



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 16 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

LILIAN NALIAKA.....ACCUSED

J U D G M E N T

1. The accused herein was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that **on the 9th day of April 2012 at Kipsongo Estate in Trans Nzoia County unlawfully murdered Rachael Nafula**.

2. The accused denied the charge. The prosecution called 4 witnesses to prove its case. The summary of their evidence is as follows.

3. **PW1 Moses Simiyu Wafula** testified that he was informed that a person had been stabbed at a nearby hotel. He proceeded with his colleagues and found the deceased having been stabbed with a knife. He said that it was alleged that the deceased was stabbed by the accused who was still at the scene. She thereafter took a bicycle and left. With his colleagues they put the deceased in a vehicle and took her to hospital. He said that he did not know who stabbed the deceased.

4. **PW2 Laburent Oduori** testified that he went to the scene after being told of the incident. He found that the deceased had been stabbed by the accused. The deceased who was his wife was rushed to the hospital but she died. He said that the deceased had quarreled with one Rose, the owner of the hotel.

5. **Dr Patrick Musita PW3** produced the post mortem report which showed the cause of death as severe internal hemorrhage due to rupture of the aorta and spleen.

6. **PW4 P.C. Beanard Ndiwa** carried out the investigations. He said that the accused was an employee of Rose Nelima at the hotel where the deceased was allegedly stabbed. He stated that the deceased had picked a quarrel with the said Rose and then before reaching the kitchen where Rose was the accused stabbed her.

7. The said witness however did not record statements from Rose or the chief who came to the scene as well as the AP officers. He was equally unable to produce the knife which was allegedly used.

8. When put on her defence the accused gave unsworn evidence. She said that she worked for Rose at her hotel. That Rose had borrowed seats from the deceased and that she had come to demand for her money. Caleb who was equally present said that Rose should give the seats or the money. The accused then went outside (garage) to serve customers with tea. Before the customer finished the tea she heard screams from the hotel. She rushed and found Galeb sitting and the deceased had fallen down. Rose was in the kitchen cooking ugali. Galeb told her that the two ladies had fought. The accused rushed to get the village elder but did not find her. She went looking for the deceased husband. The deceased was then taken to hospital by her husband and Moses.

9. She was later arrested together with Rose and Galeb. She refused to part with kshs 20,000/- which the police demanded. Rose however paid and was set free.

Analysis and Determination

10. Having read the proceedings herein as well as the submissions by the parties on record, the fundamental question is whether the prosecution proved its case beyond reasonable doubt.

11. It is clear that there was no eye witness to the incident. Both Galeb and Rose were not called, neither did they record any statements. The AP Officer who went to the scene did not record the statement either. Nor was the knife allegedly used to stab the deceased produced.

12. For this offence to be proved malice aforethought must be established. Section 206 of the Penal Code has defined it as;

“ (a) Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not

(b) Knowledge that the act or omission caused death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not

(c) Intention to commit a felony.

d) 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.”

13. From the evidence on record although the accused was at the scene, she seemed to have been outside and not inside the hotel. None of the witnesses placed her at the scene. If her unsworn evidence is to be believed then Rose and Galeb should have been inside the hotel. It appears that the stabbing took place inside and not outside the hotel.

14. It is also agreed that the deceased had gone to ask for her money or seats from Rose. It appears that that was the genesis of the problem.

15. In my view therefore the persons who would have shed light on the incident and whether it was the accused who stabbed the deceased should have been both Galeb and Rose. Apparently, all the three were arrested and it was only the accused who was charged., Even then the key witnesses should have been Rose and Galeb.

16. In the premises and as was held in **Bukenya Vs Uganda (1972) EA 549** the failure to call the 2 crucial witnesses entitles this court to make adverse conclusion against the prosecution. This failure totally weakened the prosecution case. No reason was advanced why they were not called. This should benefit the accused person.

16. Consequently, no malice aforethought was established against the accused herein . She is hereby set free unless lawfully held. The surety is equally discharged.

Delivered, signed and dated at Kitale this 17th day of July 2018.

H.K. CHEMITEI

JUDGE

17/7/18

In the presence of:-

Mr Kakoi for the State

Ngeywa for Accused

Accused - present

Kirong – Court Assistant

Judgment read in open court.