under section 33(a) of the Evidence Act, a statement made by a deceased person relating to his cause of death is admissible in evidence:

40. Under section 33(a) of the Evidence Act, "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

41. In **PHILIP NZAKA WATU VS REPUBLIC [2016] EKL.R.**, this Court stated the following on admission and reliance on a dying declaration:

Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe."

42. The court therefore finds that the death of the deceased was caused by un-lawful act of the accused.

43. On whether there was malice aforethought, the viciousness of the attack without any provocation prima facie smacks malice aforethought. The magnitude of the injuries as disclosed by the PW5 (doctor) demonstrated that the attack was very forceful. The deceased passed on while being taken to hospital.

44. The court therefore finds accused guilty of murder and makes the following orders:-

i. Accused is convicted of murder.

ii. The accused shall be sentenced after mitigation.

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

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C. KARIUKI

JUDGE