

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 5 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

OMAR WAITHAKA KEVAL.....ACCUSED

RULING

Omar Waithaka Keval, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of this charge are as follows:

OMAR WAITHAKA KEVAL: On the 2nd day of January 2012 at Happylands Flats in Harambee Estate Buruburu in Starehe District within Nairobi County murdered YVONNE NJOKI MAINA.

This is an old case. From the court file records, the accused was arraigned in court for the first time on 6th January 2012 and the plea taken on the same day. The matter changed hands from judge to another without the hearing taking off until I took over the proceedings in this matter in October 2014. The delay in hearing this matter can be attributed to a variety of reasons including non-attendance of learned counsel for the accused and lack of witnesses. When I took over the proceedings the case had a hearing date on 12th and 13th November 2014 but it did not proceed on those dates due to lack of prosecution witnesses. It was rescheduled for hearing on 16th and 17th February 2015. Hearing commenced on 17th February 2015. It has taken this court from 17th February 2015 to 8th May 2018 when the prosecution closed its case. It was the intention of the parties to make submissions at this stage of the trial before this court delivers its ruling as to whether the prosecution has established a prima facie case against the accused or not. This did not happen because of reasons recorded in the court file. The matter had been adjourned twice pending submissions at the behest of the learned counsel for the accused before 4th October 2018 when this court declined any further adjournment on the same grounds. I directed that the court would proceed and prepare the ruling based on the evidence on record and the law.

The evidence gathered from the prosecution witnesses is that the deceased Yvonne Njoki Maina and the accused Omar Waithaka were girlfriend and boyfriend. Their relationship has been described by the relatives of the deceased as an on-and-off kind of relationship. Other words used by Romuald Waweru Maina (PW2) and Eugene Stephen Gatheru (PW4) both brothers to the deceased to describe the relationship between the deceased and the accused are “abusive” and “toxic”. At the time of her death the deceased was living with her family in Ongata Rongai. She had a child, a boy, with the accused. At the same time the deceased had another boyfriend Geoffrey Wambugu Ngugi (PW1). It seems that the accused did not enjoy good relationship with the family of the deceased. Geoffrey however did and according to the evidence, Geoffrey’s mother had approached the parents of the deceased to start dowry negotiations.

There is no direct evidence to shed light into the circumstances surrounding the death of the deceased. What happened can be gathered from circumstantial evidence. The deceased was picked from Ongata Rongai by the accused in company of his friend Wellington Mabua Ombuni (PW5) on 1st January 2012 at about 8.00pm. The accused and Wellington did not go to the home of deceased’s parents because according to the accused the relationship between him and the family of the deceased was not good. They waited for the deceased to join them some distance from her parent’s home. The deceased joined them and they left for Nairobi West where Wellington was running an electronics business. They left for Majengo Nairobi to pick some *miraa* (khat) after which they returned to Nairobi West at about 11.00pm. They left Nairobi West and went to South B, Nairobi, and continued chewing *miraa* inside the accused’s vehicle. The accused and the deceased parted ways with Wellington at about 3.30am when Wellington went to Westlands, Nairobi, leaving them at South B. On 2nd January 2012 at about 10.00am the accused called Wellington while crying. He was incoherent and Wellington could not understand what the accused was saying. Wellington disconnected the phone and called the accused after about five minutes. The accused told him that the deceased had jumped from accused person’s flat in Harambee Estate Nairobi and that she appeared dead.

The same morning, Geoffrey called the deceased but received no answer. He received a call later that morning by a man using deceased’s phone. The man, who later identified himself as Omar (the accused), wanted to know who he was and what relationship he had with the deceased. Geoffrey told the court that he could hear someone screaming in the background. He called the parents of the deceased and told them that deceased may not be well and that they should check on her. PW3, father of the deceased, confirmed to the court that he received a call from Geoffrey about the deceased. The brothers of the deceased, PW2 Romuald and PW4 Eugene were also informed about the deceased. The information they received was that the deceased had jumped from the accused’s flat on the 5th floor and had been taken to Metropolitan Hospital in Buruburu. The parents and the brothers of the deceased went to Metropolitan and found the body of the deceased inside a Matatu belonging to the accused. She had been pronounced dead on arrival at the hospital.

The body of the deceased was taken to Umash Funeral Home after the scene of crime officer PC Joseph Kipsaimo (PW9) took photographs of the body. It was examined by Dr. Oduor Johansen (PW7) on 3rd January 2012. The doctor found numerous external injuries including bruised forehead, multiple bruises to the arm and hands, stab wound on the back of the ring finger on the right hand, stab wound on the middle finger of the left hand, extensive bruises on the left side of trunk from pelvis area and bruises on the left leg below the skin and left buttocks. Internally the doctor found bleedings on the muscles of the neck, multiple fractures in the back, fractures on the 2nd and 5th ribs on the left and fractures on the 2nd and 3rd ribs on the right, fractured sternum born, fractured pelvis, multiple skull fractures, extensive scalp

haematoma, excessive bleedings on layers covering the brain and fractured spine at the level of the thorax. The doctor formed the opinion that the deceased died due to injuries caused by a fall from height. He was of the opinion that since the deceased did not have fractured limbs, a common feature of people who fall from height; it was possible that the deceased was not conscious when she fell. Specimens of deceased's liver, kidney, blood and stomach were extracted for toxicology analysis. The toxicology analysis was conducted by Joyce Wairimu Njoya (PW8) a Government Analyst. She did not find any chemically toxic substance that could have contributed to the death of the deceased.

The position taken by the prosecution is that the accused is the one who killed the deceased. The report made to the police indicated that the deceased had committed suicide. PC Pharis Thoya (PW11) one of the investigating officers in this case told the court that the initial report made to the police was that the deceased had committed suicide but after further investigations and the results of the post mortem the police changed their mind and treated the matter as homicide.

I have examined all the evidence by the prosecution and have considered the same. I note from the evidence of the doctor that the deceased sustained stab wounds in her fingers, she had bruises on her hands which the doctor described as defense injuries. The doctor also found signs of strangulation. This evidence taken together with that of Wellington that he had been with the accused and the deceased chewing *miraa* until late at night or early in the morning at 3.30am on 2nd January 2012 when he left them in South B, it is my considered view that the accused was the last person to be with the deceased before she met her death at his flat in Harambee Estate Nairobi in the same morning. Circumstantial evidence in this case points to the accused person to the exclusion of all others as the last person to be seen with the deceased while she was alive. In my view therefore the prosecution has presented a case on which a reasonable tribunal, properly directing its mind to the law and the evidence, could convict if no explanation is offered by the defence (see *Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335* and *Wibiro alias Musa v. R [1960] E.A at 186*).

The law under **Section 306 (2)** of the **Criminal Procedure Code** provides as follows:

When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

In compliance with this provision and the authorities I have cited above, it is my finding that the prosecution has established a prima facie case against the accused person. Consequently, I find that the accused has a case to answer. I proceed to order that the accused shall be placed on his defense. This court informs him of his right under the law as provided in Section 306 (2) of the Criminal Procedure Code. It is so ordered.

Delivered, dated and signed this 18th day of October 2018.

S. N. Mutuku

Judge