



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 58 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

J N K.....ACCUSED

JUDGMENT

J N K, hereinafter “the accused” is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the this offence show that the accused murdered M W, hereinafter “the deceased” on the night of 9th and 10th June 2014 at [particulars withheld] within Nairobi County. The accused was taken to court on 14th July 2014 but the plea was not taken until 17th July 2014. I took over this trial on 12th June 2017 after L M N, PW1, had testified before my predecessor. I took the evidence of seven witnesses.

The deceased was a teacher at [particulars withheld] Primary School in Riruta. She lived at [particulars withheld] with her two children, PW1, who was 8 years old at the time she testified on 8th July 2015 and a younger son H. J. G aged 2 years at the time. She was in a relationship with the accused. It is not clear whether they were officially married or not. P N G, PW2, who is brother to the deceased, told the court that the accused and the deceased started living together after completing school and that they had gone home to see the parents of the deceased and that they had a child together. J N W, PW7, who was the head teacher in the school where the deceased taught testified that he did not know that the deceased was married. The Investigating Officer CPL Jairus Namiti, PW8 told the court that he was informed by witnesses that the accused and the deceased were married, had separated and had re-united. However he could not remember which witness gave him this information nor did any such witness testify to that issue. The accused told the court that the deceased was his wife but she had left him in Olkalou and moved to Nairobi to take up her teaching job. Whatever the case may be the evidence shows that the accused and the deceased were in some form of relationship and on 9th June 2014 the accused arrived at [particulars withheld], where the deceased lived with the children, from Olkalou where he lived. This was on the evening of 9th June 2014. He found the deceased and the two children. The accused has confirmed arriving home in the evening on that day.

PW1 told the court that 9th June 2014 was her mother’s birthday and that after the accused arrived home that evening the family had supper and the children, who shared a bedroom, went to sleep. It was usual practice to have the deceased wake PW1 up every morning but on 10th June 2014 she did not. PW1 woke up at 8.00am and went into the bedroom the deceased shared with the accused perhaps curious as to why her mother had failed to wake her up. PW1 found her mother lying half on the bed and half on the floor with her throat cut and her body covered with a coat. She went to the sitting room and found the accused lying on a sofa seat covered with a blanket. The accused had an injury on his neck and could not talk. PW1 went outside their house to seek help from neighbours. He told a neighbour she referred to as Baba Momasi who called the police.

Police officers from Kabete Police Station visited the scene in the morning of 10th June 2014. The scene, as described by CPL Nancy Ogembo, PW5, was at some rental houses build facing each other with a corridor separating them. PW5 told the court that they found the main door open and that the household items were scattered all over the house an indication according to PW5 that there had been a struggle. The accused and the deceased were found inside the house. PC Joseph Gathecha, PW3, the scenes of crime officer who photographed the scene told the court that the scene was in House No. 6A; that they found blood stains on the floor of the house; that the door to the table room had been damaged; that the room where the deceased lay on the a bed was open; that there were three knives with blood stains, one knife was in the kitchen sink and two knives were on the table; that there were foot marks on the door and blood has splattered on the wall and on the door. Further evidence by CPL Nancy is that the accused had a cut on his throat and he looked dead and that the deceased was lying on the bed on her back with the neck tilted sideways and had a cut on the chin and a deep cut on the neck. CPL Nancy said the accused was unconscious when they found him and that he regained consciousness while in the police vehicle. Evidence further shows that the body of the deceased was taken to the city mortuary while the deceased was taken to Kenyatta National Hospital where he was admitted for treatment.

The accused was found to have a case to answer and was placed on his defense. He testified under oath as the only witness for the defense. He testified that he arrived home at [particulars withheld] at about 6.30pm on 9th June 2014. He said he found his wife the deceased at home preparing supper and the children, PW1 and the brother, in the sitting room doing their homework. He sat with the children to assist with homework and after eating supper the children went to bed. He said he was left watching television as his wife was busy in the kitchen

washing up and preparing pancakes for breakfast the following day. He testified that he went to bed at 10.30pm and after about 20 minutes he heard a knock at their main door. He heard his wife ask who it was. He heard a voice of a woman but could not hear the words. He thought it was a neighbour. The deceased opened the door and the accused heard a commotion inside the house. He heard the door of the bedroom hit and a tall man entered the bedroom following by the deceased in the middle and a second man behind the deceased. He said the first man had a gun in his hand. The man warned the accused not to do anything. The man holding the deceased had a long Maasai knife. The men demanded money from the couple. The deceased told them there was no money. The man holding her hit her and she fell on the bed. The first man held the accused and took him to the table room leaving the deceased in the bedroom with the man holding the knife. The accused gave him Kshs 70,000 out of the Kshs 80,000 the couple had received from "chama". The man demanded all the money. The man pushed table forcing the accused to kneel down still demanding more money. Shortly after the man left in the bedroom with the deceased came out holding the knife, now bloodstained, in his hand. The accused demanded to know what had happened to his wife and tried to stand but he was forced down. He was cut and he lost consciousness. The accused told the court further that he did not know what happened from that point onwards and that he regained consciousness in the police vehicle. He said he could not talk to the police officer who was trying to talk to him because his throat had been cut. He confirmed that he was taken to Kenyatta National Hospital where he was admitted for three weeks and three days. He said that the police picked him from hospital before he was discharged and took him to Kabete Police Station where he was placed in cells. He said the men who attacked them had covered their faces with black masks.

Mr. Ambani appearing for the accused person submitted at the close of the defense case that the prosecution has failed to prove this case beyond reasonable doubt. Counsel submitted that the accused had no reason to kill his wife; that the police suspected the accused for the murder but suspicion alone no matter how strong is not sufficient to prove a case. He cited Joan Chebichii Sawe v. Republic [2003] eKLR to support this submission. Counsel submitted that the prosecution has proved that the deceased was killed but has failed to establish who killed her; that it is circumstantial that the accused was in the house that night but he has offered credible explanation about what happened. Counsel submitted that the Baba Momase, the neighbour who was called by PW1 to help did not testify though he was a vital witness and the inference to be drawn is that his evidence would have been adverse to the prosecution case. He cited the case of Bukenya & others v. Uganda (1972) EA 549 to support his submissions on the above point. Counsel submitted that the knives recovered from the scene were examined and found to have had blood of the accused and this raises doubts that these were the knives used to kill the deceased. Counsel submitted that the circumstances taken cumulatively do not form a chain so complete that there is no escape from the conclusion that the accused is the person who committed this crime. He urged that the accused be acquitted because the evidence against him is circumstantial, it does not pass the test of circumstantial evidence and it is not sufficient to support murder.

Ms Nduati for the prosecution submitted that the prosecution has proved its case beyond reasonable doubt. She submitted that the only people inside the house were the accused, the deceased and their two minor children; that the door to their house was not broken; that PW1 is the one who opened the door in the morning and sought help from neighbours; that if it was true that two men attacked the family they could not have left the door locked and that the defense of the accused is incredible and must be rejected. Ms Nduati further submitted that the accused committed the crime and turned the knives on himself in a bid to commit suicide after realizing what he had done and that this is the reason the knives recovered from the house had his blood. She submitted that PW5 heard the accused crying and lamenting what he had done. She submitted that the accused and the deceased were not in a happy relationship since evidence shows that they had separated at one time. She submitted that the injuries show that the accused intended to kill the deceased or to cause grievous harm. Ms Nduati urged the court to find that the offence of murder has been proved beyond reasonable doubt and convict the accused.

The offence of murder under Section 203 of the Penal Code is committed when **any person who of malice aforethought causes death of another person by an unlawful act or omission**. Malice aforethought is defined under Section 206 of the Penal Code. This section is framed as follows:

Malice aforethought shall be deemed to be established by evidence proving 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.**

The prosecution bears the onus of proving a criminal case and the standard of proof to be met is proof beyond reasonable doubt. The prosecution must prove the following:

- i. That death of a person has occurred.
- ii. The cause of that death.
- iii. The identity of the person causing that death.
- iv. Malice aforethought on the part of the person who has caused that death.

The death of M W on the night of 9th/10th June 2014 was not witnessed by anyone. Evidence shows that the accused, the deceased and their two children were the only people in their house No. 6A at [particulars withheld]. The prosecution case therefore is based wholly on

circumstantial evidence. To prove a criminal case basing that proof on circumstantial evidence requires that certain evidentiary parameters must be met. These parameters are settled in case law. The tests upon which a court will be justified in drawing the inference of guilt from circumstantial evidence are laid down in various precedents. Some of the leading precedents on this issue are *Rex v. Kipkering Arap Koske [1949] 16 EACA 135* and *Simon Musoke v. R [1958] EA 715*. The gist of the test is that circumstantial evidence against an accused must irresistibly point to the accused to the exclusion of all others as having committed the offence and that circumstantial evidence against the accused must exclude co-existing circumstances which would weaken or destroy the inference of guilt. This is what the prosecution in this case must prove through the available circumstantial evidence (see also *Joan Chebichii Sawe* case supra).

On the issue of proof of the fact of death of the deceased and the cause of that death, I have looked at the evidence of PW1 who found her mother dead on the morning of 10th June 2014. I have looked at the evidence of P N G, PW2 and brother to the deceased who identified the body to the doctor who conducted post mortem. I have looked at the evidence of PC Joseph Githecha, PW3, who took photographs of the scene including those of the deceased and the evidence of CPL Nancy Ogenbo, PW5. All these witnesses saw the body of the deceased. I have also analysed the evidence of Dr. Dorothy Njeru, PW6, who examined the body of the deceased on 12th June 2014 at the City Mortuary. Dr. Njeru confirmed the death of the deceased. She found five cut wounds on the front of the neck measuring 8cm at the longest dimension. Four of these wounds were superficial but one was deep and extended to the windpipe cutting across the left main vessel supplying blood to the brain. The doctor's opinion is that the deceased died as a result of severe blood loss (exsanguination) due to sharp force trauma to the neck. Dr. Njeru produced a post mortem report with her findings as Exhibit 7.

I find all this evidence credible and I accept it. This evidence proves beyond reasonable doubt that the deceased died as a result of an unlawful act (cut wounds).

I will determine the remaining issues as to who killed the deceased and the issue of the ingredient of malice aforethought together. The only witness who was inside the house, the scene of this crime is PW1. She was however asleep and did not hear anything. PW1 did not mention anything was wrong with her parents. She narrated how they had supper and the children retired to bed. Her mother did not wake her up the following morning as was the practice. She woke up at 8.00am and in my view she may have wondered why her mother had not woken her up as usual and had decided to find out. She went to the bedroom shared by accused and the deceased and stumbled on a gory site. Her mother was lying half way on the bed and the floor with a cut throat. She was covered with a coat. She went to the living room and found the accused lying on the sofa seat covered with a blanket. The accused also had an injury on the neck.

When PW1 was cross examined she told the court that she found the main door of their house open. She contradicted herself in re-examination by stating that she found the door locked from inside and no one could access the house from outside. This court did not benefit from the evidence of Baba Momasi, the neighbour PW1 sought help from. He was not called as a witness and neither did any of the other neighbours. This is a serious oversight on the part of the Investigating Officer and the prosecution. I agree with the defense counsel relying on *Bukenya & others v. Uganda* (supra) that the prosecution has a duty to make available all the witnesses necessary to establish the truth and that where the evidence called is barely adequate, the court may infer that the evidence the uncalled witnesses would have tendered would have been adverse to the prosecution.

The duty to prove a criminal case always lies with the prosecution and does not shift. In other words the accused does not assume the burden of proving a criminal case or proving his innocence. All the evidence the accused tenders is aimed at creating doubts against the prosecution evidence. The accused has given a lengthy account on what happened. He was cross-examined at length and his testimony did not change. His evidence was not challenged during cross-examination as it remained firm.

To my mind there is no dispute that the accused was at home on the evening of 9th June 2014. He testified to what happened after the children had gone to bed. He denied killing the deceased. He stated that they were attacked by two men who had covered their faces. He stated that at the time the deceased was being attacked he had been taken to the sitting room by the second man and that as the other attacker was demanding more money from him, the second man came from the bedroom where the deceased was with a blood stained knife. He said that he was cut on the throat and lost consciousness. He said he was not able to talk due to the cut in the throat and that he stayed in hospital for over three weeks.

I have examined all the evidence carefully. There is no doubt that both the accused and the deceased sustained serious injuries on the night of 9th/10th June 2014. The only available evidence is that of PW1 and the defense of the accused. PW1 was aged 9 years at the time she testified in 2015. To my mind PW1 was about 8 years when her mother was killed. She did not testify to any bad blood between the mother and the deceased. There is nothing in her evidence to show that on the night in issue the accused and the deceased argued or quarreled. None of the witnesses, specifically the deceased's brother PW2 testified to bad relationship between the accused and the deceased. As far as I can discern from the evidence the prosecution has not shown any motive for murder on the part of the accused. This court must decide this case on the available evidence and although motive is not an ingredient for murder, it is an important factor in a criminal trial because it offers explanation why an accused behaved the way he did.

I have also examined the evidence from the Government Analyst Ms Elizabeth Waitheya Oyiego, PW4. She examined the three knives (Ex. 3, 4, and 5) recovered from the house of the deceased. The blood that had stained these three knives belonged to the accused according to the DNA profiles generated from these stains of blood. None had blood stains from the deceased. The only conclusion that I can arrive at basing it on this evidence is that those knives did not come into contact with the deceased. In other words they are not the murder weapons. The mystery of the evidence of the knives continues in that all the three had blood from the accused. There is no explanation through evidence adduced by prosecution witnesses. The law does not allow me to speculate. I have to base every finding and decision on solid evidence.

The prosecution has advanced a theory that the accused attacked the deceased first and after realizing what he had done attempted to commit suicide by cutting his own throat. This theory is not supported by evidence. It is not explained how the deceased used all the three knives to inflict injuries on himself and again this court will not speculate. The injury the accused suffered was serious hence his hospitalization for over three weeks. This court did not benefit from the evidence of the doctors who treated the accused or the police surgeon who examined the accused. This doctor did not testify and the prosecution used the Investigating Officer with no objection from the defense counsel to produce the mental assessment report (P3) Exhibit 8. This form shows that the accused had healed scar on the front neck which is consistent

with the evidence that he had a cut on the throat.

The evidence of the police officers who visited the scene is that they thought they were removing two bodies from the scene of the crime. In his evidence CPL Jairus Namiti the Investigating Officer referred to two bodies having been recovered from the scene and placed in a police vehicle that ran out of fuel and was driven to the police station with the bodies still inside. He stated thus:

“The police visited the scene. We returned to the station to record statements of M. (PW1) and a teacher who was said to be the head teacher where deceased taught. Later the bodies were taken to the city mortuary. We wanted to confirm the bodies (sic). The male body raised the hand and opened the eyes. We realized he was alive. The female body was taken to the City Mortuary and the man was taken to Kenyatta Hospital. He was admitted”

This evidence agrees with the defense of the accused that he was unconscious and came to on the way to the hospital. It also shows that the accused was critically injured.

I have considered all the evidence by the prosecution and the defense. I have read with care all the submissions and the cited authorities. Mine is to consider whether the evidence by the prosecution satisfies the test of circumstantial evidence. It is unfortunate that a young mother died and left her little children at that young age. However, in deciding a case, the trial court has to do so without emotion. This is meant to accord the accused a fair trial and the victim justice. Where evidence falls short of proving a case beyond reasonable doubt, the trial court must obey the law and acquit the accused. Where evidence meets the set standards, the court likewise obeys the law and convicts. I find that the evidence placed before me does not meet the test of circumstantial evidence. I find that I am not able to conclusively state that if all the evidence is taken cumulatively, it forms a chain so complete that there is no escape from the conclusion that the accused and none else killed the deceased. The doubts created in the blood found on the knives, the severe injury on the accused's throat that rendered him unconscious and led police to think that he was dead and the involvement of the three knives as well as the defense of the accused that there were two men involved lead me to doubt that the accused may not have committed this offence. In other words, I lack evidence to prove beyond reasonable doubt that the accused is the one who killed his wife. As submitted by the defense counsel basing those submissions on Joan Chebichii Sawe case (supra) there is suspicion that the accused may have been involved in this crime. However, suspicion alone, no matter how strong can never form a basis for conviction. The accused shall benefit from the doubts created by the evidence in this case.

My finding on the issue as to whether the accused killed the deceased and whether he possessed malice aforethought is that there is insufficient evidence on the two issues. Consequently, I find that the prosecution has failed to prove this case against the accused beyond reasonable doubt. I find the accused not guilty of murder as charged and hereby acquit him forthwith. He is free to go home and enjoy his liberty unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Delivered, dated and signed this 16th May 2018.

S. N. Mutuku

Judge