



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO 97 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL MAINGI SILA.....ACCUSED

JUDGEMENT

1. The accused **DANIEL MAINGI SILA** 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 1st day of October, 2014 at Kayaba slums in Industrial Area within Nairobi County murdered **REBECCA MWENDE KIIO**.

2. He pleaded not guilty to the said charges and to prove its case the prosecution called a total of nine (9) witnesses and when put on his defence the accused tendered in sworn evidence and called no witness.

PROSECUTION CASE

3. The prosecution case was that the deceased who had been married to **PW2** with one child left him as a result of marital disagreement and started cohabiting with the accused in the neighbourhood of Kayaba slums. In the course of their stay since the minor child between the deceased and her husband **PW2** was staying with her husband's parents, the motherhood instinct came calling forcing the deceased to go visiting her in Machakos and the parents of **PW2** as good in laws convinced and reconciled the deceased and **PW2** and having come to her senses she decided and resolved to go back to her husband leaving her then lover the accused.

4. On her way from Machakos she called the accused and gave him the said information - that she had decided to leave him to go back to her husband and to take her earthly belongings from her house which was being paid for by her broker **PW3** and which had been their love nest for the time she had separated with her husband who was ready and willing to accept her back just like Hoseah of the bible accepted Gomer but this was not to be as what she had thought was going to bring an end to her immoral indulgence and moral restoration of her marriage did not come to pass as that was the very day she died shortly after returning back to her husband's house.

5. To prove this fact the prosecution led the following evidence:-

PW2 FREDRICK NZIOKA MUSAU testified that he was married to the deceased in April 2011 and they lived as such upto 3rd April 2014 when as result of domestic dispute she left him to live with a lady called Kameli leaving behind the child of the union who he took to his parents in Machakos. He tried to reconcile with her to no avail and shortly thereafter she rented her own house within the area only to later meet her with the accused carrying a bed and he got to know that they were living together in some unholy union. As a good child of his parents he informed them of the new development. In the month of September the deceased informed him that she was going to his rural home to see their sick child which she did and while there he called her and with the mediation skills of his parents they reconciled and an "handshake" arranged.

6. It was his evidence that on arrival back to the city the deceased went to his house and as a good husband which he now wanted to be, gave her money to make purchase for supper while he proceeded to nearby bar to drink beer as Kenyan men are known to do and to celebrate the return of his wife. When he got to the house the deceased informed him that a sister of the accused had told her that he was going to kill her. He promised to report the matter to the nearest police and proceeded to buy paraffin which they needed for the night. On the way he was informed by a lady who was selling potato chips that there was a cry from his house and when he rushed back, he found her with stabbed wounds. She told him that she had been stabbed and killed by Maingi the accused and that he was seeing her for the last time. She was rushed to the nearest chemist but was pronounced dead on arrival.

7. **PW4 NAOMI CHEPKEMOI** testified that on 1/10/2014 at about 3.00 p.m. while going to the stage she met the deceased who was carrying a paper bag and a child, she requested her to escort her to her house and she asked her why she was not going to the house of her

friend Maingi. She was told by the deceased that she had decided to go back to her husband's house who was known in the area as "Musungu". From **PW2's** house they proceeded to her house and the deceased called the accused to ask for the key to his house and was directed to Mama Mercy the vegetable vendor who did not have the key. Maingi the accused then came to her house and a quarrel ensued. She sent for her husband who came and requested the two to sort out their dispute without creating a scene before leaving them at her house.

8. The deceased then asked the accused about a bed which the accused was to sell and give her money from the sale which he said was in his house and requested the deceased to go there with him. The accused then told her that he had heard that she had decided to go back to her husband which she confirmed. They then met **PW2** who informed the deceased where to get money for shopping and she left the deceased going to the house of **PW2** while she proceeded towards her house where she met the accused who inquired where the deceased was and she told him she had gone to her husband's house. At 8.00 p.m. she was called and informed that the deceased had been stabbed to death.

9. **PW1 CAROLINE MAWIA ROBERT** testified that on 1/10/2014 while in her house she heard a cry from the house of **PW2** with the words in Kiswahili translated as "*Maingi you are killing me*" and when she got outside she found people surrounding the deceased who was lying down bleeding from a stabbed wound on her chest. It was her evidence that she knew the accused, the deceased and **PW2** who had been her neighbours for four (4) years. When she got out of her house she met the deceased's husband but did not see the accused.

10. **PW3 BONIFACE MUSEMBI KIIO** her brother on 7/10/2014 attended the postmortem examination where he identified the body of the deceased having been informed of her death on 1/10/2014. In cross-examination he stated that he knew the accused who was living with the deceased in the house he was paying for her rent in Kayaba having separated with her husband. **PW5 CORP. ESTHER KINAITORE** testified that on 6/10/2014 when at the police base at Karagita in Naivasha one Raphael Musyoka went to the station and reported that he had a person at his house who had told him that he had killed his wife and wanted him arrested before he escaped. She proceeded to the said place and arrested the accused and handed him over to the police officers from Naivasha. In cross-examination she stated that the accused had arrived at the house of the reportee on 3/10/2018 and that at the time of arrest the accused had injuries on his neck which she thought might have been caused by him attempting to hang himself and commit suicide. This was confirmed by the accused in his defence.

11. **PW6 ELIZABETH WAITHIRA ONYIENGO** a Government Analyst received items that had been collected from the house the accused shared with the deceased and carried an analysis thereon and concluded that the DNA profile generated from the blood stains on the lock bar and the switch matched DNA profile generated from the buccal swab of the accused.

12. **PW7 PC DANIEL KIENI** visited the scene together with the investigating officer and collected the items at the scene and took photographs of the same. **PW8 DR. JOHANSEN ODUOR** performed postmortem examination on the body of the deceased on 7/10/2017 who had sustained a slash wound on the left elbow, stab wound on the mid chest, stab wound on the right chest, bruises on forehead, bilateral lung laceration, bilateral hemothorax and penetrating trauma to right ventricle of the heart. As a result of the said examination he formed an opinion that the cause of death was heart and lung injuries due to penetrated trauma.

13. **PW 9 CORP. REBECCA MOLA** was assigned to investigate the matter. She visited the house of the accused where she noticed blood stains on the lock bar, blood stains on the electricity switch and floor which were taken by the scene of crime officer. She recorded statements from the witnesses. In the course of her investigations she received information that the accused was in Naivasha Police Station from where he was re-arrested and taken for medical examination and was found fit to stand trial. She established that the motive for the offence was a love triangle and that the accused had quarreled with the deceased on the material day shortly before her death.

DEFENCE CASE

14. When put on his defence the accused gave sworn statement of defence and stated that on 1/10/2014 he woke up and went to work from where he was instructed to prepare for delivery to Naivasha. He went home for preparation when a friend of his called him for offloading job which he did before going back to his house and in the process he injured his fingers. When he went to his house later he touched the lock bar and lighting switch leaving blood stains thereon. He was then called by the deceased his then girlfriend who told him that she was coming from the village and asked for the house key.

15. He stated that when he went to his house he did not see the deceased but **PW4** Naomi told him that she was in her house. The deceased then told him that she had decided to go back to her husband and asked for her clothes. She informed him that they had reconciled with her husband for which he did not have any objection. He left her with Naomi going towards her husband's house while he prepared himself to go to Naivasha. He was later on called by one Alex Mutua who gave him information that the deceased had been stabbed with a knife. The said Alex later on called him to confirm that the deceased had died and he told him that he had left her at 4.30 p.m. while going back to her former husband house.

16. He stated that he proceeded to Naivasha and the next day he did not return to Nairobi with the driver since he was being sought by the police. He therefore called his uncle who lives in Naivasha and went to visit him. He stayed with him for three (3) days before his uncle came with policeman who arrested him. He stated that he was not in Nairobi when the murder occurred. In cross-examination he confirmed that he deceased was his girlfriend for four months. He knew that she had been married to **PW2**. He further stated that he was not happy with the deceased leaving him. He stated that he attempt to commit suicide since he was being sought for an offence he did not commit.

SUBMISSION

17. At the close of the defence case the prosecution opted not to make any submission and relied on the evidence on record. On behalf of the defence it was submitted that the accused had given a clear account of himself on the day the deceased was killed. It was submitted that the prosecution had not met the test of circumstantial evidence as stated in the case of **ABANGA alias ONYANGO v REPUBLIC CA NO. 32 OF 1990** as the chain of evidence cannot be said to be complete. It was submitted that the motive for the murder was merely presumed since the fact that the deceased and accused severed their relationship does not make it certain that he felt the urge to kill her. Reference was made to the case of **LIBAMBULA v REPUBLIC [2003] KLR 683** where it was held that motive became an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. It was submitted that the accused attempt to hang himself was

a knee-jerk reaction to the circumstances and does not prove he committed the offence.

ANALYSIS AND DETERMINATION

18. To sustain a conviction on a charge of murder the prosecution is required to prove beyond any reasonable doubt the following ingredients of the offence under **Section 203** of the **Penal Code**:-

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

b) The fact that the said death was caused by unlawful act of omission or commission on the part of the accused.

c) That the said act was caused with malice aforethought which is defined in Section 206 of the Penal code as:-

(a) An intention to cause death to another.

(b) An intention to cause grievous harm to another.

(c) 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, by a wish that it may not be caused.

(d) Intention to commit a felony.

19. The fact and cause of death of the deceased is not disputed. The accused in his defence confirmed that he heard of the death of the deceased allegedly while he was in Naivasha. **PW1, PW2, PW3** and **PW7** confirmed the death of the deceased. The cause thereof was proved by the evidence of **PW8 DR. JOHANSEN ODUOR** who concluded that the cause of death was heart and lung injury due to penetrating trauma and he produced a postmortem report in support thereof. I therefore find and hold that the death and cause thereof was proved beyond reasonable doubt.

20. On whether the said death was caused by unlawful act on the part of the accused person:- as stated herein the accused and the deceased were in a relationship and at the time of death were staying together. On the material day the deceased went to the house of **PW4** Naomi Chepkemoi having decided to get back to her husband in whose house she went upon arrival from the village. At the house of **PW4** the accused started a quarrel with the deceased on many issues including the money from the sale of a bed, her clothes and was not happy with the decision of the deceased to go back to her husband whom he described as someone who was only giving her “sugarcane” and “pineapples”. **PW4** later on met with the accused who asked where the deceased was and when told she had gone to her husband the accused was not happy at all and expressed the same through his action.

21. **PW1 CAROLINE MAWIA ROBERT** a neighbour of the deceased husband was in her house at 8.00 p.m. when she heard a cry from the house of the same followed with the words “Maingi you are killing me”. She knew the accused who was living in the same neighbourhood very well. Immediately she got out of her house she found the deceased lying down next to her door. This evidence was corroborated by **PW2** the husband of the deceased who rushed to his house and found the deceased at the door crying with stab wounds all over her body. She then told him that she had been stabbed and killed by Maingi and said he was seeing her for the last time before falling down onto his chest.

22. The accused in his defence corroborated the evidence of **PW4** and confirmed that he met with the deceased at her house when the deceased told him that she would be going back to her former husband’s house having refused to go with him to his house to collect her clothes. It is therefore clear and I find that the accused was positively placed at the scene. The deceased before her death told her husband that it is Maingi the accused who had stabbed and killed her. Further **PW1** the neighbour of **PW2** heard the deceased cry out that Maingi was killing her. This therefore brought the deceased account of the cause of death within the scope of dying declaration which is admissible under **Section 33 (a)** of the **Evidence Act** and as was stated by the Court of Appeal in the case of **CHOGE v REPUBLIC [1985] KLR** submitted by the accused person in the case of **REPUBLIC v PETER MUGEREKI [2017] eKLR** that:-

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death. There need not be corroboration in order for dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of the deceased person.”

23. In this case the dying declaration by the deceased was corroborated by the evidence of **PW1** and **PW2**. **PW5** the arresting officer also corroborated the evidence since the reportee which led to the arrest of the accused person stated that he had killed his wife which information he was given by the mother of the accused. The accused in his defence admitted that he attempted to commit suicide upon the death of the deceased and the blood which was lifted from the lock bar and electrify switch in his house matched his DNA. I am satisfied and find that the accused was positively placed at the scene and therefore find that the death of the deceased was caused by unlawful act on the part of the accused person. The only other person who was at the scene was **PW2** the husband of the deceased who had no reason to kill her having once again won her love.

24. The final issue for determination is whether the said death was caused with malice aforethought:- The accused and the deceased as stated herein were in a relationship. The accused in his defence under cross-examination has admitted that he was not happy with the deceased

leaving him for her husband. The accused therefore had the motive of killing the deceased on erroneous belief that he was better than the “sugarcane” and “pineapple” buyer which unknown to him was what the deceased needed to make her life complete. He had even told his sister that he was going to kill the deceased which information the deceased gave to her husband immediately he went to the house and coming immediately before her death I find it admissible under the dying declaration exception to hearsay rule.

25. I have taken into account the conduct of the accused who immediately upon commission of the offence ran away to Naivasha from where he was arrested, the nature of injuries inflicted upon the deceased as per the postmortem report and on the authority of **TUBERE S/O OCHEN v REPUBLIC [1945] EACA** quoted by Nyakundi J. in **REPUBLIC VERSUS MUGEREKI [2017] EKL**R thus:-

“It is trite law that malice aforethought can be inferred from the circumstances in which the offence was committed as follows:-

(a) The nature of the weapon used against the deceased to inflict injuries.

(b) The part of the body targeted by the attacker whether vulnerable or not.

(c) The manner in which the lethal weapon was used whether in furtherance to cause grievous harm the assailant used the weapon repeatedly.

(d) The conduct of the accused before, during and after the attack of the deceased.”

26. I have further taken into account the evidence tendered by the accused, his alibi and dismiss the same as an afterthought. If the accused was as innocent as he would like the court to believe, instead of attempting to commit suicide and running to Naivasha he should have reported to the police. I have taken note that in his defence the accused alleged that he was called by his friend Alex Mutua with information that the deceased had been stabbed whereas **PW4** places him together with the deceased at 3.00 p.m. and **PW1** places the time of death of the deceased at 8.00 p.m. His conduct is that of a guilty mind as once he was informed of the death as he alleges and being a better lover as he purported to be, nothing would have been easier than for him to come back to Nairobi and assist the police with investigations to find the truth. What the accused decided to do was to run away from the scene to Naivasha and thereafter create an unbelievable story that he was sent there by his employer.

27. Whereas the accused is under no obligation to defend himself, having been placed with the deceased by prosecution witness and having raised the issue of him being sent to Naivasha for delivery by his employer, it was upon the accused to prove the existence of this act which as stated herein was an afterthought and inconsistent with his evidence in cross-examination. I have therefore come to the logical conclusion that the accused defence has no merit and hereby dismiss the same.

28. I am satisfied and find that the prosecution has proved its case against the accused person beyond any reasonable doubt and therefore find the same guilty of the murder of **REBECCA MWENDE KIIO** and convict the same accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 3rd day of May, 2018

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J. WAKIAGA

JUDGE

In the presence of:-

Miss Wegulu for the State

Mrs. Makau for the accused

Accused present

Court Assistant – Paul