



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL CASE NO. 5 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ISAAC MATHENGE MAINA.....ACCUSED**

**JUDGMENT**

1. **Isaac Mathenge Maina** (accused) is charged with the murder of **Eunice Muthoni Mundia** (deceased). The prosecution called six witnesses to prove the charge of murder. The burden of proof placed upon the prosecution is beyond reasonable doubt. The ingredients of the offence of murder were discussed in the case **Republic vs Mohammed Dadi Kokane & 7 others [2014] eKLR** as follows:

*“The offence of murder is defined as follows by section 203 of the penal code:*

***“any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”***

*This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:*

- 1. The fact of the death of the deceased.*
- 2. The cause of such death.*
- 3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly*
- 4. Proof that said unlawful act or omission was committed with malice aforethought.”*

**EVIDENCE**

2. The accused was employed by **Susan Nyawira Gichibi** (PW1) as a gardener at PW1’s family home in Muthaiga Estate Nanyuki. He had worked there before being arrested for this offence for three years. He lived within the servants quarters. The deceased also worked in that home as a house help. Before her death, she had worked for PW1 for 2 years. Deceased lived in a room in the main house that is the family home. The accused admitted that he and the deceased were lovers. **PW1, Gabriel Chris Kariuki Gichibi, PW3** and **George Gichibi Karegwa** (PW4) all confirmed that there had been no disagreement between the accused and the deceased during their time of employment at their home. Indeed PW4 stated that the accused was not of quarrelsome nature.

3. According to **Gabriel**, on **16th May 2017**, he went to the family home in Muthaiga at 1pm. He noticed that the deceased who he had earlier left washing clothes was not there. On making inquiries from his aunt who was cooking lunch, she informed him that the deceased had gone to Nanyuki town.

4. **Gabriel** summoned the accused to instruct him on the plants he wanted him to plant within the compound. When the accused arrived, **Gabriel** noticed he was drunk. **Gabriel** then decided to buy the seeds himself because he feared that the accused would use the money for those seeds to buy alcohol.

5. Later in the day, **Gabriel** telephoned PW1 and informed her that the deceased was not at home.

6. On **17th May 2017**, **Gabriel** was called by PW1. PW1 informed him that the accused had informed her on telephone that he, accused, had

knocked the deceased with a hammer. PW1 therefore asked **Gabriel** to go and check the house of the accused at the servants quarters.

7. Since the accused's house was locked, **Gabriel** after authorisation by PW1 broke down the door of the accused's house. On doing so he stated in evidence:

***“when I pushed the door in, I saw the deceased Muthoni lying next to the bed. She was lying on the floor. There was blood there...Muthoni was lying facing downwards and there was blood next to her...she, Muthoni, was naked except she had a black under pant...she looked dead.”***

8. The matter was reported to the police who arrived at the scene. On arriving, police confirmed the deceased dead. They also recovered a hammer next to the deceased's body. The hammer according to **PC. John Njuguna** had a bit of blood.

9. **Gabriel** confirmed that he had purchased that hammer, which was normally kept by the accused, who also kept the hoe and the simis. According to Gabriel, these were the tools the accused used to work with.

10. After the deceased's body was taken by the police to the mortuary PW4 telephoned the accused and inquired where he was. The accused informed him that he was in Nyeri. The accused inquired of the welfare of the deceased. PW4, it would seem in order to lure him, told him that the deceased was in hospital. It was then that they agreed that PW4 would drive to Nyeri to pick the accused up to take him to visit the deceased in hospital. PW4 drove to Nyeri in the company of police officers one of them being **PC John Njuguna**, and the accused was arrested.

11. The post mortem of the deceased revealed that her death was caused by severe head injuries with intracerebral haemorrhage secondary to penetrating and blunt force trauma to the head.

12. The accused in his defence stated that on **16th May 2017** the deceased went to Nanyuki town at 2pm to take clothes to her cousin. She returned later in the afternoon and in doing so she went to the accused's home within the servants quarters.

13. He stated that on her arrival and on finding the accused in the house, the deceased suggested that they have sexual intercourse. She undressed and got into bed, where it seems the accused also was. While there, the accused said that he asked the deceased about a loan of Ksh 6,000 he had given to her. Deceased promised to repay.

14. The accused further stated that he and the deceased had previously planned to leave their employment in **December 2017** and go and settle in Nyeri. The accused said that he had planned to start a business of selling second hand clothes in order to support them.

15. The accused said that while they were in bed with the deceased a text came through the deceased's telephone from a man called **Maina**. The accused said that he had previously seen the deceased together with Maina at the road side at 10pm. On questioning the deceased, the accused said the deceased denied having an affair with Maina. Maina operated a kiosk about a metre away from the homestead.

16. The accused stated that within a short while Maina telephoned the deceased through her cell phone. The deceased responded by switching off her phone. That as a consequence they began to quarrel. The accused in his own words said:

***“I told her I did not suspect her but in April 2017...in that month I saw her with Maina by the roadside, it was a few minutes to 10pm, she said that I was disturbing her....she went to the other side of the bed wanting to get out of the bed. Since she was angry, I decided to dress up and get out. As I got out of bed...I saw her with a hammer. She said ‘Mathenge you will not trouble me’. I held the hammer. We struggled. I took the hammer from her. As I got it from her hand she was knocked by the hammer. She was knocked as I grabbed the hammer. She was knocked on the face. Deceased seems to go in circles. She fell. I tried to call her, she did not answer.”***

17. The accused said he was shocked and he therefore dressed and went to Nyeri.

## **ANALYSIS AND DETERMINATION**

18. The fact that the deceased died was confirmed by Gabriel, by the doctor who performed the post mortem and by the investigating officer. The cause of death was also determined by the doctor. The doctor found that the deceased had 3 by 3 cm fracture of the skull bone. It follows that it is the severe head injury with haemorrhage that caused death of the deceased.

19. The accused telephoned PW1 and this is what PW1 stated in evidence in regards to that conversation:

***“Mathenge started [to] say that they quarrelled about money and in argument, he hit her and she fell down and he did not know if she was alive or not...Mathenge said that the deceased was like his wife and he was giving her money like his wife but he said he felt the deceased was using him because she had another man in her life. The man in her life was operating a duka.”***

20. That confession by accused was not retracted by him. Indeed the accused confirmed he telephoned PW1 but stated in his defence that he informed PW1 that the hammer hit the deceased as they struggled for it.

21. It follows that the accused does not deny that the deceased was hit by the hammer recovered by the investigating officer. His explanation of how the deceased was hit is rejected by me. It is rejected because for the deceased to have suffered such a deep injury, 3 by 3

cm, on the skull it could not have been as a result of a hammer slipping during a struggle. Such an injury in my view could only have resulted from a deliberate act of hitting the deceased. The accused must have intended to hit the deceased to have caused such an injury. I therefore find and hold that the deceased met her death as a result of unlawful act or omission on the part of the accused.

22. Having considered the ingredients no. 1 to 3, identified in the case of **Republic vs Mohammed (supra)**, the last ingredient for consideration is whether there was proof that the said unlawful act of the accused was committed with malice aforethought.

23. The accused admitted that he and the deceased were lovers for two years. He also informed PW1 they were lovers. What seems to have spoilt the love affair is the accused suspicion that the deceased was having a love affair with Maina, the kiosk operator. It is clear, without doubt that it is that suspicion that triggered the quarrel which resulted in the accused taking the hammer and hitting the deceased. Even though the accused said that at the time he had taken alcohol, it does not seem that the accused was so intoxicated that he did not know that hitting the deceased was wrong or did he not know that what he was doing was wrong. He was not so intoxicated because after hitting the deceased he was able to dress himself up and get out of the house and travel to Nyeri.

24. It is however my finding that the accused hit the deceased with the hammer as a result of his suspicion that the deceased was having an affair with another man. Such suspicion must have caused him pain and feeling of betrayal, after all he was hoping by **December, 2017** that he and the deceased would set up a home together. They had planned where they would live and how the accused would support them through his business. They even had planned how they would purchase furniture for their home. With all those plans in place, it is no surprise that on the deceased receiving not only a text but also a phone call from Maina, that the accused became infuriated and struck the deceased. The accused in my view acted on the heat of the moment. He had no malice aforethought. His was a crime of passion. My finding is in tandem with the finding in the case of **Republic vs Stanley Muthike Tiire [2018] eKLR** where the court stated:

*“In the case of Republic V Andrew Mueche Omwenga [2009] eKLR the Court reduced the charge of murder to manslaughter and stated:*

*“Adequate provocation, especially when coupled with self defence, can reduce a murder charge to manslaughter – **Mbugua Kariuki vs Republic [1976-80] 1KLR 1085 and Republic Vs Gachanja [2001] KLR 428**. This is also legislated in Section 207 of the Penal Code in the following words:-*

*“when a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”*

25. On reaching that conclusion, I will therefore substitute the charge against the accused from murder contrary to Section 203 of the Penal Code with the charge of Manslaughter contrary to Section 202 of the Penal Code. I find **Isaac Mathenge Maina** guilty of Manslaughter contrary to Section 202 of the Penal Code and I convict him accordingly.

**DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2018.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant :Mariastella

Accused: Isaac Mathenge Maina

For Accused.....

For State:.....

**COURT:** Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**