



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 12 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN GITHINDU MBUGUA.....ACCUSED

JUDGEMENT

Statement of the Charge

Stephen Githindu Mbuga hereinafter referred as the accused person was charged before this court on 18th July, 2017 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 nights of 13th and 14th July, 2017 at Bondeni Estate in Loitokitok town – Kajiado South Sub-County, within Kajiado County, accused person murdered Milca Njeri.

When the accused was arraigned in court he pleaded not guilty. He was represented at the trial by Learned Counsel Mr. Ibiya, while the prosecution was conducted by Mr. Alex Akula, a Senior Prosecution Counsel.

Summary of the Prosecution Case

In order to discharge the burden of proof under Section 107(1) of the Evidence Act the State summoned twelve witnesses.

It all began with the testimony of **PASTOR MOSES ODUDO (PW1)** who happened to be a church minister where both the accused and his deceased wife attended worship. In his evidence PW1 testified that on 16th July, 2017 on or about 10.30 p.m. the accused person visited his home seeking help on the incident involving the death of his wife which had just happened. In the course of their discussion PW1 told the court that they both agreed to have the matter reported to Loitokitok Police Station; who in turn arrested the accused and commenced interrogations.

BENARD KIONO MATIA PW2 and **PW6 RHODA WANJIKU KIONO** who testified as the father and sister to the deceased gave evidences of identifying the body to the pathologist.

During the Postmortem Examination

It was also their testimony that the accused person and the deceased lived together as husband and wife at Loitokitok Sub-County. PW2 and PW6 on being shown the set of photographs taken by scenes of crime officer PW10 ASP Mwangi Gitau they confirmed such to be that of the deceased. In the evidence of PW10 he gave a length on how he processed the storage media comprising of photographic prints of the deceased and the scene of murder. The twenty two photographs comprising various aspects of the scene and body of the deceased were produced as exhibits (a) and the certificate as exhibit (b) respectively by PW10.

MARY WANJIKU (PW3) testified that while in her house on 13th July, 2017 preparing the evening meal the daughter to the deceased who testified as PW7 came in knocking seeking assistance to contact their father, accused person in this trial. PW3 listened to the explanation given by PW7 but decided to accompany her to their house which is about forty metres (40) away. According to PW3 on arrival she noticed the deceased was seated on the floor with her head covered with a white-bed-cover. In her evidence she made several attempts to wake her up but there was no response. That is when she decided to approach the clan elder – Peter Ndegwa who also testified as PW4. According to PW3 they both returned to the house of the deceased before PW4 could arrive at the home of the deceased he also decided to enlist the company of Peter Njoroge. The clan elders and PW3 came by the house where they confirmed that the deceased, and mother of PW7 was dead. They later informed the chief of the location on what had happened so as to take further action.

JUSTUS KABIRA MWANIKI (PW5) testified as a witness who had employed the accused as his driver to motor vehicle registration KCH – 761S. PW5 Eunice testified that prior to the 13th July, 2017 the accused had spent most of the day at a shop where his vehicle was being serviced. It was on the 13th July, 2017 when the accused requested time off to travel back to Loitokitok, which he agreed leaving co-worker Changala to take care of the vehicle. In the course of the day on 14th July, 2017 PW5 told the court that the accused arrived at Kemende where they were loading luggages. Without extensive explanation PW5 stated that the accused informed him that during his short stay at home he quarreled with the wife which ended in a fatal fight. This made PW5 to conclude that from the information the incident ought to be reported to the police. Further PW5 testified that he was later to learn from PW1 that the accused had submitted himself to the police. In other words PW5 as his employer was expected to pay him a visit at the police station. It is apparent from the testimony of PW5 when he was done with his business he travelled to Loitokitok police station where he managed to record his statement.

PW7 ESTHER WACUKA, a daughter to the deceased and the accused testified at the trial on the events of 13th July, 2017. According to PW7 prior to this fateful day under instructions of their mother together with her sister Wamboi and brother Mbugua (PW9) they telephoned their father seeking financial assistance. This was to support them in paying examination fees or purchase the required books and stationaries. However, in a short while that same evening the father arrived at home. At some point PW7 gave evidence that the accused called the deceased that they go into the bedroom for some talk. The deceased responded by locking the kitchen for the bedroom. She observed that the conversation was taking long and yet the deceased had not finalized preparing a meal for them. A few minutes later she decided to inquire from the deceased but on knocking the door it was locked. It was after sometime PW7 told the court that she heard the deceased crying and seeking help at the same time. PW7 further testified that she saw the accused come out of the bedroom in search of a club, which she had been instructed to find and take it to him. In the reasoning of PW7 she knew that the club might be used to inflict harm against the deceased. Because there was some confusion she saw the accused himself go for the club which he traced in one of the locations within the house. According to PW7 the accused returned back to the bedroom and continued to assault the accused. However, there was no help to disengage the accused from beating the deceased. PW7 further stated that when the accused was done he left the house leaving the deceased fatally injured. When PW7 sensed that the deceased might have passed on she went to inform PW3 next door neighbor.

PW8 TALVIN MBUGUA testified and corroborated the testimony of PW7 on what he knew and witnessed on the fateful day the deceased was assaulted by the accused person. PW8 along with PW7 were at the scene when the accused emerged and angrily descended on the deceased with clubs, punches and fists to inflict bodily harm.

Recalling the events of the day PW8 testified that the accused engaged the deceased with a conversation and at the same time accompanied it with beatings. When they made attempts to have the deceased leave the bedroom to prepare a meal, the accused could not hear of it. PW8 testified that he later saw the deceased seated on the floor with her head covered with a bed cover. That was the last time he saw his mother alive.

PW9 DR. DEBORAH OSIEMO testified on the postmortem carried out on 18th July, 2017 at Loitokitok hospital. In her examination and findings PW9 stated that the deceased sustained multiple injuries to the upper limbs, abdomen, lower limbs and the spinal cord. She opined the cause of death to be cervical spine injury.

PW11 DETECTIVE CPL. GEOFFREY KUMBU testified that while at the police station the accused in accompany of PW1 surrendered himself alleging that he had fought with his wife and apparently did succumb to death.

PW12 DETECTIVE WYCLIFF MARWA investigated this case involving the accused person. At the time of investigations PW12 testified that on compiling the witness statements, other documentary evidence like the postmortem, the photographs from the scene and at the very end a charge of murder was preferred against the accused person.

After the State closed its case the accused person was placed on his defence. The accused testified that on 13th July, 2017 he travelled from work to Loitokitok to visit the family. It was while at his house the accused stated that he was concerned about the welfare of his children. His observation was that the deceased had not attended to their needs and this culminated in exchange of bitter words between them. Moments later the accused testified that the deceased and himself were involved in a struggle but in the course she fell down and got injured. He could not pinpoint how exactly the deceased was injured and by which weapon but denied that he participated in any way with the murder as alleged by the State. The accused further testified that when he realized the deceased has passed on he went to (PW1) who agreed to accompany him to the police station to report the incident.

Analysis and Decision

In the present case there can be no conviction without the State proving the charge against the accused person beyond a reasonable doubt. Under Article 50(2)(a) of the Constitution the accused person is presumed innocent until the contrary is established by proof of all essential elements of the offence. Therefore, there is no middleway that an accused person might be found guilty of an offence of murder of the deceased which has not satisfied the standard of proof beyond a reasonable doubt.

These are the principles emphasized to be stated in the case of **Woolmington v DPP C1935) AC and Miller (1947) ALL ER**. For the reasons given by Lord Sankey in **Woolmington** case cited above and Lord Denning in the Miller case (supra). The anchor of these cases the criminal justice is that a conviction for murder or any other offence rests on nothing else other than on the evidence proving all the elements of the offence beyond reasonable doubt. It is also sufficient to say as alluded to in the above cases that prove beyond reasonable doubt does not mean proof to the hilt or beyond the iota of doubt.

In the context of Section 203 of the Penal Code in order to determine the scope of the offence the prosecution must set out to prove the following ingredients:

a) The death of a human being

b) That the death was unlawfully caused

c) That in causing death the accused had malice aforethought

d) That the accused must be personally identified as the perpetrator of the crime.

In the present case at this stage of evaluation and determination there is need to consider each of the elements based on the evidence adduced by the prosecution against the accused person.

(a) The Death of the Deceased Milca Njeri

The prosecution presented a great deal of testimony on the deceased death from the PW7 and PW8 who stood out as star witnesses. The prosecution case was that it was in the night of 13th July, 2017 and 14th July, 2017 when the accused fatally assaulted the deceased whom he lived with at the same house in Loitokitok South County.

PW2 and PW6 testified as father and sister to the deceased confirming by their attendance during postmortem examination that Milca Njeri is dead. Further the prosecution placing reliance on the testimony of Dr. Otieno (PW9) who did the postmortem pointed out the deceased positively identified by the PW2 and PW6 to the pathologist at the mortuary is dead. The accused at the time of surrendering himself to Loitokitok police station was doubtlessly well aware that his wife, now deceased had succumbed to death during the confrontation they had in the house. The death of the deceased is without a shadow of doubt been proved by the prosecution.

(b) Unlawful Death of the Deceased

In this ingredient the prosecution through the testimonies of PW7 and PW8 painted a picture of relentless acts of assault by the accused person against the deceased which rushed several hours between the 13th July, 2017 – 14th July, 2017. As the prosecution asserts it was all started by the accused when he arrived at his house from Kemende where he had joined his employer PW5. In the evidence of PW7 and PW8 the accused started by locking the deceased in their bedroom and willfully struck her inflicting injuries. According to PW7 and PW8 not even their pleas to the accused to release the deceased to leave the bedroom in order to finish cooking for them persuaded him to stop the attacks on the deceased. Thus the act of assaulting the deceased escalated even more when the accused went for a club stored within the house to aid in enhancing the strength of gravity of injuries to be inflicted.

In a postmortem report Dr. Deborah Osiemo PW9 made positive findings on the deceased that she suffered multiple injuries but more profound on the cervical spine. Dr. Osiemo subsequently opined that the deceased cause of death was the serious injury to the spine.

The accused on his part acknowledged existence of a fight but denied any involvement of inflicting harm; except making reference to a fall by the deceased during the struggle.

A careful review of the evidence as entrenched by the prosecution reveals events of the 13th July, 2017 when the accused arrived home and started making threats to the deceased. That it's upon those threats, the deceased was ordered out of the kitchen to the bedroom where a clash between him and the deceased occurred. The altercation which later was accompanied with the use of a club maimed the deceased causing instant death.

Subject to the provisions of Section 213 of the Penal Code PW3, PW4, PW7 and PW8 told the court that they found the body in the house on the floor with a bed cover on the head. The accused had disappeared that morning of the 14th July, 2017. It seems that after killing the deceased accused pulled the body on the ground, covering the head and he took flight to Kimende. The circumstances are such that the deceased did not die out of a fall but from such acts of violence deliberately inflicted to cause grievous harm or death. The accused explanation as regards the death of the deceased failed to controvert both direct and circumstantial evidence tendered by the prosecution witnesses.

There is a link sufficiently to satisfy the criteria that the death was caused by an act of omission or commission of the accused for which he is criminally responsible for the killing of the deceased.

(c) The element of malice aforethought

This element stands out as one which distinguishes the crime of murder as established beyond reasonable doubt from other homicides which leads to the death of another human being.

Malice aforethought which ordinarily refers to person's intention (mensrea) to injure or kill another person is clearly defined under Section 206 of the Penal Code. The circumstances referred to in this section may be either manifested directly or indirectly depending on the peculiar facts of each case. The definition varies and has been divided up into the following categories:

a) An intention to cause the death of or to do grievous harm to any persons, whether such 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 may not be caused.

c) **An intent to commit a felony.**

d) **An intention by the act or mission to facilitate the fight or escape from causing of any person who has committed a felony.**

It is trite that malice aforethought shall be deemed to be established by evidence if the prosecution proves anyone or more of the above circumstances stipulated in Section 206 of the Penal Code.

It was held in the case of **Rex v Tubere S/O Ochen 1945 12 EACA 63** on the principles where malice aforethought may said to be manifested to comprise of the following features the malice of the weapon used, the part or parts of the body targeted by the accused, the conduct of the accused during, the course of the act, or after commission of the offence, the malice of injuries inflicted whether one off or multiple. In **James Masomo Mbatha v R 2015 eKLR** and **Morris Aluoch v R CR Appeal No. 47 of 1996 UR** where the court has observed that when accusatory evidence shows more than one such unlawful acts of assault with several cuts caused at vulnerable parts of the body its analogous to conclude beyond reasonable doubt that the accused committed the murder with malice aforethought. As can be deduced from those authorities the serious harm though too wide falls within the category for the court to infer malice aforethought.

Having said so it is now my singular duty to review the prosecution case whether it establishes malice aforethought. From the totality of the eye witnesses PW7 and PW8 it is evidence that the altercation received within the house of the couples. In their statements the initial event involved the accused and the deceased retreating to their bedroom for a mere conversation. It is to be noted that in the course of their discussion the deceased was heard crying and seeking for help which the children PW7 and PW8 by their tender age could not provide. There is no dispute that the deceased died as a result of unlawful and sustained acts of attack by the accused.

The accused conduct from the time he started inflicting harm to me by its nature was done with an intention to inflict serious bodily harm. The approach of going for a club to assist in inflicting more harm which bare human hands had failed to do was a dangerous act which a reasonable man in the shoes of the accused would not attempt without foreseeing it endangered life. Despite the fact that the prosecution provided sufficient evidence of serious harm that alone did not constitute malice aforethought.

I am of the view that the accused person is guilty and committed a voluntary act of manslaughter of battering his wife to death contrary to Section 202 as punishable under Section 205 of the Penal Code. The upshot of all these I find the accused guilty of the offence and I do convict him accordingly.

With this background in mind I now proceed to sentence the accused as follows: It is evident that the maximum sentence prescribed by Parliament is life imprisonment. During the sentencing hearings I take were that you are a first offender and your personal profile is as detailed in the pre-sentence report dated 24th October, 2018. The evidence on your character and personal history portrays you as a hardworking family man who also espouses Christian values.

By the death of your wife the welfare of the three children remain under the custody and care of your mother. The fact remains that by your unlawful acts you caused the death of the deceased. The genesis of this killing has been clearly tabulated in my judgement as a case of domestic violence. I see the following aggravating factors of the offence. The gravity of the crime the breach of trust expected of you by the deceased as a husband. Lack of any provocation or attack on the part of the deceased. The psycho-traumatic aspect of this death on your children who witnessed the assault and subsequent death of their mother.

I have weighed both aggravating and mitigating factors I am of the considered view that the aggravating factors of this offence outweigh any mitigation which might be favourable on your side. Doing the best in the circumstances I sentence you to 9 years' imprisonment. 14 days Right of Appeal explained.

Judgement dated, delivered in open court on 12th day of November, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Itaya for the accused

Mr. Meroka for the state