



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL CASE (MURDER) NO. 112 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

GEOFFREY NYARUNDA GEKONGE.....ACCUSED

JUDGMENT

1. On the 21st of August 2012 Geoffrey Nyarunda Gekonge was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that, “on the 9th day of October 2011 at Ichuni Village in Masaba South district within Kisii County in the Republic of Kenya, the accused murdered Lillian Kwamboka.

2. The accused person denied the offence. The Prosecution called 4 witnesses and the accused gave an unsworn statement when put on his defence.

3. Pw1 James Nyaro Nyamigwa testified that on the 9.10. 2011 he went to Ichuni his place of business. He found community policing team who informed him that his wife had been assaulted by Geoffrey Nyarunda. He informed them that he is saved and that he did not want a big incident out of the incident. The elders left and shortly thereafter the accused’s wife entered his house. This was about 9am. Geoffrey’s wife asked him why had befriended Judy and Geoffrey threatened his wife that he would kill someone at that moment. He called the village elder over the incident. The accused entered his house armed with a knife and started chasing his wife Lillian asking why they had beaten Judy. He caught up with Lillian and stabbed her on the chest twice. He struggled with Geoffrey and disarmed him. His wife died as they tried to help her. During cross-examination Pw1 testified that his wife did not abuse the accused or assault him.

4. Pw2 Mose Masagara attended the post mortem on the deceased on the 17/10/2011, the deceased was the daughter in law.

5. Pw3 Samuel Onchere a medical doctor performed a post mortem on the Lillian Kwamboka. The body had a cut on the left side. On the external appearance of the body it had extensive blood stains over hands, face and the anterior part of the head. There was a superficial burn over the left lower leg and a deep penetrating stab wound over the left mid-chest which was extending into the external and chest cavity. The left lung had collapsed due to massive haemorrhage. On the cardio vascular system there was a cut over arch of aorta. He formed the opinion that cause of death was cardiopulmonary arrest second to massive haemorrhage second to penetrating chest stab wound.

6. Pw4 No. 107718 P.C Dominic Leswamin testified that on the 9/10/2011 P.C Musembi and P.C Mutomi went to the scene and collected the body of Lillian Kwamboka. On the 28/8/2012 the accused was arrested at Kericho by OCPD Mr. Tom Mutisya Cpl Driver Rop, P C Busieni and P C Munego. The accused was later on escorted to Kisii Central Police Station and was taken for mental assessment and later charged in court. He produced the knife, the murder weapon recovered at the scene. He produced on behalf of the previous investigating officer P C Edward Nzau who had resigned from the force.

7. The accused gave an unsworn statement in his defence. He stated that he is a builder and works in Kericho. On the 9/11/2011 he at his home for the weekend. On the 8/11/2011 whilst in the house his wife told that she had heard noises outside. He put off the radio to find out the whereabouts of the noise. His mother asked him to go and investigate. On going out he found Lillian with two men one of them was fighting her outside. He found some people at the place. He decided to get involved to separate them. They separated them. He rang the village elder to find out why the people had come there. The village elder asked them questions. One of the men was said to be David Lillian’s husband. The other was David’s friend. They had heard that David’s wife had rented the place. They were asked about the fight and David replied that he had heard that his wife had a *mpango wa kando* and that he had decided to find out and hence the fight. The wife was asked and she replied that they had separated and that it had been a year from since their separation. That the husband wanted to remove her from there. The village elder said he would return the next day to sort out the matter since it was at night. He told David and his friend to find a place to sleep. Each person left and went their way. The next day David and his friend returned and found Lillian washing clothes outside. They started a fight and people came. He was far a little. During the fight Lillian got injured. He went to separate them. The village elder came. Lillian was injured. She was taken to hospital and he left them. Later he was informed that Lillian had died. Lillian was his friend and since her stay there, there was no issue nor any complaint. That on the charge what he did was to separate the fight. He was not involved. The prosecution relied on the evidence on record.

8. Mr. Okenye for the accused filed written submissions which I have read and considered. Among the issues raised by Mr. Okenye was that the post mortem form was not signed nor did it indicate the time of death. The body of the deceased had burns and there was no explanation for the burns. There was contradictory evidence from Pw1 and Pw4 that the weapon knife which was recovered at the scene had blood stains and that Pw1 at first said the deceased was stab twice then once. That there was no evidence from other witnesses yet the prosecution evidence was that there were other witnesses in the plot, to corroborate Pw1's evidence, that his evidence should be evaluated with care. That the accused's defence could safely be taken to be true. That the prosecution case has serious doubts and the benefit should be given to the accused and he be acquitted. The prosecution choose to rely on the evidence on record.

9. Section 203 defines the offence of murder and requires proof of the following if the offence of murder is to be established, malice aforethought on the part of the accused, death of the deceased, the cause of the death and an unlawful act or omission on the part of the accused resulting in the death of the deceased. Section 206 of the Penal Code defines malice aforethought as follows;

'Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 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."*

10. The first issue I will deal with is what caused the death of the deceased. The post mortem report produced by Pw3 the medical officer indicated that the deceased cause of death was cardiopulmonary arrest second to massive haemorrhage second to penetrating chest stab wound. The cause of death was not the burns on the deceased's left leg but the stab wound on her chest which caused a massive haemorrhage. Counsel for the accused raised the issue that the post mortem was not signed. Doctor Samuel Onchere confirmed that he is the one who performed the post mortem on the body of the deceased and that he had forgotten to sign it but his name was indicated and his stamp was on the said post mortem. Pw1's evidence was that his wife was stabbed on the chest. The doctor's evidence confirms that he did the post mortem and made the findings therein.

11. The next issue is whether is whether the accused is responsible for the injury which caused the deceased's death. Pw1 testified that it was 9am he saw the accused chase his wife and stab her on her chest. When he reached the accused he struggled with him to get the knife from him. The accused admits being at the scene but claims that there was a struggle between David and the deceased. His defence places him at the scene but his defence that the struggle was between Pw1 and his wife in my view was an afterthought. This was not raised when Pw1 was cross-examined. Cross-examination concerning Pw1 was as follows, *"The accused had no differences with the deceased. We were good neighbours. My wife did not abuse the accused or assault him on that day. It is the wife of Geoffrey who had a stone. My wife only said that the affair between the accused and Geoffrey was true and that they should forgive each other"*. There was no question put to Pw1 that he fought with his wife and that she died as a result of the said struggle. Pw1 testified that he saw the accused stab his wife twice and that as the accused chased his wife the other neighbours warned him not to enter their house. All this happened at 9am and Pw1 saw the accused stab his wife on the chest.

12. The final issue to determine is whether there was malice aforethought. The background of the incident is that the accused's wife confronted a girl called Judy who was having an affair with the accused and this angered the accused. In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court held that in determining whether malice aforethought has been established the following elements should be considered, **the nature of the weapon used, the manner in which it was used, the part of the body targeted, the nature of the injuries inflicted either a single stab/wound or multiple injuries and the conduct of the accused before, during and after the incident.** Pw1 testified that he saw the accused with a knife, before getting the knife the accused threatened his wife and said that he would kill someone and then the accused entered his house with a knife and started chasing his wife with the knife. The accused then used the knife to stab the deceased on her chest, not once but twice. I am satisfied that the prosecution proved malice aforethought. The prosecution has proved their case and I find the accused **Geoffrey Nyarunda Gekonge** guilty of the murder of **Lillian Kwamboka** I convict him accordingly.

Dated and delivered at Kisii this 13th day of **December 2018**.

R.E.OUGO

JUDGE

In the presence of;

Accused Present

Mr. Okenye For the Accused

Mr. Otieno Senior Prosecution Counsel

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Court/ clerk