



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[CORAM: A. C. MRIMA, J.]

CRIMINAL CASE NO. 17 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

BENARD ONYANGO TAMBO.....ACCUSED

JUDGMENT

1. **Benard Onyango Tambo** (hereinafter referred to as '**the accused person**') was charged with the murder of his wife one **Rosemary Ben** (hereinafter referred to as '**the deceased**'). The particulars of the offence were that on 01/07/2018 at Oruba Sub-Location, Oruba Ragana Location, Suna West Sub-County within Migori County the accused person murdered the deceased.

2. The accused person denied the information and the prosecution availed 9 witnesses in a bid to prove the information. **PW1** was **George Ochieng Martin**. **PW1** was an in-law to the accused person as he had married a sister to the accused person. **PW2** was **Brian Mboya**. He was an Advocate of the High Court of Kenya. **PW1** was a brother to the father of **PW2**. **PW1** was hence an uncle to **PW2**. The accused person and the deceased lived with the family of **PW2**'s father. That was in Oruba village within Migori town. **PW2** also lived in his father's homestead.

3. **Dr. Awinda Victor Omollo** who conducted the post mortem examination on the body of the deceased testified as **PW3**. **PW4** was a Police Officer **No. 79093 Cpl. James Olago**. He was a gazetted officer attached to the DCI Migori as a Scenes of Crime expert.

4. **PW5**, **PW6** and **PW7** were minors. **PW5** was a boy called **V.F.** He was aged 9 years old. He was the first born to the accused person and the deceased. **PW6** was also a boy. He was called **D.O.** aged 11 years old. **PW6** was a son to **PW1**. **PW7** was a girl aged 12 years old. She was **C.A.O.** She was a daughter to **PW1** and a sister to **PW6**.

5. A brother to the deceased testified as **PW8**. He was one **Charles Odhiambo Achari**. The investigating officer was **No. 111656 PC Milton Mwanzi** who was attached to the Migori DCI Office. He testified as **PW9**. I will refer to the witnesses in the sequence in which they testified before Court.

6. **PW5**, **PW6** and **PW7** were at home in the evening of 01/07/2018. It was a Sunday. They were playing outside the main house with other children including **J**. The deceased was generally inside the house preparing supper. Before it was dark the accused person arrived at the home. He was drunk. **PW5**, **PW6** and **PW7** had seen the accused person drunk previously. The accused person talked to them. He asked where the deceased was. By then the deceased had gone into a latrine which was outside the main house. They so told the accused person. The accused person stood outside the house waiting.

7. **PW6** watched the accused person intently. He saw something tucked into his waist which appeared like a weapon but he did not see it. The accused person talked to himself in Dholuo language. According to **PW6** the accused person said '*...kawouro tonyaka taneke...*'. **PW6** understood Dholuo language. According to him the accused person said '*...today I must kill her...*'.

8. Shortly the deceased came out of the latrine. The accused person and the deceased met but they did not talk to one another. The deceased proceeded inside the main house. The accused person followed her inside the house. After a while there were screams from inside the house. **PW5**, **PW6** and **PW7** recognized the voice to be of the deceased. She was calling for help from **J**. She said in Dholuo language '*.....J bikonya.... J bikonya...*'. According to **PW6** the deceased said '*.... J come and help me.... J come and help me....*'.

9. **J** was the eldest child at home that day. **PW5**, **PW6** and **PW7** ran inside the house. They were led by **J**. Upon entering the house, **J** ran out very fast while crying. **PW6** followed **J** closely. When **J** turned away crying **PW6** instead remained inside the house. The house was still well lit from the natural light. **PW6** saw the accused person holding a knife. The accused person then stabbed the deceased on the stomach once. In an act of bravery **PW6** took a broom which had a long handle and hit the accused person with it on his head. The accused person then left the deceased. **PW6** saw the deceased remove the knife from her stomach. The knife had blood. The knife fell.

10. PW6 saw the accused person pick the knife which the deceased had removed from her stomach. The accused person tucked the knife unto his waist and disappeared into a nearby maize farm.
11. According to PW6 the incident occurred at the dining area next to the sitting room. PW6 saw the deceased running outside the house. He raised alarm and people gathered almost immediately. As the deceased ran towards a neighbour's house she collapsed and was later rushed to hospital.
12. PW5 and PW7 vouched the evidence of PW6. PW7 saw PW6 rescue the deceased by hitting the accused person on the head with a broom. As a result, the deceased got a reprieve and ran outside the house. All the children who were inside the house screamed as they witnessed the ordeal. The accused person wept when PW5, his son, testified.
13. PW1 and PW2 were variously called and informed of the incident immediately it occurred. PW1 who was in Nyatike directed those who were at the scene to rush the deceased to hospital. PW2 was at a nearby restaurant watching football. On receipt of the information he rushed home. He found people gathered where the deceased was lying down. PW2 observed the deceased. He saw the intestines protruding from the stomach. The deceased was unconscious. PW2 rushed the deceased to the nearby Oruba Nursing Home and Maternity Hospital. They were then referred to the Migori County Referral Hospital (hereinafter referred to as 'the MCRH'). The deceased was pronounced dead on arrival at the MCRH.
14. It was PW1 who accompanied the accused person to Migori Police Station on 03/07/2018. PW1 knew that the accused person was at Kadem in Nyatike. The accused person was arrested at the police station and booked into police custody.
15. The police commenced investigations into the death of the deceased. PW9 led the investigations. PW9 testified that he was called by the DCIO Migori and informed on the incident on 01/07/2018. Immediately PW9 was accompanied by other officers and rushed to MCRH where the deceased was reportedly undergoing treatment. PW9 saw the deceased. She had already been pronounced dead. He viewed the body of the deceased and saw the injury on the stomach.
16. PW9 was accompanied by among others, PW4. It was PW4 who photographed the body of the deceased at the hospital as well as scene at the hospital. PW9 then visited the scene where the incident had occurred. That was at Oruba village. As it was night PW4 could not take some photographs. PW9 interrogated several people and requested some to record statements at the police station on the following day. Indeed, they turned up and recorded their statements.
17. PW9 and PW4 revisited the scene at Oruba village on 02/07/2018. PW4 photographed the scene.
18. The accused person was arrested before PW9 completed investigations. PW9 sought for and was granted a Court Order to hold the accused person in custody for 7 days pending completion of investigations.
19. On 05/07/2018 PW9 escorted the accused person to MCRH for mental assessment. He was found fit to stand trial. On 06/07/2018 PW9 organized for and PW3 conducted a post mortem examination on the body of the deceased. The body of the deceased was identified by PW8 prior to the autopsy.
20. PW3 found 2 stab wounds at the stomach of the deceased. One was a shallow stab. The other was a deep penetrating stab wound which had ruptured the omentum; a layer around the abdomen which holds and protects the internal organs. There was blood in the abdomen. Around 3 litres of blood were collected. PW3 opined that the death of the deceased was due to excessive bleeding secondary to a penetrating abdominal injury due to assault.
21. The accused person was later formally charged. PW3 produced the Post Mortem Report as an exhibit. PW4 produced the photographs and the Certificate as exhibits. PW9 produced the Mental Assessment Report for the accused person as an exhibit. The weapon suspected to have been used in the assault was not recovered.
22. It is the forgone chronology of events that led this Court to find that the accused person had a case to answer. That was at the closure of the prosecution's case.
23. Placed on his defence, the accused person elected to and gave sworn evidence. He did not call any witness. He denied committing the offence. The accused person admitted that there was a disagreement with the deceased on 01/07/2018. The disagreement was over KShs. 3,500/-. The accused person stated that he had given the money to the deceased about 2 days ago to pay for the school fees for their son PW5. That, 2 days later the accused person met PW5's teacher. The teacher asked the accused person why he had not paid fees for PW5. The accused person was surprised and went to find out the reason from the deceased.
24. The accused person further stated that he met the deceased at Oruba. He asked her of the money he had given her 2 days ago. He was by then drunk. According to the accused person the deceased responded so rudely. The accused person was annoyed and slapped her. The deceased rushed to the kitchen and took a knife. The deceased intended to harm the accused person. That a scuffle ensued and the accused person managed to disarm the deceased.
25. The accused person testified that the deceased did not stop her quest for the knife. They fought over the possession of the knife. That was at the dining room. As there were stairs, the deceased slid and fell on the knife which injured her on the stomach.
26. The deceased raised alarm and ran outside the house. The accused person could not catch up with the deceased as he was drunk. He wanted to assist her. When he heard screams outside the house the accused person instead ran away to his sister and reported the incident. He later surrendered to the police.

27. The accused person described the incident as unfortunate as he had never fought with the deceased before.

28. At the close of the defence case, Learned Counsel for the accused person, **Miss Apondi**, filed written submissions. The prosecution relied on the evidence on record.

29. As the accused person was charged with an information of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the ‘actus reus’ of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the ‘mens rea’ of the offence.

30. There is no doubt that the deceased died. All the witnesses as well as the accused person confirmed as such. As to the cause of death, PW3 took this Court through the Post Mortem Form which he prepared after conducting the examination and opined that the cause of death was the assault which ruptured the abdomen and caused excessive bleeding. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence. The first ingredient is answered in the affirmative.

31. I will now deal with the second ingredient as to whether the accused person unlawfully caused the death of the deceased. PW5, PW6 and PW7 were eye-witnesses. They all testified on how the accused person went to the home and attacked the deceased with a knife. PW6 saw the accused person stab the deceased in the abdomen with a knife. PW6 and PW7 saw the deceased remove the knife from her stomach. All the three witnessed the attack by the accused person on the deceased inside the house. The eye-witness account was therefore duly corroborated.

32. There is no doubt that PW5, PW6 and PW7 knew the accused person well. The incident occurred before darkness fell. The eye-witnesses testified that visibility was not hindered in any way.

33. Against the foregoing account, the accused person presented his defence. According to him, it was the deceased who had the knife and wanted to attack him. He recovered the same from her and in the course of the struggle the deceased fell on the knife and was injured.

34. The accused person also raised the defence of intoxication. I will deal with this aspect before I return to the accused person’s first line of defence. It is a defence provided for under **Section 13** of the **Penal Code Chapter 63** of the Laws of Kenya. The section states that: -

13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3)

(4)

(5) For the purposes of this section, “intoxication” includes a state produced by narcotics or drugs.

35. From the reading of the above provision it appears that the defence of intoxication is very narrow in its application. The defence can be raised in two instances. First, under **sub-section 2(a)**. In that case the burden of proof is on the accused person to satisfy the conditions therein. Second, under **subsection 2(b)**. In this latter case the burden remains on the prosecution.

36. The Court of Appeal for Eastern Africa in *Kangaro s/o Mrisho vs. R (1956) 23 EACA 532* referred to the case of *Cheminingwa vs. R*, in which it was stated: -

It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused.

See: *Joshua Matata Ndonge v R, [2001] eKLR, CR No. 122 of 1991 (Kwach, Shah & O’Kubasu JJ. A).*

37. Further, the Court of Appeal cases of *Manyara v. R (5) (1955) 22 EACA 502*, *Nyatike s/o Oyugi (1959) EA 322* among others remain very relevant on this issue.

38. As rightly submitted by Learned Counsel for the accused person the defence of intoxication in this case was raised in context to **Section 13(2)(b)** of the **Penal Code**. In that case the burden was on the prosecution to prove that the accused person although drunk still knew what he was doing.

39. The accused person gave his defence on oath. He narrated the events of that day. He recollected well that he met PW5's teacher and they talked of unpaid school fees. He further recalled that he had given the deceased the money to settle the fees.

40. The accused person then decided to and went to find out why the deceased had not paid the fees. He boarded a motor cycle as a pillion passenger and paid Kshs. 20/= as fare. He directed the motor cyclist to the house where the deceased was. He met the deceased. He sat down with the deceased and asked her of the payments. The accused person remembered well that the deceased answered him rudely. He further remembered that the deceased went into the kitchen and took a knife. He recalled that he was in danger from the deceased. He then decided to disarm the deceased. A scuffle arose. In the process the deceased slid and fell on the knife. The knife then injured her.

41. The accused person was still determined to help the injured deceased. He attempted to run after her but he could not catch up with her pace as he was drunk. He then heard screams from outside the house. He left to inform his sister what had happened. He went all the way from Oruba in Migori to Kadem in Nyatike that very night. He met his brother-in-law and informed him of the incident. He spent there. On the following day he called PW1 and PW2 and talked of the incident. He later surrendered to the police.

42. The inevitable question is whether in the foregone circumstances the accused person did not know what he was doing for he was too drunk. Taking the totality of the foregone, I easily arrive at a finding that the accused person although drunk was well within his senses. He knew all what was happening. He was fully alert and took charge of all his actions. The accused person would not have narrated all the events with ease and clarity if he was not fully aware of what happened.

43. The defence of intoxication does not therefore come to the aid of the accused person in this case. It is hereby dismissed.

44. Returning to the first line of the accused person's defence, this Court observed the witnesses testify. The prosecution witnesses were candid and straight-forward. They also withstood and were not shaken in cross-examination. The Court formed the opinion that the witnesses were truthful and credible and their evidence reliable. A witness who deliberately causes a Court to see him/her as otherwise not a straight-forward person runs the risk of his/her evidence regarded of no probative value or such little value, if any.

45. Based on the evidence of PW5, PW6 and PW7 I find the accused person's narration of the events not convincing. I did not believe him. The accused person was not truthful in his defence. I find no reason why PW5, PW6 and PW7 should stand in unison against the accused person. There was no allegation of bad blood between the witnesses and the accused person. Infact PW5 was the very son of the accused person.

46. The accused person admitted that he was at the scene. He also admitted that a scuffle between him and the deceased ensued. He further admitted that the deceased was injured in the encounter.

47. At the very most I therefore find the defence an afterthought. It is hereby rejected.

48. I now hold that there is cogent and well corroborated evidence to the effect that it was the accused person who unlawfully occasioned the fatal stabs on the deceased. The second ingredient is also answered in the affirmative.

49. As to whether there was malice aforethought in the accused person causing the death of the deceased, the starting point is the law. **Section 206** of the Penal Code defines 'malice aforethought' as follows:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

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(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.

50. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;

i) *The intention to cause death;*

ii) *The intention to cause grievous bodily harm;*

iii) *Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.*

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55.

My Lordships in the above case went on to say that: -

In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -

There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR..."

51. And in the case of ***Mary Wanjiku Gitonga –vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)*** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows: -

We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed.... Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention "to do grievous harm to any person....." is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.

In the circumstances we see no reason to interfere with the appellant's conviction for murder. The conviction was fully justified by the evidence on record.

52. PW2 testified on the relationship between the accused person and the deceased. According to him, the two did not relate well. He narrated three incidents where the accused person threatened the life of the deceased. At one point the accused person pursued the deceased with a knife. PW2 intervened. He also indicated that the accused person though a quiet person was very rough when drunk. He knew that the accused person got drunk anytime he had money.

53. PW6 heard the accused person on the day he attacked the deceased talking to himself about his intention towards the deceased. The accused person was very categorical that he was going to kill the deceased. That was before the deceased came out of the latrine and met the accused person. PW6 also noted that the accused person was armed. When the deceased came out of the latrine she met the accused person. The accused person did not say anything to her. He waited for her to get inside the house. He then followed her inside and attacked her.

54. The accused person had planned to kill the deceased. He was not provoked. He was not angry. He made his intention to kill the deceased clear and was overheard by PW6. He also craved for an opportunity that would make it impossible for the deceased to escape his wrath. He opted not to attack her outside the house. He therefore knew that he would get ample time with the deceased and accomplish his aim before anyone would intervene.

55. Another important consideration is the part of the body where the accused person stabbed the deceased. It was in the abdomen. I saw the photographs of the deceased with intestines protruding. The accused person knew or ought to have reasonably known that stabbing the deceased with a sharp knife around the abdomen was likely to rupture the delicate internal organs. That would cause death instantly.

56. There is also the issue of the number of times the accused person stabbed the deceased. According to PW2 and PW3 the accused person stabbed the deceased two times. However, had PW6 not intervened and hit the accused person with a broom on the head thereby freeing the deceased, the number of stabs would have definitely increased. The accused person reasonably intended to cause more stab wounds on the deceased.

57. Based on the evidence on record I find and hold that malice aforethought was demonstrated on the part of the accused person. The third ingredient is also answered in the affirmative.

58. As I come to the end of this judgment I must highly congratulate PW6, **DO**, for his acts of bravery. He swiftly took action in an attempt

to save the deceased from the wrath of the accused person. He risked his life for the deceased. May **DO** live to save lives.

59. Consequently, I find **Benard Onyango Tambo** guilty of the murder of **Rosemary Ben** as charged and do convict him under **Section 322(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya.

60. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of November, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Miss Apondi, Counsel for the Accused person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.