



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL CASE NO. 50 2013

REPUBLIC.....PROSECUTOR

VERSUS

JUDITH KANANA MUGA.....1ST ACCUSED

DENIS MUTUMA.....2ND ACCUSED

GLADYS KARIANGI.....3RD ACCUSED

JUDGMENT

Murder

[1] The three accused persons, namely Judith Kanana Muga, Denis Mutuma and Gladys Kariangi were charged with murder contrary to section 203 as read with 204 of the Penal Code, Cap 63 Laws of Kenya. Particulars of the Offence were that, on 24th May 2013 at 21:30 hrs at Nkandone village, Kijja Sub-location in Imenti Central District within Meru County murdered Beatrice Kauna Nkonge. The prosecution called witnesses and so was the defence. Their testimonies were recorded and are part of record. However, I will evaluate the evidence with judicious alertness so as not to miss the subtleties, the power and grace of those testimonies to establish whether the prosecution has proved its case beyond any reasonable doubt.

Elements of Murder

[2] To secure a conviction for murder, the prosecution must prove beyond any reasonable doubt the following;

- 1) *The death of the deceased and the cause of death;***
- 2) *That the accused caused the unlawful act or omission which caused the death; and***
- 3) *That the accused had malice aforethought as defined under section 206 of the Penal Code.***

The fact and cause of death of the deceased

[3] Dr Njuguna carried out a post- mortem on the body of the deceased, one Beatrice Kauna Nkonge. He compiled a report thereto dated 28th May 2013 in which he formed the opinion that the cause of death was a massive hemorrhage due to penetrating chest injury. The report was produced by PW6 Dr. Maria Muthoni Mwangi. She testified that she had worked with Dr Njuguna for 2years before he left for his masters. She therefore knew his signature and handwriting. With that medical evidence, the death of the deceased and cause of death has been established beyond any reasonable doubt.

Who caused the unlawful act which caused the death of the deceased?

[4] **PW1 WILJOY KAWIRA NKONGE** told the court that on 24th May 2013 she had come home from school at about 7:30 pm and found her mum, Beatrice Kauna Nkonge (deceased) preparing food for them. Dennis Mutuma (the 2nd accused person) was seated outside at the time. The deceased cooked for them and they ate. At around 9:00 pm, the 2nd accused person asked the deceased to give him a “push” and they left. Soon thereafter she heard her mother, the deceased herein scream. She then found that she had been stabbed on the chest and she called the neighbours for help. Her brothers came and chased after the two people. Thereafter, the neighbours and her uncle came to the scene. She was afterwards taken to her grandmother’s home as she was suffering shock. She left the neighbors taking care of the deceased. However her mother was already dead by the time she was leaving for her grandmother’s house.

[5] PW 1 recalled, on that material day she saw Judith Kanana the 1st accused person stabbing her mother. Since there was a full moon she was able to identify and recognize her as the light was sufficient. During cross-examination she said that she saw that the first accused was wearing a skirt and blouse but she could not tell the colour. She also stated that she saw another person wearing a skirt and blouse but because she was wearing a cap she only recognized the first accused. She noted that the 1st accused person and the 2nd accused person were married and that the deceased was a friend of the 2nd accused person. They had reported earlier that the 1st accused and the deceased person were fighting over the 2nd accused; the 1st accused person accused the deceased of cohabiting with her husband. She nevertheless confessed that it was true that the deceased and the 2nd accused were boyfriend and girlfriend. Her statement was recorded at Kaguma police station.

[6] **PW2 WILSON MWENDA** told the court that it was on 24th May 2013 when his mother was killed. He said that at about 9:30 pm Jamlick informed him that their mother had been killed, and that the people who had attacked her did it again. He was informed by his brother that it was the 1st accused that had stabbed her. He informed the court that the 1st accused had attacked her mother on several occasions before, because perhaps she was annoyed with the relationship her mother had with the 2nd accused, her husband.

[7] **PW3 JAMLICK GITUMA** told the court that on the day of the incident at around 9:30 pm he heard PW1 scream; he heard their mother, the deceased scream. He went out. The moon was bright and found Denis trying to run away and his mother was lying down having been stabbed in the chest. He also saw two people run away. He also noticed that Denis had been stabbed. They thereafter reported the matter to the police and organized how she could be taken to hospital. During cross-examination PW3 told the court that he recognized the 1st accused from a distance and it was him who told him that the two people running ahead of him were his wife the 1st accused and the 3rd accused.

[8] **PW3** additionally told the court that the 2nd accused told him that he had protected the deceased from being stabbed but when they went back to check on her they found out that she had also been stabbed. They reported the matter at Mworoto police post and the police came for the deceased body. They were asked to take the police to the 2nd accused home which they did and they found him sleeping. The 3rd accused was a neighbor to the 2nd accused.

[9] **PW4 ERICK MUGENDI** testified and told the court that he was at home on 24th May 2013 when he heard his sister PW1 scream. He came out with PW4 and chased after 3 people who were running away. He identified the 3 as the 3 accused persons in court. They were able to catch the second accused but the rest disappeared into the banana plantation. The 1st accused had been stabbed and he said he got stabbed when he was separating them. They then left the 2nd accused and went back home. There they found that the deceased had been stabbed in the chest and died. They then went to Mworoto Police post and reported the incident.

[10] **PW4** told the court that at the scene there was no weapon but the two who got away discarded a knife (marked MF1) that they used to stab the deceased. They also threw away slippers (marked MF2) and 2 caps (Marked MF3). The black cap belonged to the 1st accused and the green one to the 3rd accused. However during cross-examination PW4 said that he did not witness the 1st accused stabbing the deceased but saw her running from the scene and during that time she was wearing a long trouser and a t-shirt and had a masai kikoi around her neck. The 3rd accused wore a Skirt and a t-shirt. They were about 20-30 meters away from him so he could see them. Denis had a small stab on the chest.

[11] **PW4** told the court during cross examination that the 2nd accused used to visit their home and that day wasn't the first time. The deceased used to sell alcohol so the 2nd accused used to stopover. He confessed that he could not tell who between the 1st and the 2nd accused stabbed the deceased. He further stated that the recovered items were found around the area where the 1st and 2nd accused ran to. Additionally he said that the 1st accused had accused the deceased of trying to take away her husband

[12] **PW5 STANLEY RIMIRI** told the court that on the evening of the 24th may 2013 PW1 told him that the person who had been attacking her mother had killed her. She was certain that it was the 1st and the 3rd accused. He went to where the deceased was lying and found that the deceased had a stab wound in the neck. They called the police who came and looked for the 3 accused persons. The police later came and took the body to the mortuary. He added that he knew the accused person as they are from their village. He said that his home is about 4 meters from the accused as they live in the same shamba.

[13] **PW 5** told the court during cross examination that he did not see the deceased being stabbed as he was called by PW1. The 2nd accused person had disappeared with the perpetrators. He recalls that the 1st accused person and the deceased were fighting over the 2nd accused and that a year had lapsed since the last assault by the 1st accused on the deceased.

[14] **PW7 WILFRED MWANGI** told the court that he and P.C Jirma are the investigating officers of this case. On 25th may 2013 as he was on patrol duty, he was called by PC Karanja of Munjua Police Control Base who informed him that he had a report of murder that PW3 made to him. He called off patrol duties and assembled a team of police officers at the station and then went to Munjua patrol base with PC Karos and P.C Gachanja. He met P.C Karnaja and set out for the scene but before reaching the scene CP David Lemyasunya called him informing him that he had the suspect in custody. He proceeded to Kijja Police Post and found Dennis Mutuma in the custody. Thereafter we went to the scene and found the body of the deceased Beatrice Nkonge 18meters from her home. She had a deep knife cut above the breast and near the neck on the left side.

[15] **PW7** went on to narrate that they interrogated people around and there was no eye witness except the children of the deceased who told them that they had chased 2 women but they managed to escape. The children also confirmed that they knew the 2nd accused for he was frequent in their mother's home. The next morning they revisited the scene and the 1st and 3rd accused were arrested by the AP and he collected them from Kijja police station for interrogation. Through their investigations they established that the 3 persons had a case to answer and they charged them with murder. They also recovered some exhibits that were taken to the government chemist.

[16] **PW8 AP CPL DAVID LENYASUNYA** testified and told the court that he was at Kijja station when two boys came to the station and told him that they were brothers and that their mother had been stabbed. He called AP Cpl. Martin Kinyua and Edward Ndwiga to deal with the matter. They immediately went to the scene and found deceased's lifeless body lying on the ground. He called the in-charge of division C.I Joseph Nkunja and OCS Gaitu. They waited for their arrival. Some few minutes later the OCS called him back and told asked him to remain at the scene until he arrives. He arrived at 1.30 a.m. or thereabout. They were not able to arrest any suspects that night and he went back to the station. The OCS took away the body.

[17] The following morning, first two suspects were brought by members of the public which included sons of the deceased. They called OCS again and he came with investigators and took the suspect. They also gave us exhibits and we delivered them to the OCS.

[18] **PW9 CPL GABRIEL KOOKEI** testified and told the court that he is DCI Meru County where he has been for four years. He is a scenes of crime officer through gazette notice No. 407 of 18/1/2010. He said that he knows Cleophas Musinga a scenes of crime officer and had worked with him for 6 months before he was transferred to Garissa. He knows his handwriting and signature and produced 5 photographs and certificate, (P Exh 10 (a) for certificate, P Ex 10 (b) – (e) for photographs). The Certificate was prepared on 12/6/2013. I confirm his signature.

[19] **DW 1 JUDITH KANANA MUGA** testified and in her defense said that on 24th May 2013 she left school where she is a teacher at 4.00p.m and went home. She did her chores and after dinner she together with her children went to bed at around 9.00p.m. On this material day her husband was not home. She heard someone knocking and she found that it was her husband and opened the door. Her husband told her that he had been taken hostage and injured on the left shoulder which he showed her. When she enquired who attacked him he said that he did not know. In the house she performed first aid on her husband and he dosed off as he was drunk. The OCS Gaitu police station later on knocked on her door and inquired the whereabouts of her husband. She woke him up. He was informed of an incident that had happened and was requested to assist in investigations. Her husband left with the police and she was left behind.

[20] **DW 1** further told the court that on the following day she went to Mworoto AP camp to ask about her husband. She found Cpl Lenyasinya who told her that her husband had been arrested. She was thereafter arrested together with her neighbor Gladys Karangi (3rd accused) and taken to Gaitu Police Station. She spent two nights in the cell. DW1 told the court that she had never met Beatrice and that she was not aware of any relationship between her husband and the deceased. That on 24th May 2013 she was with her husband in the morning and evening and was not with the 3rd accused person. She denied that the items that were recovered were hers.

[21] **DW2 DENIS MUTUMA** testified and told the court that on the day of the incident he worked on his shamba until 5:00 pm when he left for home. He passed through Nkandore village where he went to the house of the deceased and took a traditional brew. The deceased was in the company of others including her brother Francis Thaaaji. He stayed for few hours then left for home. However, as he was leaving he was attacked by people he did not know and he could not tell who and how many they were as there was no moonlight also there was bananas. He said that the deceased came out screaming and when he found an opportunity he took off. He met deceased son and told him that it was not safe at home.

[22] When DW2 arrived home he woke up the 1st accused and told her what happened and she administered first aid on him. Later she woke him up and told him that the OCS wanted him to help with the investigations of the incident and he was arrested.

[23] **DW3 GLADYS KARINAGI** told the court that on 24th May 2013 she woke up and prepared her children for school then went to her shamba which was 2km away. She went home at 5:00 pm and prepared supper then went to sleep at around 9:00pm. The following day she woke up and prepared her children. She later went home which was about 2 kilometers. However when she got home she found the first accused in a police vehicle and asked her what she was doing. The OCS then enquired what she was doing and he pushed her into the vehicle. They were taken to Gaitu Station and arrested.

[24] **DW3** further told the court that she knew the deceased as they used to meet in church. But, she had never heard of any quarrel between the 1st accused and the deceased. During cross-examination, she however failed to name the title number of her shamba or the person who had leased it to her.

Identification

[25] In view of the foregoing, I make a finding that the accused persons in their defence were trying to create doubt as to who stabbed the deceased. The incident took place late at night which calls for careful examination of the evidence to ensure that the circumstances were favourable for positive identification so as to avoid a miscarriage of justice. The Court of Appeal in **Odhiambo v Republic [2002] 1 KLR 241, 247** set out the guiding principles for consideration of such evidence as follows:

The law on identification is not in doubt. It has been stated and restated in several judicial decisions by this Court and by the High Court. The Court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons from which the Court may reasonably conclude that identification is accurate and free from the possibility of an error.

[26] The court therefore must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and the time taken by the witness to observe the accused so as to be able to identify him. However this requirement is relaxed when dealing with recognition. See **ANJONONI & OTHERS V. THE REPUBLIC [1980] KLR 59** where it was stated:

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

[27] PW1 testified and told the court that the 2nd accused person asked the deceased to escort him out which she did. When the deceased screamed PW1 went out and she saw the 1st accused person stabbing the deceased. She also notified the court that it was night time but she recognized the 1st accused person because there was a full moon. PW1 also gave details of how the 1st accused was dressed. These are people she knew well and could easily recognize. She recognized tem under the moonlight. PW3 also confirmed that there was bright moonlight on that day and he was able to recognize the 2nd accused; he also observed the 2nd accused had also been stabbed in the shoulder. He also stated that the second accused told him that the two people who were running were the 1st and 2nd accused. The investigations officer also established the three accused were at the scene on the material day. PW1, PW2 and PW3 stated that the deceased were intimately involved with the 2nd accused, the husband to the 1st accused. And, that the 1st accused had attacked the deceased previously as she did not approve of the said relationship. Witnesses herein stated that the same person who had attacked the deceased before had now stabbed her. The evidence shows that this is a case of love triangle. Careful consideration of the testimonies of the witnesses and the circumstances of the case makes the court to believe the testimonies of the prosecution witnesses. The alibi provided by the 1st and 3rd accused persons was mere afterthought and no sufficient alibi was given by the two. Evidence herein place the two together on the material night. Their defence that they were at home sleeping does not hold sway. PW1 saw the 1st accused stab the deceased. All circumstances show that the 1st accused stabbed the deceased and as a result the deceased died of the stab injuries. She therefore caused the death of the deceased.

[28] The 1st and 3rd accused was identified as the two individuals who were running from the scene of the crime. Evidence suggests a case of love triangle. The 3rd accused was enlisted to help in the commission of the offence. She was identified as one of the persons at the scene. Accordingly, circumstances are that these two committed the offence. I find that the 1st accused caused the act that caused the death of the deceased.

Did the accused possess malice aforethought?

[29] Section 206 of the Penal Code gives circumstances that constitute malice aforethought but on proof thereof. Section 206 of the Penal Code Provides:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b. Knowledge that the act or omission causing death will probably cause the death 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 it may not be caused;

c. An intent to commit a felony

d. An 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.

[30] Applying the test of law, evidence shows that the 1st accused had previously attacked the deceased person for having sexual affair with the 2nd accused. She was aware of where the deceased lived and that the 2nd accused frequented the place. This was not an act at impulse or heat of the moment. The 1st accused set out to kill the deceased. She enlisted the help of her friend, the 3rd accused. She also tried to disguise herself by wearing a cap and asking her friend the 3rd accused to accompany her to the home of the deceased. The 1st accused stabbed the 2nd accused, and also the deceased on the chest causing her death. The attack was vicious and was a stab on the chest by a dangerous weapon. These matters show that the 1st accused had the intention of causing grievous bodily harm upon or killing the deceased. I find her guilty of murder of BEATRICE KAUNA NKONGE and convict her accordingly under section 322 of the CPC.

[31] The 3rd accused was also in her company and was a partaker of common plan and intention of killing the deceased; this is unlawful purpose. The Court of Appeal held in the case of ***Njoroge -vs- Republic (1983) 197*** that:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of someone of the party in the cause of his endeavours to effect the common object of the assembly.....”

[32] The 3rd accused person accompanied the 1st accused person to attack the deceased and the actions of the 1st accused person resulted in the death of the deceased. Therefore, relying on the above authority the 3rd accused is a principal offender as well under section 20 of the Penal Code. Accordingly, I find the 3rd accused person guilty of murder of BEATRICE KAUNA NKONGE, and convict her accordingly under section 322 of the CPC.

[33] There is no evidence whatsoever that the 2nd accused person was party to the unlawful design to kill the deceased. The deceased was his

girlfriend and he had no intention of killing her. He was also a victim of the cruelty and evil designs by the 1st and 3rd accused persons. He did not even stab the deceased. He tried to help but was also stabbed by his own wife. He was economical with the truth about the whereabouts of his wife on the material day. Nonetheless, I find nothing on him and therefore acquit him of the crime of murder. He shall be set free forthwith unless otherwise lawfully held in custody. It is so ordered.

Dated, signed and delivered in open court at Meru this 17th day of December, 2018

F. GIKONYO

JUDGE

In presence of

Abubakar for accused

The three accused persons

Namiti for state.

F. GIKONYO

JUDGE