



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 22 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENJAMIN WAINAINA NJAU ALIAS**

**BENJAMIN NG'ANG'A.....ACCUSED**

**JUDGMENT**

Benjamin Wainaina Njau, alias Benjamin Ng'ang'a, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence are framed as follows:

**BENJAMIN WAINAINA NJAU ALIAS BENJAMIN NG'ANG'A:** On the 7<sup>th</sup> day of February 2015 at Mahindi Hotel along Racecourse Road in Nairobi area within Nairobi County murdered **FELISTA WANJIRU GICHERU**.

The events giving rise to this case occurred on 7<sup>th</sup> February 2015. The scene is Mahindi Hotel situated at Racecourse Nairobi. On the morning of that day, Maureen Njoki (Maureen), PW4, Felista Wanjiru Gicheru, (the deceased), Solomon Karanja (Solomon), PW5, Mary Muthoni (Mary), PW6 and other staff members of Mahindi Hotel reported on duty about 8.00am that morning. Maureen and the deceased worked as cleaners. Their job entailed changing beddings and washing them. Solomon was a cook in the Hotel kitchen and Mary was the manager. Maureen arrived at the Hotel before the deceased and she got busy on the first floor. The deceased arrived slightly after 8.00am and went to the second floor to start her duties. The Hotel had two floors. The washing station was located on the second floor where the deceased was. At about 10.00am the two cleaners were informed that staff tea was read. They decided to take a break to take their tea. They were on the second floor. Solomon joined them for the tea. After tea Solomon left to continue with his duties in the kitchen. It is at this time when Maureen and the deceased saw Benjamin Wainaina, the accused, arrive at the Hotel. The accused was the boyfriend of the deceased and he was known to Maureen. She had seen him before and knew him as a boyfriend of the deceased. The deceased called the accused to join her on the second floor. They entered room 121 located on the second floor. After about 30 minutes Maureen heard the deceased screaming and calling her (Maureen) as she ran towards her (Maureen). Maureen observed that the deceased was bleeding profusely from a stab wound on the neck. Maureen picked pillow cases (Exhibits 1 and 3). She used them to try to stop the bleeding but it was futile. Solomon who had been attracted to the second floor by the screams went to the scene. He found Maureen trying to stop the bleeding on the deceased's stab wound on the neck. Solomon followed the trail of blood from where the deceased was to room 121. Inside that room he saw a man lying on the floor facing upwards. Between his legs was a knife identified as a pen knife (Exhibit 2). Solomon noted that the man was bleeding on his chest. He identified the man he saw in room 121 as the accused before the court.

Mary was busy taking stock that morning when she heard screams on the second floor of Mahindi Hotel and in company of other staff identified as Philip Kimani and Selina, she went to the second floor to find out what was happening. She found the deceased lying on the floor with Maureen administering first aid. Mary sought to know what had happened. She was informed that the deceased had been stabbed by a man in room 121. Mary went to room 121 and saw a man lying on the floor with a knife between his legs. She did not know the man. She identified the man she saw in room 121 as the accused before the court. Mary called the police.

The police officers who went to the scene are SGT Charles Mugweru, PW7, of Kamukunji Police Station and PC Vincent Langat, PW8, who is the Investigating Officer. They observed the scene and removed the accused and the deceased and took them to Kenyatta National Hospital. The deceased was pronounced dead on arrival at the Hospital. The accused was admitted for treatment. After he was discharged he was arrested and charged with this offence.

The accused has denied committing this offence. He gave an unsworn defence. He told the court that on 7<sup>th</sup> February 2015 he reported to work at Machakos Country Bus at Flying Emirates Coach. His job was to issue receipts to travelling passengers. After he finished his duties, he was assigned to travel in one of the buses as a conductor later that day. He decided to go to Mahindi Hotel where the deceased worked to inform her about the assigned duties to travel as a conductor. He found the deceased on second floor. He found the deceased seated on a bed

arranging the towels. After he informed her about the travelling duties assigned to him she was not happy with him travelling claiming that the accused intended to see someone else. To pacify the deceased the accused told her to call his employer to confirm the information. She promised to do.

The accused testified further that he lay on the bed facing up. This is when the deceased picked a knife she had been using to cut towels and stabbed him on the chest. He said that he tried to snatch the knife from the deceased but she stabbed him again. He said that they struggled over the knife and he managed to snatch the knife from her. He said that the deceased was stabbed in the course of that struggle over the knife but he did not know she had been stabbed until she screamed. He said he fell down and lost consciousness. He said he regained consciousness while in hospital.

In his submissions after the close of the defence case, the accused through Mr. Wakaba, advocate, told the court that the conduct of the accused on the morning of 7<sup>th</sup> February 2015 shows that his intention of going to Mahindi Hotel was not to kill the deceased or to cause her grievous harm. It was submitted that he went to the Hotel to inform the deceased that he had been assigned to travel in one of the buses of his employer as a conductor. It was submitted that none of the witnesses testified to seeing the accused with a knife and that the evidence of the accused that the deceased had been using a knife to cut towels for cleaning and that this is the knife she used on the accused has not been controverted by the prosecution and therefore the prosecution has failed to prove beyond reasonable doubt that the intention of the accused was to kill the deceased or cause her grievous harm.

Mr. Wakaba submitted that the accused sustained injuries on his chest as evidence shows; that the theory advanced by the prosecution is that he stabbed himself after stabbing the deceased but there is no evidence to prove this and that the accused was acting in self-defense. Counsel referred this court to the Court of Appeal decision *Ahmed Mohamed Omar & 5 others v. Republic [2014] eKLR* to support his submissions on the defense of self-defense.

It was submitted that the weapon/object used to stab the accused was not identified and that the knife recovered from the scene was stained with deceased's blood. It was submitted that there is no evidence of recovery of another weapon and therefore Exhibit 2, the knife found between the legs of the accused and which was found with stains of blood belonging to the deceased, must have been the same weapon used to stab the accused. It was submitted that the Investigating Officer did not handle exhibits in a proper manner. It was further submitted that it is not clear whether the deceased was stabbed in room 121 or room 117 because of conflicting evidence on the issue.

Mr. Wakaba submitted that the prosecution relied on dock identification which is worthless. He submitted that the prosecution case is based on circumstantial evidence and cited *Republic v. Michael Muriuki Munyuri [2014] eKLR*; *Musili Tulo v Republic [2014] eKLR* and *Abanga alias Onyango v. Republic Criminal Appeal No. 32 of 1990 (UR)* to support his submissions on circumstantial evidence. Mr. Wakaba urged the court to acquit the accused person.

On the other hand, Ms Nduati for the prosecution submitted that the prosecution has proved the case beyond reasonable doubt; that death has been proved as resulting from exsanguination; that due to the nature of the injuries it is clear that cause of death is due to an unlawful act; that the injuries were caused by a sharp object; that such object, a knife, was found between the legs of the accused and that the knife has been examined and found to have deceased's blood. Ms Nduati submitted that although the prosecution case is based on circumstantial evidence, the prosecution has proved that the accused was at the scene; that the accused and the deceased were the only people in room 121; that the accused was known to the witnesses and therefore the prosecution has not relied on dock identification; that the nature of the injuries suffered by the deceased show that there was malice aforethought; that the accused turned the knife on himself after realizing what he had done; that the injuries were on his left side of the chest and he was right handed and that the prosecution witnesses were credible. Ms Nduati urged the court to find that the prosecution has proved this case beyond reasonable doubt and convict the accused.

In determining this matter I have considered the applicable law and the available evidence. I have also considered submissions by both sides and the cited authorities in support of the submissions. The offence of murder is committed when ***any person who of malice aforethought causes the death of another person by an unlawful act or omission***. The prosecution bears the onus of proving the crime of murder, just like any other crime. The standard to be met is proof beyond reasonable doubt. The ingredients of murder that must be proved beyond reasonable doubt before a conviction can be entered against an accused person are found under Section 203 of the Penal Code. I have broken the ingredients down as follows:

- i. Proof of the fact of the death of the deceased.
- ii. Proof of the cause of such death of the deceased.
- iii. Proof that the cause of the death of the deceased is as a result of an unlawful act or omission by the accused.
- iv. Proof of malice aforethought on the part of the accused.

Malice aforethought is defined under Section 206 of the Penal Code in the following terms:

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

In *Nzuki v. Republic (1993) KLR 171*, the Court of Appeal on the issue of malice aforethought stated 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 and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.”

The evidence placed before me is clear and I find no dispute that the accused went to Mahindi Hotel. He met the deceased who was his wife or girlfriend. Maureen, a co-worker of the deceased, saw the accused and the deceased enter room 121. Shortly thereafter there was screaming from the deceased who came out of room 121. She was screaming and calling Maureen. She was not able to explain herself what had happened. Maureen started administering first aid to stop the bleeding. She was not succeeding in stopping the flow of blood. The photographs produced, all 27 of them (Exhibit 6), bear testimony to the amount of blood lost. The screaming from the accused alerted Solomon and Muthoni who rushed to second floor. Both testified to finding Maureen administering first aid to the deceased. Both testify to following the trail of blood to room 121 where they found the accused lying on the floor in that room. He was injured on his chest. Evidence shows he was unconscious. By the time the deceased was taken to Kenyatta National Hospital, she was pronounced dead.

Without a doubt, I find ample and credible evidence to prove death of the deceased. The cause of that death has been confirmed through the evidence of Dr. Peter Muriuki Ndegwa, PW11. The doctor examined the body of the deceased on 11<sup>th</sup> February 2015 at the City Mortuary. He found a penetrating stab wound below the mandible with severed neck muscles including the left jugular vein and left carotid artery. His opinion is that death of the deceased was due to exsanguination due to neck injuries due to penetrating stab wound. A stab is an unlawful act. My finding on this issue is that the prosecution has proved beyond reasonable doubt the fact of death and the cause of the death of the deceased.

From the analysis of the evidence, it is clear that the case for the prosecution on the issue of the identity of the person who stabbed the deceased leading to her death is circumstantial. There is no eye-witness account of who did it. Circumstantial evidence shows that the accused went to see the deceased and they went into room 121. Up to that point there is no dispute. While inside that room, there is no evidence from the prosecution as to what happened. This is where circumstantial evidence plays a part. For the prosecution to prove this case basing on circumstantial evidence the following standards set in various authorities including *Joan Chebichii Sawe v. Republic [2003] eKLR*, *Musili Tulo v. Republic [2014] eKLR*, and *Republic v. Michael Muriuki Munyuri [2014] eKLR*, must be met:

i. In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt (*Joan Chebichii Sawe* case).

ii. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

iii. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, a further principle must be considered as set out in the case of *Musoke v. R [1958] EA* 715 citing with approval *Teper v. R [1952] AL 480*, thus:

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”(*Musili Tulo* case).

Without evidence from the prosecution as to what happened inside room 121, this court will have to consider circumstantial evidence. It would have been easier for me to state that the circumstances of this case have a definite tendency unerringly pointing towards the guilt of the accused and that taken cumulatively these circumstances form a chain so complete that there is no escape from the conclusion that within all human probability this offence was committed by the accused and none else. This is because the accused and the deceased were the only two people in room 121. The deceased was stabbed and died from the wounds inflicted and that the knife found between the legs of the accused inside room 121 is the murder weapon because it was found to have stains of the blood of the deceased. The problem with this conclusion is that it fails to take into account the fact that the accused also sustained multiple injuries to his chest. The theory passed by the prosecution is that the injuries sustained by the accused are self-inflicted and that after stabbing the deceased the accused stabbed himself after realizing what he had done. This theory is not convincing even to the prosecution. The Investigating Officer in cross examination told the court that he did not have any other evidence to support the conclusion that the accused stabbed himself. To my mind this officer meant that other than his own conclusion, he did not have any other evidence to support the theory that the accused stabbed himself. The reason I find the theory that the accused stabbed himself after stabbing the deceased untenable is that the police did not find any other weapon inside room 121 or any other room or place within Mahindi Hotel. The only weapon found at the scene and connected with this offence is the knife

referred to as pen-knife and produced as Exhibit 2. This knife was no doubt found between the legs of the accused inside room 121. It was blood stained. It was examined by Anne Wangechi, PW9. Her findings are that after examining the three pillow cases, two pink (Ex.1) and one white (Ex.3) and the knife (Ex. 2), she found them stained with human blood. DNA profiles generated from these items and compared with the blood sample of the accused and the deceased showed that all these items were stained with deceased's blood. It is an obvious conclusion to make that if indeed Ex. 2 was used by the accused to stab the deceased first and then the accused stabbed himself using the same knife, then his blood or both his and deceased's blood would have been found on the knife. Another explanation would have been that the accused used another object to stab himself. I have applied my mind to the circumstances surrounding this case and my view is that without evidence to support the theory that the accused stabbed the deceased first then stabbed himself, this court is left with nothing to base its findings on. It will remain a mystery as to what exactly happened in room 121 Mahindi Hotel.

Then there is the defense of the accused. It is simply that he was stabbed by the deceased and in the course of struggling with the deceased to snatch the knife from her to stop her from stabbing the accused further, the deceased was stabbed. To understand the defense of the accused there is need to consider the circumstances surrounding his visit to Mahindi Hotel as narrated by the accused. He went to Mahindi to see the deceased and explain to her that he has been assigned to travel in one of the buses of his employer as a conductor. The accused was not working as a conductor at the time. His job was to issue tickets to passengers. This is what he did on the morning of 7<sup>th</sup> February 2015 until he was assigned to travel as a conductor. This according to him, necessitating that he informs the deceased who was his wife/girlfriend. There is no evidence contradicting the defense of the accused about this. His going to Mahindi Hotel was not driven by bad intentions. Indeed on arriving at Mahindi he was welcomed by the deceased and they entered room 121. Shortly thereafter, Maureen puts the time as after 30 minutes of their going to room 121, the deceased was heard screaming.

With this clear intention of the accused going to Mahindi Hotel stated, with no evidence that the accused stabbed deceased first and then stabbed himself, with the evidence showing that Ex. 2 had blood belonging to the deceased and with no evidence of another weapon that the accused may have used on himself, this court finds the defense of the accused plausible. What this court lacks is expert evidence or any evidence to show that Ex. 2 was used to stab both the accused and later the deceased.

The defense also raised the issue of self-defense. Section 17 of the Penal Code states that:

**“17. Subject to any express provisions in this Code or any other written law in operation in Kenya, criminal responsibility for the use of force in the defense of person or property shall be determined according to the principles of English Common Law.”**

The Court of Appeal has extensively dealt with the issue of self-defense in the case cited by the defense *Ahmed Mohammed Omar & 5 others* (supra). The Court of Appeal discussed the English Common Law principles that courts in this country must use to determine the issue of self-defense by citing the decision of the Privy Council in *Palmer v R [1971] A. C. 814*, a decision that was approved by the Court of Appeal in *R v McInnes, 55, Cr. App. R. 551*. The Common Law principles are contained in the following citation by Lord Morris:

**“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 may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances..... Some attacks may be serious and dangerous. Others may not be. If there 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 immediate defensive action may be necessary. If the moment is one 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. There may be no longer any link with a necessary defense..... The defense of self-defense either succeeds so as to result in an acquittal or it is disproved, in which case as a defense it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one 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.”**

The defense of self-defense absolves an accused person of criminal responsibility.

As stated above the accused has given a plausible defense. I find it credible in the absence of any other evidence to controvert it. As it was held by the Court of Appeal in the *Ahmed Mohammed Omar & 5 others case* (supra), the test to be applied where self-defense is invoked as a defense is subjective. It is what the accused person perceives to be the danger confronting him and not what a reasonable person perceives.

To resolve the issues as to whether the accused stabbed the deceased with malice aforethought it is my finding, going by my determination of the issues and my reasoning above, that the prosecution has fallen short of proving these two ingredients beyond reasonable doubt. I have also considered the accused's defense of self-defense and as I have stated above, I find it plausible. The accused benefits from two fronts, from his defense of self-defense and from the doubts created by his defense. Before I make the final orders I wish to state that the defense counsel was wrong to submit that the prosecution was relying on dock identification. This is not the case because Maureen knew the accused before. Mary, the manager of Mahindi Hotel and Solomon saw the accused lying unconscious in room 121 and were able to identify him. Solomon actually assisted in carrying the accused down to the police vehicle. Secondly, the hotel was described as having two floors. Maureen was categorical that on that morning she worked on the first floor and then went to the second floor where the washing station was located. She was categorical that room 121 was situated on second floor and that the deceased came out of room 121 running towards her screaming and calling her name. Further rooms 121 and 117 were on the same floor, second floor. Any other contradictions on this issue are minor and negligible as it depends on how the witnesses described the building and the floors of Mahindi Hotel.

In conclusion, I find that the offence of murder has not been proved beyond reasonable doubt. It is painful to lose a human being. But the evidence before me shows me that the accused did not have the intention to kill the deceased and going by his defense and in the absence of the evidence to the contrary he acted in self-defense. I consequently record a finding that the accused is not guilty of the offence of murder.

Having so found, the law dictates that I order his immediate release from custody unless for any lawful cause he is so held, which I hereby do. Orders shall issue accordingly.

**Delivered, dated and signed this 14<sup>th</sup> day of May 2018.**

**S. N. Mutuku**

**Judge**