



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL CASE (MURDER) NO. 19 OF 2017

REPUBLIC.....PROSECUTOR

-VERSUS-

JAMES NJENGA NJOROGE.....ACCUSED

JUDGMENT

The charge and the evidence

1. The accused is charged with the murder of his wife Nancy Wairimu Gathoni contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars are that the accused committed the offence on an unknown date between 29th March, 2017 and 1st April, 2017 at Kinamba Trading Centre in Kinangop Sub County.
2. He was first arraigned in court on 19/10/2017 and pleaded not guilty on 23/10/2017. The prosecution presented nine witnesses, who were heard between 11th July 2018 and 4th February, 2019. The defence presented its case on 3rd April, 2019. The accused was represented by Mr Wairegi and the state was represented first by Mr Koima.
3. The prosecution's case is essentially that the accused and deceased lived together as husband and wife and had a child together. At the material time, the accused was working a butcher at Kinamba area of Njambini. That at some stage of their relationship, the couple had disagreements. This is garnered from the evidence of PW1 James Kanyara Gacheru, the deceased's older sister and PW4, Gacheru Kanyara, her father. As a result, they lived a strained life and separated frequently, according to the evidence of PW8, Zipporah Wambui Gacheru, the deceased's mother. That this led the accused to lure his wife to his house in Kinamba where he murdered her and locked her lifeless body in the house, then fled and went into hiding until his arrest.
4. There is no evidence of the actual commission of the of the murder or killing of the *actus reus*. The deceased's body was found after the accused's neighbour and workmate, PW2 Samuel Njogu Gachohi, a shepherd, noticed a foul smell emanating from the accused's house on Saturday 1st April, 2017. He told Benson Mwangi PW3, his employer. Benson, who owns the two houses where PW2 and the accused live, told PW2 to break open the door on Sunday 2nd April, 2017. When PW2 broke open the accused's door and he entered, on Sunday, the first thing he saw were two legs of a human. He closed the door and reported to Benson, who told him to report to Njambini police station, which he immediately did. Samuel Njogu identified photographs MFI1 1A-1B as the houses in which he and the accused lived. He said he never saw the accused on Friday 31st March or Saturday 1st April, 2017
5. Benson Mwangi corroborated the evidence of Samuel PW2. He confirmed that he was the employer of both Samuel and the accused. He stated that he had called the accused on Friday 31st March, 2017 several times without getting an answer, and again on 1st April.
6. PW4, Gacheru Kanyara, the deceased's brother, testified that he saw the deceased's body lying on a sofa in the house. After he had been told of the death, he took a bodaboda and went to the scene. He found many people crowded around the house. He identified from photographs MFI1A the deceased's house, and described how he saw her lying face up.
7. Pathologist Dr Titus Ngulungu, PW5, conducted the post mortem on 4th April, 2017, on request of Njambini police station. The body was identified by the deceased's family in the presence of PC Dominic Mugambi PW7. After examining the body he found it had injuries on the head and upper limbs. There was also brain injury. He determined the cause of death as head injury leading to trauma. He testified that the object used to cause the injuries had the same co-efficient as that of human tissue, for example a hand or other part of body. He stated that there had been about a week's interval between the post mortem and the date of death. He produced the post mortem report as Exhibit 2.

8. PC Richard Kurgat gave evidence as PW6. He was at Njabini Police station when he received a report that a person had been found dead in a house in Kinamba. He went there with Corporal Morris Misoi and PC Rone. They found a large crowd gathered near a mabati roofed timber structure, which Administration Police were controlling. Inside the house, they found a smelling body of a lady lying on a sofa set facing upwards. He identified MFI 1-A-D as pictures showing the house and the deceased as they found her facing upwards. They also saw a rope tied to the roof but with no noose (MFI-1E), and a hammer and knife none of which had any blood stains. Shown pictures MFI 1F-H he asserted that they depicted the deceased after they had turned over her body, which had blood around it.

9. Police Constable Domiinic Muriuki Mugambi, PW7, was the one who took the deceased's family to identify the body for the post mortem. On 11th October, 2017, he received information that the accused was at a place called Ndemi Scheme in Kipipiri, about fifty kilometres away from Kinamba. He went with some officers and found the accused had prepared to flee and was being carried by a motor cycle. An informer had given them this information stating his name as Njenga. PW7 arrested the accused and noted his name on his identity card as Njenga, and booked him at Kinangop Police Station that day. The following day 12th October he went to court and requested that accused be remanded in custody.

10. The investigating Officer Corporal Morris Musoi gave evidence as PW9. He testified that he received a report of suicide at 11.00am on 2nd April, 2017. He went with PC Kurgat and Rono to the scene. On arrival he found a crowd at a timber house. The house had two rooms: one belonged to Samuel Njogu and the second to James Njenga. The two were employees of Ben Kimuhu, and he had given out the rooms to them. In James Njenga's room, the door had been broken from outside. Inside there was a young lady about 22 years lying on a sofa set dead and looking up. The deceased's face had injuries and the body had begun rotting and smelling. Inside the house there was a hammer and a rope which was hanging from the roof. He produced pictures as Exhibits 1A - 1H, and also Exhibit Memo Form as Exhibit 6 and Certificate of Processing Prints as Exhibit 7.

11. He investigated the background of the couple and discovered they had had marital differences resulting in their separation. The deceased then went to live with her brother in Nairobi Kayole. She had started a small business of selling milk. He found out that on 30th March 2017 the deceased told her brother that she had spoken with accused and that they would meet to reconcile. The deceased did not disclose where the meeting was to be held, but she left and did not return. On 1st April 2017 when the deceased's mother went to visit her in Nairobi, she did not find deceased, but came to understand she had gone to visit the accused. After investigations, he concluded that the accused had called the deceased to his home with the intention to kill her. He then locked her and left work without telling his boss Kimuhu.

12. The accused gave a sworn statement and was cross examined. He stated that the deceased was his wife; that they lived together; that they have one child, a boy; that they had normal marital disagreements and his wife ran away to her parents; that he had wanted her to stay at home but she wanted to do business; that they had a family meeting at which it was agreed she would return home.

13. He further stated that she did return on a Thursday - but he could not remember the date. When she came back they went to have lunch at Spring Hotel, Kinamba Town, and were happy because they were together again. There, he drank a tusker beer and she drank a Vienna. They spent the afternoon there. At about 7.00pm they took away 2 Tuskers and 2 Viennas, and went home. Both of them were drunk, and when they reached home, he switched on the radio. The deceased then went to charge her phone and saw a baby's clinic card on the cushion of a chair. The card was for Veronica Wanjiru's child.

14. According to the accused, the deceased then approached him and slapped him. He says he clicked. She was angry and accused him of having another woman with a baby in the house. As he had been drinking on the chair, when she came to hit him again he and pushed her firmly. He says she fell on a gas cylinder. He explained that his house is small. He was shown Exhibit 1 photograph, and confirmed that it was a picture of the house with two doors, his house being the one with the open door. He testified that his house had only one room. It was used as the sitting room, bedroom and kitchen. At the time, he was sitting on a wooden sofa set, and the gas cylinder was nearby. Shown Exhibit 1H - he said it shows some *mitungis*, and the gas cylinder was near the small chair.

15. The accused testified that he then went to help the deceased up as she was crying having fallen on the gas cylinder. According to him, she did not have any injury. He told her *pole* (sorry) and explained that the Clinic Card was for his sister Veronica Wanjiku, and produced the clinic card (booklet) as Defence. Exhibit 1.

16. The accused said he did not intend to kill her; and that he could not remember on which side she fell on the gas cylinder. He asked for forgiveness from his wife's family, his family and the village people.

17. **Section 203 and 204 of the Penal Code** under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:

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

204. Any person who is convicted of murder shall be sentenced to death.”

18. The offence of murder is complete when, “*malice aforethought*” is established if, pursuant to **section 206** of the **Penal Code** evidence proves 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.”

19. When none of the aforesaid elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under **section 202 Penal Code** which is punishable under **section 205 Penal Code** by a term of imprisonment extending up to life.

20. I have carefully considered all the evidence availed in this case as set out above, and together with the submissions of the parties. In my view, there is only one question that arises in this case: whether, in the circumstances of the scuffle presented in this case, the accused can be said to have had the intention of killing his wife.

21. There is no doubt that husband and wife had marital disagreements as many couples do. There is no dispute that on the afternoon before the night that she died, the couple spent the time together at a hotel and went home where they spent the time into the night. That they were both drunk is also not disputed. Further, the accused had admitted that his wife accused him of an extramarital affair and slapped him. He says he then pushed her and she fell down hitting her head onto a gas cylinder, but that she was not seriously hurt when he helped her up. Eventually, he said that they went to sleep.

22. In the morning, the accused says he woke up to find her dead; he panicked and attempted to commit suicide. So he tied a rope to the roof and found the experience too painful, and gave up. The rope was found by the police still hanging in the ceiling and was identified in the picture in Exhibit 1E.

23. In my view, the picture that emerges is that the drunken couple had a fight in the night arising from the accusations about infidelity stated by the accused, rooted in previous unresolved differences and issues of mistrust. The fight resulted in his hitting her so violently that she died. Shocked and confused, the accused then tried to clean up the disarray and tidied up the room, but forgot to set up the death scene to accord to the story that he eventually spun about how she died. For example, he said that the deceased hit her head on a gas cylinder. He pointed it out in a picture, Exhibit 1E, which has a green round item in the background that he said was the cylinder. I have carefully studied the picture and am unable to see the cylinder. What I see is the bottom end of a green basin or bucket. Indeed the item is sitting on its side in a dish-rack or larger basin with other kitchen utensil. It is definitely not a gas cylinder.

24. That there was a serious fight and not that the accused was merely slapped by the deceased and then pushed away by him to the point she fell, is confirmed by the injuries stated in the post mortem report which shows:

“External appearance....

....

2. Defence injuries: seen at the outer surface of forearm measuring 15..-25mm....”

These injuries disclose a natural reflexive reaction of a person who was attempting to defend herself from an attack that was imminent. Thus it appears that the deceased attempted to defend herself from the accused’s attack and suffered the said forearm injuries.

25. The post mortem report goes on to conclude:

“External appearance....

....

3. Head a bruise measuring 30x20 mm seen on the left frontal region oriented longitudinally....

He determined the cause of death to be:

Head injury attended by brain contusion [due to] multiple blunt force trauma to the head. In keeping with homicide”

26. When asked in cross examination what sort of object could have caused those head injuries that he described as blunt force trauma causing the death, Dr Ngulungu said:

“I could ascertain that the object used had the same co-efficient as that of human tissue e.g. a hand or other part of body could have caused the injury”

27. The accused’s reaction of running away from the scene and escaping into another region of the country for months, instead of dealing

with the outcome of his actions resulting from the fight discloses a guilty conscience. The law is very clear that every homicide is unlawful unless authorized by law or excusable under the law See **Sharm Pal Singh [1962] EA 13**, see also **Guzambizi Wesonga v Republic [1948] 15 EACA 63** where the court held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”

28. In his submissions the accused’s counsel sought to set up the defence of self-defence and referred to the English authorities establishing principles that:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do what is reasonably necessary”

29. Those principles have been clearly elucidated in persuasive English authorities See: **Palmer v Republic [1971] AC 814** and **Republic v McInnes 55 Cr. Appeal 551** where the Privy Council and the Court of Appeal respectively stated as follows:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury.”

30. The doctrine of self-defence was discussed in **Mokwa v Republic [1976-80] 1KLR 1337** where the Court of Appeal held that:

“Self-defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applies excessive force.”

31. In my view, the defence of self-defence may be effectively relied upon if the accused can show that he reasonably acted in defence of life or property. Thus, he must demonstrate that he was reacting to an act of the person against whom he was defending himself that was so egregious that force was required to repel it; that the repelling act was reasonable and that it did not exceed the bounds of self defence as explained in the **Palmer and McInnes Cases (Supra)**.

32. The defence also cited **R v Godfrey Mutiso [2008] eKLR** and the Ugandan criminal appeal of **Morris Alouch v Rep** (cited in **Godfrey Mutiso’s case** below) for the proposition that malice aforethought can be inferred if the injuries sustained by the deceased are grievous and repeated which was not the case here. In **Mutiso’s case** the court stated:

The injury on the head was grievous. The deceased’s head was hit against the wall and as a result the deceased bled through the mouth. Can it be said that Malice aforethought can be inferred from these injuries? The Court of Appeal in Morris Aluoch vs Republic Cr. Appeal No. 47 of 1996 (UR) stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late. In the case of REX vs TUBERE S/O OCHEN (1945) 12 E.A.C.A. 63 the assault was of a serious nature causing severe injuries from which the victim died shortly afterwards.”

33. It is true that the injuries in this case were not repeated as it appears the blow was a single blow. However, it was so excessive in force that it was a fatal blow. Further, the accused testified that the deceased slapped him and he merely clicked. It was when she came for him again that he says he pushed her and she fell. As earlier stated, I think the accused fought with the deceased and delivered a fatal blow – causing an injury of 15mm by 25mm in the head. I do not see here a reasonable reaction in defence to a slap by the deceased.

34. The accused also relied on intoxication as a defence citing **Cherungwa v R [1956] 23 EACA 45** where the Eastern Africa Court of Appeal stated:

“The intoxication may provide a defence either by enabling the accused to prove temporary insanity or by indicating that he was incapable of forming the intention necessary to constitute the offence. In the first case the onus is on the accused to show insanity. In the second, the onus never shifts from the prosecution”.

35. In this case, it was for the prosecution to show that there was an intention to murder no matter the circumstances. I do not think the prosecution has discharged that onus. However, I am satisfied that the overall evidence proves the elements under **section 202** of the **Penal**

Code. That is to say, the accused unlawfully killed the deceased, and after so doing sought to cover up, locked the deceased up the house, then fled the scene and went into hiding out of guilt and fear of the consequences.

Disposition

36. In light of all the foregoing, I hereby convict the accused of the felony of manslaughter under **section 202 Penal Code**. Under **section 205** of the **Penal Code** the offence is punishable by a term of imprisonment extending up to life.

37. The accused shall be given an opportunity for a hearing on sentencing and thereafter sentence shall be meted.

38. The accused has a right of appeal within fourteen days.

39. Orders accordingly.

Dated and Delivered at Naivasha this 7th Day of October, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Maingi for the State
2. Wairegi for the Accused
3. Accused - James Njenga Njoroge - present

Court Clerk - Quinter Ogutu