



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL DIVISION

CRIMINAL CASE NO. 15 OF 2015

REPUBLICRESPONDENT

VERSUS

ELIZABETH MUGOYWA ACCUSED

JUDGMENT

1. The accused **ELIZABETH MUGOYWA** 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 24th day of January, 2015 at Tassia Mabatini Estate within Nairobi County murdered **CHRISTINE WANYAMA**.
2. She pleaded not guilty to the said charge and to prove its case against her the prosecution called a total of six (6) witnesses.
3. The facts of this case are that **PW5 FREDRICK ASHINYIRA** a total man by any standard was married to both the accused and the deceased and each had one child. At some stage in their life he lived with the two women in a one room mabati house for two weeks and thereafter rented a house for the deceased who was the younger wife some three hundred meters away from the house of the accused.
4. Their husband PW5 was popularly known as “FREDIE” within the plot where they were staying and that is the name the accused used to call him with. This man Freddie according to his evidence before court had not “visited” or slept in the house of the deceased for two days before the fatal day but had on the said date met her next to her house going for water and she did not have any complaint! It was at about 10.30 a.m. while in Ruiru working when a lady called and informed him that his two wives were fighting. Upon receipt of the said information he took a motor vehicle but while on the way he received further two calls one to the effect that the deceased had been rushed to hospital and another that the same had died.
5. To Freddie none of his wives was violent and he did not know why the deceased had gone to the house of the accused but this was answered by the accused in her defence – to find out why she had stopped Freddie from going to her house of which her answer was to ask the said Freddie their husband only for her to die before getting the answer.
6. **PW2 FLORENCE MWANZA** a neighbour of the accused confirmed that in the year 2014 both the accused and the deceased together with their husband lived in one house and even when she was rented for a house, the deceased used to come to their plot. On 24th January, 2015 while in her house at 8.30 a.m. she heard screams from outside and went to check what it was about and found that the accused had stabbed the deceased with a knife which she was holding in her hand with blood stains. She held onto the accused while pushing her towards the house of PW1 while calling the name of the same.
7. It was her evidence that when PW1 responded she let go of the accused and rushed outside the plot to call neighbours who came and took the deceased who had a stab wound on the left side of her chest to the clinic. This evidence was corroborated by **PW1 RUTH NDENYA MWEMA** who stated further that when she held the accused who was holding a knife in her hand the same threw the said knife away. **PW3 PC PETER KIVUVA** re-arrested the accused from Tasia Royal Health Centre where she had been taken to together with the deceased by the neighbours.
8. **PW4 DR PETER NDEGWA** performed post mortem examination on the body of the deceased who had a penetrating stab wound left infra-clavicular and 2nd rib cartilage fracture. He formed an opinion that the cause of death was exsanguinations due to severe chest injuries due to stab wound.
9. **PW6 PC PAUL MUTHIANI** investigated the matter and confirmed that the murder weapon was thrown into a river next to the scene,

took the accused for medical examination and was found to be fit to stand trial. From his investigation he confirmed that the fight between the accused and the deceased started inside the house but moved outside where the deceased was stabbed and that the motive of the murder was that the two were fighting over their husband whom the accused suspected had been kept in the house of the deceased.

10. When put on her defence the accused stated that the deceased went to her house and demanded to know why she had blocked their husband from going to her house and wanted to know the reason why the same was not going to her house and since the deceased had come with a knife, they started to fight over the knife and as they struggled the knife stabbed the deceased whom she did not intend to kill.

SUBMISSIONS

11. On behalf of the prosecution it was submitted that the accused was placed at the scene of the crime and that it was proved that she is the one who stabbed the deceased who died from the injuries sustained. It was submitted that the deceased entered into the house of the accused unarmed and the accused was not in any danger to mete out a merciless attack on her co-wife. It was submitted that the fact the accused had stated that she did not intend to do it and that it turned out so is not a defence.

12. On behalf of the accused the same filed written submissions wherein it was stated that nobody was privy to what happened inside the house of the accused moments before the attack save for the evidence of the accused person that it was the deceased who visited her house on the material morning over the failure of their husband to visit her house and picked up a quarrel with her when a fight ensued and that the fact that only one stab wound was inflicted on the deceased demonstrate lack of intention to commit murder on the part of the accused who acted in self defence.

13. It was submitted that there was no disagreement or grudge between the deceased and the accused prior to the day the offence was committed and no preparation on the part of the accused person to commit the offence of murder and further that the events of the day were spontaneous and occurred suddenly. The accused further relied on the defence of provocation and submitted that malice aforethought was not established.

ANALYSIS AND DETERMINATION

14. For the prosecution to sustain a conviction on a charge of murder under **Section 203** of the Penal Code as read with **Section 204** thereof the following ingredients of the offence must be proved beyond any reasonable doubt:-

a) The fact and cause of death of the deceased.

b) That the said death was caused by unlawful act or omission on the part of the accused person.

c) That the said unlawful act was caused with malice aforethought.

Section 206 of the **Penal Code** has defined malice aforethought as follows:-

“S. 206 “Malice aforethought shall be deemed to be established by evidence proving any 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 the death will probably cause the death of grievous harm to some person whether that person is the person actually killed or not although such knowledge is accompanied by indifferent whether death or grievous bodily harm is caused or not by a wish that it may not be caused.

15. Sections 207 and 208 of the Penal Code provides for the defence and definition of provocation in the following terms:-

“S.207. When a person who unlawfully kills another under circumstances which but for the provision of this section would constitute murder does the act which causes death in the heat of passion caused by sudden provocation as herein defined and before there is time for the passion to cool is guilty of manslaughter only.

S.208. The term provocation means and includes except as hereinafter: stated any wrongful act or insult of such a nature as to be likely when done to an ordinary or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant to deprive him of the power of self control and to induce him to commit an assault of the kind which the persons charged committed upon the person by whom the act or insult is done or offered.”

16. The fact and the cause of the death of the deceased is not in dispute. **PW5 PC PAUL MUTHIANI** upon being assigned the role of investigating the matter went to Royal Medical Centre in Tasia and found the body of the deceased lying on the floor with a single wound on the chest. This evidence was confirmed by **PW3 PC PETER KIVUVA**. **PW4 DR. PETER NDEGWA** performed post mortem examination on the body of the deceased and formed opinion that the cause of death was exsanguinations due to severe chest injuries as a result of stab wound. I therefore find and hold that the fact and the cause of death has been proved beyond any reasonable doubt.

17. On whether the said death was caused by unlawful act on the part of the accused, **PW 2 FLORENCE MWANZIA MUTUA** heard a

distress cry while inside her house and when she went outside to check, found the accused holding a blood stained knife with the deceased on the ground. She then called PW1 for assistance while holding and pushing the accused towards her house and when PW1 responded she left her with the accused and went outside the plot to call neighbours who took the deceased to Tasia Royal clinic. The deceased was her neighbour and there was therefore no mistaken identity.

18. PW1 RUTH NDENYA MWEMA corroborated the evidence of PW2 and stated that when she responded to the alarm raised by PW2 she found the accused holding a knife in her hand while the deceased was lying down with a knife wound on the right chest. It was her evidence that there were no other people in the plot save for herself, PW2, the accused and the children. It was her further evidence that the accused was her very good friend. The accused in her defence further confirmed that she is the one who inflicted the fatal injuries on the deceased.

19. From the evidence tendered I am satisfied and find that the death of the deceased was caused by unlawful act on the part of the accused person.

20. On whether the said death was caused by malice aforethought, the accused has offered a defence of provocation and stated that it is the deceased who went to her house with a knife and demanded to know from her why she had stopped their husband from going to her place and that as they struggled over the knife through bad luck the knife stabbed the deceased.

21. The defence of the accused is however contradicted in material particulars by the evidence of PW1 who testified that she did not hear of any commotion from the house of the accused and that there was blood on the ground outside the house where the deceased was lying. PW2 also confirmed that she did not hear any commotion from the house of the accused and only heard the scream coming from outside the house.

22. The accused in her defence stated that the deceased went to her house and demanded to know why she had refused their husband to go to her place and when told to wait for their husband PW5 she started to fight her and she fought back over the knife, but the accused is silent over how they ended up outside her house where the deceased was found lying down while the accused was holding a knife which she threw away upon seeing PW2.

23. The issue for determination is whether the deceased had provoked the accused to the extent that would have deprived her of the power of self control? There is no dispute that both the accused were married to the same man PW5. There is further evidence by PW5 that he had not slept in the house of the deceased for three days before the material day and that he had in the fateful morning met the deceased while on his way to work.

24. It is also on record that it is the deceased who went to the house of the accused and inquired from her why she had restrained their joint husband from going to her place and whereas the dead tells no tale the only evidence available as to what happened between the accused and the deceased is the direct evidence of the accused and the circumstantial evidence tendered by the prosecution witnesses. There is evidence on record that before the fateful day there was no dispute or grudge between the accused and the deceased and that at some stage in their life both of them had stayed together with their husband PW5 in the accused one roomed house and that even after the deceased was rented for her own house she used to come to the plot.

25. The only evidence tendered by the prosecution witnesses is that it is the deceased who had gone to the house of the accused uninvited in the earlier hours of the morning after she had met their husband on his way to work coming from the house of the accused person having not slept in her house for three days and as per the evidence of the accused her sole purpose for visiting her was to find out why their joint husband had not visited her house.

26. It was the accused evidence that the deceased went to her house armed and therefore she acted in self defence, this being a criminal trial the prosecution was required to prove beyond any reasonable doubt that the accused person intentionally inflicted the fatal wounds upon the deceased and did not act in provocation or self defence.

27. By going to the house of the accused uninvited and demanding for her to account for the action of their husband, I find and hold that that amounted to provocation on the part of the deceased who should have found out from their husband PW5 the reasons for his missing in action having met with him on that fateful morning as per his evidence on record.

28. The accused in her defence has raised reasonable doubt on the prosecution case and this being a murder trial, the benefit of that doubt ought in law to be given to the accused person in the absence of evidence to the contrary.

29. The essence of the offence of murder is malice aforethought and as submitted by the defence there was no grudge or disagreement between the deceased and the accused prior to the day of the offence. There was no preparation on the part of the accused to commit the offence, the accused had the man in her bosom and therefore see no need why she would have wanted to eliminate her co-wife who on the other hand had all the reasons to attack the accused from holding "Freddie" exclusively to herself.

30. Since it is the deceased who went to the house of the accused uninvited and in the absence of any evidence to the contrary, PW5 having confirmed that he had not spent time with the deceased for three nights and days and without knowing their arrangement, I will give the accused the benefit of doubt that she acted out of provocation by the deceased and therefore find the same not guilty of the offence of murder and acquit the same accordingly.

31. Having found that the death of the deceased was caused by the action of the accused without malice aforethought, I therefore find the same guilty of the offence of manslaughter under **Section 202** as read together with **Section 205** of the Penal Code and convict the same accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 6th day of February, 2018

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Mr. Wachira for the accused

Accused present

Court clerk Tabitha