



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL CASE NO. 23 OF 2017

BETWEEN

REPUBLIC.....PROSECUTOR

AND

ANN NJOKI MACHARIA.....ACCUSED

JUDGMENT

1. ANN NJOKI MACHARIA (“the accused”), faces one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 73 of the Laws of Kenya)**. The particulars of the offence are that on 9th November 2017 at Mwembe area in Kisii township within Kisii County, she murdered **EDWARD MONARI OMBATA** (“the deceased”). After the accused pleaded not guilty to the charge, the prosecution marshalled 6 witnesses to support its case while the accused gave an unsworn statement.

2. The evidence presented by the prosecution was as follows. On 9th November 2017 at about 3.00am, a boda boda rider, Harney Kibogo Nyabira (PW 3), recalled that he was ferrying a customer when he saw the deceased crossing the road bare foot and dressed in boxer shorts. He was holding his chest and shouting “*Nisaidie, Nisaidie, Njoki amenidunga kisu*” (“*Help me! Help me! Njoki has stabbed me with a knife.*”) while the accused was following him carrying clothes dripping with blood.

3. PW 3 testified that he knew the deceased as he often saw him at Mwembe area. He agreed with the customer he was carrying that he would let him alight so that he could assist the deceased. The deceased showed him his stab wound on the left side of his body. PW 3 carried the deceased for a distance left him lying on the ground outside Christa Marianne Hospital as he went to seek help. When he returned shortly afterwards, he found the accused next to the deceased. By that time other motorbike riders had gathered at the scene. They took the accused and deceased to Kisii Level 5 Hospital. PW 3 was amongst those that followed them to the hospital. PW 3 recalled that the deceased kept saying that it was Njoki who had stabbed him.

4. A night duty nurse at the hospital, Gaudencia Kemunto Nyasani (PW 1) recalled that while she was on duty, she received a call from Casualty Department concerning a patient who had been brought in with a serious condition and needed transfer to another hospital. When she went to assist, she recognised the deceased as a son of one of her colleagues. He was laid on a stretcher and had a stab wound on his chest and could not talk. She also found the accused next to the deceased. She immediately informed the deceased’s mother and prepared the deceased for transfer to Moi Teaching Referral Hospital (“MTRH”) at Eldoret.

5. The deceased’s father, Joseph Ombati Moywaywa (PW 2) proceeded to the Hospital after receiving news of his son’s distress. He found the deceased at the Casualty Department and observed that he was bleeding from the chest where he had been stabbed. When he got out of the treatment area, he met one of the boda boda operators who showed him the accused as the person suspected of stabbing the deceased. When he talked to the deceased, the deceased told him that Njoki had stabbed him. He asked the accused whether she had stabbed him and she replied, “*Vile amesema*” (“*Just as he has said*”). PW2 then requested a security guard and Corporal Eliazar Onywele (PW 4), who was stationed at the Hospital, to arrest the accused. PW 2 further testified that the deceased was taken to MTRH where he was operated on but died.

6. PW 4 recalled that when he went to the Casualty Department, he found the deceased with a stab wound on the chest. He also found the accused who introduced herself. When he spoke to her, she told him that the deceased was her friend and had fallen on a bottle. He asked the deceased what had happened but before he could answer, the deceased requested that the accused move away. He testified that the deceased told him that the accused had stabbed him. He proceeded to arrest the accused and took her to Kisii Police Station in the company of PW 2

7. The investigating officer, Corporal Cosmas Kaloki (PW 5), interrogated several witnesses and organised for the post-mortem. He testified

that according to his investigations, the accused person and the deceased were in a relationship. In cross-examination, PW 5 admitted that he had visited the accused's house which he found was a clean and well-arranged single room with the accused clothes hanging on the wall. He did not find any man's clothing, blood stains or sign of struggle so he concluded that the deceased did not suffer any injuries in her house. He admitted that he had not traced the scene of the crime as the deceased was found on the road.

8. The accused in her unsworn statement denied stabbing the deceased. She testified that before her arrest, she was running her wines and spirits business at Mwembe area. On the material night she closed at around 11.00pm and went out for entertainment. She told the court that although the deceased had been her boyfriend, she had not seen him for a week prior to the incident as they were not on good terms. As she was returning home to Mwembe at about 1.00pm, she met many motorbike riders at Mashauri Petrol Station. As the rider carrying her was trying to make his way through the crowd, she heard people asking him to give way for a motorbike which was coming from Mwembe. When the headlights shone, she saw the deceased. She told the crowd that she knew him whereupon they asked her to take him to hospital. They took him to Kisii Level 5 Hospital and as he was being treated, a police officer requested her to accompany him to the police station. She was then detained at the police station and charged with the offence.

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 the deceased's death was not disputed. Dr Benson Macharia (PW 6) conducted the autopsy on the deceased's body on 10th November 2017 after it was identified by PW 2. PW 6 observed that the deceased suffered a 6 centimetre stab wound that had penetrated the chest wall to the left ventricle, two abrasions on the right knee joint and three bruises on the left side of the neck. His eyes were very pale indicating loss of blood. He concluded that the deceased had died as a result of cardiac arrest due to a penetrating stab wound extending to the heart. The findings of the post mortem corroborate the testimony of PW 1, PW 2, PW 3 and PW 4 who all saw the stab wound on the deceased's chest.

11. The second issue for determination is whether the accused inflicted the stab wound. From the evidence I have outlined, there were no eye witnesses to stabbing of the deceased. The scene of the stabbing was not identified and the weapon used to stab the deceased was not recovered. The court is therefore left with circumstantial evidence and the deceased's dying declarations.

12. Before he died, the deceased made statements to PW 2, PW 3 and PW 4 implicating the accused as the person who stabbed him. These statements made by the deceased declaring the cause of death are made admissible as evidence under **section 33 (a)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which provides:

33 Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead ... are themselves admissible in the following cases—

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

13. Our courts have urged caution in relying on dying declarations as the accused is effectively denied an opportunity to test such testimony by cross-examination of the deceased. This approach was summarised by the Court of Appeal in **Musili v Republic NAI CA Criminal Appeal No 111 of 1987 [1991] eKLR** as follows:

However, it has always been stressed by the Court of Appeal that although there is no rule of law that to support a conviction there must be corroboration of a dying declaration, but it is generally unsafe to base a conviction solely on an uncorroborated dying declaration, and that too great weight should not be attached to dying statements which should be received in evidence with caution (T) R v Ramzani bin Mirandu (1934) 1 EACA 107, (T), R v Mgundulwa s/o Jalu and others (1946) 13 EACA 169, (K) Pius Jasunga s/o Akumu v R (1954) 21 EACA 331.

14. In this case, the deceased made the same statement implicating the accused to three different people. As regards, PW 3, the statement was not in response to a specific question but he was shouting the accused's name while asking for assistance as the accused was following him at that early morning hour. Notwithstanding that PW 3 was familiar with him, nothing in the deceased's statement turned on his familiarity with the deceased as it general but PW 3 nevertheless assisted him. The deceased also told his father, PW 2, at the hospital in answer to the question. He identified the accused as “Njoki”, the accused's middle name which indicated familiarity and confirmed a previous relationship. Lastly, he implicated the accused in answer to PW 4, who was a person in authority and whom the deceased probably understood would assist him.

15. I find that the deceased's statements implicating the accused made to the witnessed credible. All these people were independent witnesses who had no reason to lie about what the deceased told them. They had no ill motive or reason to conspire together to implicate the accused. The fact of stabbing is corroborated by the testimony of all the witnesses and the post-mortem report which confirmed that the deceased was indeed stabbed.

16. In addition to the dying declaration, the evidence of PW 3 is that he saw the accused following the scantily dressed deceased. She was carrying his blood stained clothes. The deceased appeared to be running away from her as he knew she was his assailant and that is why he was calling for help. At the time PW 3 saw him, no other boda boda riders were present. I therefore reject her defence that she was not with the deceased and only met him by sheer chance with other riders as she was going home. Further, her statement to PW 4 that the deceased had fallen on a bottle betrays her defence as it established that she must have been with the deceased when the stabbing took place. Lastly, the accused's answer to PW 2 confirming that what the deceased stated is what happened leaves no doubt that the accused is the person who

stabbed the deceased.

17. I note that the deceased's blood stained clothes and the murder weapon were neither recovered nor produced in evidence. I do not think this is fatal to the prosecution case because the evidence of the dying declarations as I have shown is sufficient to sustain the conviction. This is a case where only the accused would know where she took the deceased's clothes as she was the last person seen carrying them. Likewise, the fact that the weapon was not recovered does not undermine the prosecution case that the injury was not self-inflicted and that deceased was stabbed with a sharp object by another person (see *Karani v Republic* [2010] 1 KLR 73).

18. The last issue for consideration is whether the accused stabbed the deceased with malice aforethought. It was held in *Republic v Tubere s/o Ochen* [1945] 12 EACA 63 that malice aforethought may be inferred by the nature of the weapon used, whether lethal or not, the part of the body targeted, whether vulnerable or not, the manner in which the weapon is used, whether repeatedly or not, and the conduct of the accused before, during and after the attack.

19. The accused's act of aiming a sharp object at the deceased's chest with such force as to cause a 7-inch penetrating wound on the chest that goes to the heart shows a clear intent to cause death or grievous harm. I find and hold that the prosecution has established malice aforethought beyond reasonable doubt.

20. I therefore find ANN NJOKI MACHARIA guilty of the murder of EDWARD MONARI OMBATA and I convict him accordingly.

DATED and DELIVERED at KISII this 5th day of DECEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Nyakundi, Advocate for the accused.

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