



**REPUBLIC OF KENYA**

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

**CORAM: D. S. MAJANJA J.**

**CRIMINAL CASE NO. 15 OF 2017**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**VERONICA MUSATI NYANGWESO.....ACCUSED**

**JUDGMENT**

1. The accused, **VERONICA MUSATI NYANGWESO** was charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on the 22<sup>nd</sup> day of June 2017 at Daraja Mbili market, Kisii Township within Kisii County the accused murdered **JUDY KWAMBOKA** (“the deceased”) The prosecution called 4 witnesses in support of its case.
2. The facts as presented by the prosecution are that on 21<sup>st</sup> June 2017 at about 10.00pm, Enoch Onchoka Maina (PW 1) closed his workshop and headed for Abuja Bar where he met the deceased who was employed at the bar. He waited for her to complete her duties so that they could go to his place. On the way, he stopped to buy a soda at a shop only to return and find the accused and the deceased fighting.
3. PW 1 told the court that he could not see them clearly as they were fighting but when he got closer; he saw the accused using a weapon to stab the deceased in the back. She started bleeding from the mouth and nose. He called a *boda boda* rider and took her to Ram Hospital within Kisii town. He was later informed by a police officer that the deceased had passed away. When cross examined, he confirmed that in fact the accused and deceased were his wives and while he lived at Daraja Mbili, his wives lived about 3 kilometres apart. He denied that he had beaten the accused on that day.
4. The manager at Abuja Bar, William Machuki Omwayo (PW 2), testified that the deceased was an employee at the bar while PW 1 was a regular customer. He recalled that on the material night the deceased served PW 1 and they left together when he closed the bar at 11.00pm. He learnt of the deceased’s death the following morning.
5. At around midnight, Corporal Wilson Kiptum (PW4) received a call from members of the public informing him that two women were fighting and one had been stabbed. He rushed to the scene with other officers. He found the deceased lying down and an irate mob threatening to lynch the accused. The accused was arrested and the deceased rushed to Ram Hospital where she succumbed to her injuries.
6. According to PW 3, PW 1 was a friend of the accused and the deceased. The accused met PW 1 on that day and headed to his house. At about 11.00pm, the deceased also went to PW1’s house in his company where they found the accused. She was infuriated when she saw them. They left the house together and the accused followed them to Daraja Mbili. The accused had a knife. In the cause of trying to restrain the accused, PW1 was empowered and the deceased was stabbed in the heart.
7. When put on her defence, the accused elected to give sworn testimony. She told the court that on 21<sup>st</sup> June 2017 she was working at a workshop in Daraja Mbili when she received a message from a strange number. She asked PW 1 who the person was and he replied that it was a customer who usually called him for help. When she called the number, the lady on the other end told her that PW1 was her husband. She put the phone on speaker and asked her husband to speak to the lady but he instead smashed it on the wall. He told her to go home and said that he would come later for them to resolve the issue.
8. At about 9.30 p.m. that night she heard someone knocking at her door. She saw PW1 and the deceased through the window. She went back to sleep and at about 11 p.m. PW1 came back in the company of the deceased. When asked why he had brought another woman to the house, he did not respond. She told him that she was leaving for her cousin’s place. He slapped her and the woman he was with ran away. She insisted on leaving that night. PW 1 accused her of having other men whom she was going to meet and she asked him to escort her to her cousin’s place if he suspected her. They left together and as they approached the market at Daraja Mbili, she heard people shouting, “Who is

that going to stab someone with a knife.” She saw it was the deceased and hid behind PW1. As the woman tried to reach him she slid and fell down. Everyone went towards her to take the knife. They realized that she was bleeding. PW1 was asked to take the deceased to hospital. And she went to record her statement at the police station.

9. The offence of murder is defined by **section 203** of the **Penal Code** as follows, “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” The prosecution must prove beyond reasonable doubt the following three ingredients; first, the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

10. The fact and cause of death was not disputed. Dr Peter Morebu Momanyi (PW 3) conducted the post mortem on the deceased on 29<sup>th</sup> June 2017. He observed that found a linear penetrating injury measuring 6 centimetres on the right back side. Internal examination revealed that the injury was between the 4<sup>th</sup> and 5<sup>th</sup> intercostal spaces. The deceased had also sustained a fracture of the right 4<sup>th</sup> and 5<sup>th</sup> ribs which led to bleeding in the chest cavity. He concluded that the deceased died as a result of a chest injury secondary to penetrating trauma to the chest.

11. The next issue this court needs to determine is whether the accused committed an unlawful act or omission which led to the deceased’s death. The only eye witness to the stabbing was PW 1 who knew both the accused and deceased as they were, according to him, his “wives”. Although our courts have warned against the dangers of mistaken identity in circumstances that are not favourable for positive identification, this is a case of recognition and nothing turns on the issue of mistaken identity of the parties and the accused admits. In any case, the accused admits she was at the scene of the incident.

12. The main issue for determination is whether the accused stabbed the deceased. The prosecution case, supported by the testimony of PW 1 is that the accused and deceased were fighting when the accused stabbed the deceased. The accused version of events is that the accused is the one who had a knife and was going to stab her and as she tried to hide behind PW 1, she slid and fell.

13. In order to resolve the issue, it is necessary to consider the two scenarios in light of the deceased’s injury. According to PW 3, the linear injury was caused by a knife penetrating from the right back side through to the chest hence the bleeding in the chest. PW 1 recalled that he saw one wound on the deceased’s back. I find that such an injury could not have been caused by the deceased sliding and falling on the knife since the injury is from the back and she could not have fallen on her back holding a knife that caused her injury. Moreover, the accused stated that when she fell, “Everyone went towards her to take the knife.” It is thus not possible that the deceased would have stabbed herself on the back and continue holding the knife.

14. I accept PW 1’s version of events that the accused and deceased were fighting and since it is only one of them who had a knife, the irresistible conclusion is that in the course of fighting, the accused plunged the knife in the deceased’s back causing her to die.

15. Counsel for the accused, assailed the prosecution case on the basis that there was inconsistent evidence regarding the recovery of the knife that the accused is alleged to have used. PW 1 did not see the knife but he recalled that a knife was brought to the police station and which PW 4 produced as an exhibit. In cross-examination he admitted that he did not record the recovery in his statement. In my view, the evidence is clear that the deceased was stabbed with a sharp object that was plunged into her back and went into her chest. Although PW 1 stated he did not see the knife, I do not have any doubt that the PW 4 recovered the knife which he produced in evidence.

16. Referring to the case of **Bukenya v Uganda [1972] EA 549**, counsel for the accused urged the court to make an adverse inference in favour of the accused as one Jeremiah Nyangau Nyangate who witnessed the incident was not called to give evidence. According to PW 4, he only saw the commotion. Nothing was suggested in cross-examination of PW 4 that would imply Nyangate would say anything that would call for a negative inference. Likewise, in her defence, the accused did not point to anything that Nyangate would have said that would add or subtract from the prosecution case.

17. On the basis of the evidence, I am satisfied on the basis of the prosecution evidence that the prosecution established beyond reasonable doubt that the accused stabbed the deceased. I now turn to consider the issue of malice aforethought.

18. The prosecution case was that there was a fight between the accused and deceased as confirmed by PW 1. The testimony of PW 4 confirms what the accused stated that PW 1 went with the deceased to his house where they found the accused who was infuriated about PW 1 bringing another woman to the house. In her fit of anger she walked out and followed the accused and deceased with a knife and confronted the accused leading to a fight in which she plunged the knife into the deceased. Although her carrying the knife and following the deceased are the hall marks of a deliberate and vengeful act, I am prepared to find that she was in a fit of anger and given that she inflicted one stab wound she is entitled to the benefit of doubt. In making this finding, I find that it is PW 4 who in fact corroborated that aspect of the accused’s case.

19. Following the conclusions, I have reached, I find the accused, **VERONICA MUSATI NYANGWESO** guilty of the offence of manslaughter contrary to **section 202** as read with **section 205** of the **Penal Code** for unlawfully causing the death of **JUDY KWAMBOKA** and I convict her accordingly.

**DATED and DELIVERED at KISII this 6<sup>th</sup> day of DECEMBER 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Nyangwencha, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.