



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 28 OF 2015**

**REPUBLIC.....PROSECUTOR**

**Versus**

**CATHERINE KARIMI NYAGA.....ACCUSED**

**JUDGEMENT**

**CATHERINE KARIMI NYAGA** hereinafter referred as the accused was charged before this court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the offence being that on the 28/1/2013 at Maile 46 Market in Kajiado Central District within Kajiado County the accused murdered **PETER NYONYI MARONA** hereinafter referred as the deceased.

The accused was arraigned in court where she denied the charge and particulars of causing the death of the deceased. At the trial she was represented by Counsel Mr. Nyaata while the prosecution was conducted by senior prosecution counsel Mr. Alex Akula.

The facts of the prosecution were presented by the ten (10) witnesses who testified in support of the charge against the accused person summarized as follows:

**PW1 JOHN MWANGI** told this court that on the fateful night while working at his barber shop he heard some screams from the house of the deceased. Since the deceased lived next to PW1 he decided to rush to the scene to confirm what was happening at the house of the deceased. PW1 further testified that on arrival he saw the deceased lying on the ground next to his door and blood stained knife besides his body. PW1 further added that on noticing the nature of injuries inflicted upon the deceased he called the neighbours and in a little while the police also arrived at the scene. In his examination in chief PW1 was able to identify the knife he saw next to the deceased body and the clothes he was wearing on the material day.

**PW2 GEORGE MWANGI** also gave evidence relating to the events of the material night with that of PW1. PW2 told this court that he has been a neighbour to the deceased at Maile 46 where at about 7 pm he heard people screaming. In his testimony PW2 decided to rush to the scene where on arrival confirmed that the deceased had sustained chest injuries and his body lay on the ground with a knife on the side. PW2 further stated that the deceased was also married to one Catherine Nyaga, the accused in this case whom they lived together at the house where the offence took place.

**PW3 COSMAS MUTIE** who was also a resident of Maile 46 was walking home on 28/1/2013 when he heard screams from the direction of the deceased house. He followed the screams upto the deceased house only to find the deceased to have succumbed to death due to the stab wounds at his chest. PW3 on being shown a T-shirt, pair of jeans and a knife he was able to positively identify them as seen where the

deceased was lying.

**PW4 PC EVANS OBWOCHA** gave details of booking a murder report from PW3 which had occurred at Maile 46. It was further PW4 testimony that while he was acting on the report by putting together a team of police officers to visit the scene, the accused person came in with another report. According to PW4 the accused made a report to the effect that she had stabbed her husband, the deceased herein with a knife. PW4 considered the accused a suspect for the murder. He placed her in police cells to await further action.

**PW5 GEORGE MARONA** who was a brother to the deceased also stated to have learnt of the incident involving the accused and the deceased on the 28/1/2013. PW5 told this court on the action he took to report the matter to the police station and mount a search to look for the accused. PW5 further testified that he attended the postmortem at Kajiado District Hospital Mortuary where he identified the body to the pathologist. PW5 further added that prior to the deceased demise he was married to the accused person staying at the same house at Maile 46.

**PW6 ELIZABETH MARONA** a sister to the deceased gave evidence on positively identifying the body of the deceased during the postmortem which was carried out at Kajiado Hospital Mortuary.

**PW7 DR. LINCOLIN GITAU** stated that he examined the accused as to her mental fitness to participate in a criminal trial which is one of the requirements in a charge of murder. On examination PW7 confirmed the accused as fit to stand trial and duly issued a medical certificate admitted as exhibit 4 (a) and (b).

**PW8 DR. DAVID OMAR** who conducted the postmortem on the deceased body on 30/1/2013 made a finding that the cause of death was as a result of penetrating stab wound on the chest caused by a sharp object. The report was produced by PW8 and admitted in evidence as exhibit 5.

**PW9 SNR SERGEANT YUSUF OMAR** testified on how he led other police officers in visiting the scene where the deceased was murdered. PW9 further stated that on arrival they noticed the presence of a knife next to the deceased body. It was his testimony that they took action of transporting the body to Kajiado District Hospital Mortuary and the other exhibits handed over to the investigating officer. PW9 identified the exhibits as the knife, a pair of jeans and T-shirt all connected with killing of the deceased.

**PW10 LAWRENCE KINYUA** a government analyst testified as to receipt of exhibits namely black/blue white T-shirt indicated as of the deceased, blue jeans trouser indicated as of the deceased, a knife and blood sample of the deceased. According to PW10 the exhibits forwarded by PC Mwinyi of Kajiado police station was to have the analyst through forensic determine the presence and source of the blood stains. PW10 in his testimony having examined the samples concluded that the DNA generated from the knife and T-shirt matched that of the deceased as per exhibit 6 (a).

**PW11 PC SALIM MWINYI** who investigated the murder also gave evidence on the role he played to recommend an indictment for this offence against the accused. PW11 stated that he caused the postmortem to be conducted, the exhibits relevant to the murder like the knife collected at the scene was forwarded to the government chemist for analysis and the clothes the deceased was wearing at the time he was killed. It was further PW1 testimony that upon recording statements from various witnesses he recommended that the accused who was already in police custody be charged with the offence of murder.

In response to the prosecution case the accused gave a sworn testimony and denied being involved with the murder of the deceased. The timetable of events as deduced by the accused on the material day consists of the following:

She woke up in the morning of 28/1/2013 and prepared breakfast for the deceased and their children. She later travelled to Eastleigh in Nairobi to purchase clothes to restock her shop at Maile 46, Kajiado County. She boarded a public service vehicle from Nairobi for Kajiado at 4.00 pm arriving at 6.00 pm in the evening. On arrival at the home where they stay with the deceased she noticed many people gathered and

talking in low tones. It is on inquiry when one member of the public informed her that she is being sought as a suspect for the death of the deceased. It is when she decided to report the matter to the police station who directed that she be placed in police custody. She denied therefore neither being present at the scene on the fateful day nor ever planned to kill the deceased.

## **FINAL SUBMISSIONS BY THE DEFENCE COUNSEL**

Mr. Nyaata for the accused submitted that the prosecution evidence has not discharged the burden of proving all the ingredients for the offence of murder. The learned counsel contended that under section 203 of the Penal Code one of the key elements to be proved is a malice aforethought on the part of the accused. In his submissions Mr. Nyaata cited section 206 of the Penal Code and the case of ***Republic v John Ndungu Njoki & Another [2012] eKLR*** for the proposition that there was no independent witness to link the accused persons to the murder of the deceased. Mr. Nyaata argued that the prosecution witnesses failed to place the accused at the scene. According to Mr. Nyaata the accused gave cogent testimony on her whereabouts when the deceased was murdered.

Learned counsel cited the case of ***Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990*** for the proposition that for a court to find a conviction exclusively upon circumstantial evidence the inculpatory facts must be incompatible with innocent and incapable of explanation upon any other hypothesis than of guilt. It was Mr. Nyaata's contention that the prosecution case did not pass the test on the principles set out on circumstantial evidence. Mr. Nyaata urged this court to follow the legal principles in the authorities cited to find that the case against the accused fell short of the threshold of proof beyond reasonable doubt. The benefit of doubt should therefore be resolved in favour of the accused.

Mr. Akula a senior prosecution counsel for the state submitted that the court should go with the evidence of the eleven witnesses which establishes the ingredients of the offence against the accused. Mr. Akula to buttress his arguments cited the case of ***Libambula v Republic [2003] KLR 683*** for the proposition on motive and existence of circumstantial evidence, the case of ***Charles O. Maitanyi v Republic [1986] KLR 198*** for the proposition that a fact may be proved by a testimony of a single witness provided the court in relying on the evidence has to test it with the greatest care in respect of identification. Mr. Akula further relied on the case of *Abunga alias Onyango v Republic (Supra)* on circumstantial evidence. In closing Mr. Akula contended that the prosecution put up a watertight case discharging the burden of proof to warrant a verdict of guilty be recorded against the accused.

I have considered the charge, evidence by the prosecution, the accused defence and rival submissions by both counsels. In this case it is the burden on the part of the prosecution to prove the following ingredients under section 203 of the Penal Code.

- 1. That the deceased Peter Nyonyi Marona died.***
- 2. That his death was unlawful.***
- 3. That in the accused causing death he did it with malice aforethought.***
- 4. That the accused has been positively identified as the perpetrator and placed at the scene of the murder.***

In the case of ***Woolmington v DPP [1935] AC*** the House of Lords stated inter alia on burden of proof in criminal cases as follows:

**“That it is the duty of the prosecution to prove the prisoner's guilt subject to the defence of insanity and other statutory exception. If, at the end and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case against the prisoner.....”**

The proposition was strengthened in the case of *Sekitoliko v Uganda [1967] EA 531* where the court held that the prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence case.

It is therefore necessary evaluate the evidence visa viz each of the ingredients of the offence to test whether that burden of proof of beyond reasonable doubt has been discharged by the prosecution.

### **1.The death of the deceased.**

According to PW1, PW2 and PW3 on 28/1/2013 at 7 pm a voice identified as similar to that of the deceased was heard from his house. PW1, PW2 and PW3 all from different locations rushed to the scene and found the deceased on the ground motionless. PW9 and PW10 visited the home confirming the death and took action of transporting the body to Kajiado Hospital Mortuary. PW8 conducted a postmortem which revealed that the deceased died of massive haemorrhage due to the stab wound. PW5 and PW6 identified the deceased body positively to the pathologist. The accused in her testimony also attest to the fact that her husband died on the 28/1/2013. All these evidence taken together proves the death of Peter Nyonyi Marona beyond reasonable doubt.

### **2. The death of the deceased being unlawful**

The general principle on this ingredient is well illustrated in the case of *Mohammed & 3 Others v Republic [2005] 1KLR* where the court stated thus:

**“That a person may not be convicted of a crime unless it is proved beyond reasonable doubt both that he had caused, a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs which is forbidden by criminal law, and that he had a definite state of mind in relation to the causing of the event or the existence of the state of affairs.”**

See also *Criminal Law by W. Musyoka J at chapter 3 at pg 27.*

**“The criminal responsibility on the part of an accused person which the prosecution must prove gives rise to two elements commonly referred to as *mens rea* and *actus reus*.**

On this principle the court stated as follows in the case of *Emma D/O Mwadiko v Republic [1976]*

**“That however harmful or reckless an act may be, it does not constitute an offence unless the law has forbidden it.”**

Applying this legal principle to this case, it is not all murders that are considered criminal. The law has exempted certain cases of homicide from being unlawful where the circumstances leading to the death are in defence of self, property or accident or in execution of a sentence of the court. This proposition in law is well enunciated in the case of *Gusambizi Wesonga v Republic [1948] 15 EACA* the court held interalia:

**“Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”**

The prosecution evidence on this ingredient was that on the material day the deceased and accused person were together in their house at Maile 46. PW1, PW2, PW3 heard the voice of the deceased screaming. They responded by rushing to the house. The deceased had been fatally assaulted with a knife which was next to his body. PW4 received the accused at the police station who reported to have stabbed her husband to death. PW8, PW9 and PW10 from the police station Kajiado also rushed to the scene and took the body to the mortuary for a postmortem. PW8 confirmed on examination and conducting a postmortem

that, the cause of death was a penetrating stab wound on the chest caused by a sharp object. The government analyst PW7 analysed the blood stained knife recovered from the scene and confirmed that the DNA profile generated from the knife matched the blood sample of the deceased.

What the evidence reveals is that the deceased death was an assault through a third party. The act of killing the deceased was unlawful and no evidence has been adduced to bring it within any of the exceptions recognized by law.

I therefore find that the prosecution has proved beyond reasonable doubt that the death of the deceased was unlawful.

### **3. The third ingredient is in respect of malice aforethought.**

Malice aforethought has been defined in section 206 of the Penal Code as constituting any 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.***

***(c) An intention to commit a felony; and***

***(d) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.”***

The reading of section 206 introduces the respect of the unlawful act on the part of the offender which is intended to cause grievous harm or death of another person. The prosecution is therefore required to prove intention on the part of the perpetrator in order to prove the offence of murder under section 203 of the Penal Code.

Under section 231 of the Penal Code – grievous harm means inter alia, ***“any harm which amounts to maim, disfigure or disability, unlawful wounds or unlawful attempts in any manner to strike any person with any kind of projective or with a spear, sword, knife or other dangerous or offensive weapon or.....is guilty of the offence.....”***

Section 231 also recognizes the element of intent on the part of the assailant who causes harm on another person. This is what the court is called upon to determine whether in causing death the accused had the necessary intent and knowledge that her action will result in the death of the deceased.

The element of intention and knowledge of probable consequences under section 206 has been discussed by the superior courts in the following cases; ***Philibert v Republic [1976 – 1985] EA 477***. In this case the appellant was found to have had an intention to kill the deceased and therefore had malice aforethought by stabbing him in the chest, an area where the heart is situated, which is by all standards a very dangerous place to stab with a knife. In ***Ogeto v Republic [2004] 2KLR 14*** the Court of Appeal in the circumstances where the appellant chased the deceased and another person, caught up with the deceased and stabbed him with a knife on the chest resulting in the death from the stab wound the court held inter alia that by the provisions of section 206 (a) of the Penal Code malice aforethought is deemed to be established by evidence showing an intention to cause death or grievous harm.

In ***Republic v Mazabia bin Mkomi [1941] EACA 85*** the Court of Appeal observed that where the appellant killed his friend with an arrow at a close range in the rear and there was no motive, provocation or insanity he was guilty of murder. In ***Republic v Tubere S/O Ochen 12 [1945] EACA 63*** the court held that malice aforethought can be inferred on any of the following circumstances: the use of the lethal

weapon used, the manner in which it was used, the part of the body targeted and injured, the conduct of the accused prior to the incident, during and after the attack take place. In *Republic v Chebiegon Arap Cheron & Another [1933] 15 KLR* the court held that, ***“malice aforethought is established when death is caused with an intention to commit a felony is evidenced and when the felony involve employment of violence against the person killed.”***

At the close of the trial Mr. Nyaata submitted that the prosecution did not prove malice aforethought on the part of the accused. In appraising the evidence it is not in dispute that the deceased and accused stayed together as husband and wife in the same house where he was killed.

It is not in dispute that PW1, PW2 and PW3 heard the deceased voice prior to his death. The nature of the voice was one of distress prompting them to visit the scene. The deceased was confirmed to have died from the stab wound at the chest. The murder weapon a knife produced as exhibit was left next to the body of the deceased. PW8 conducted the postmortem and on examination the deceased had sustained penetrating wound on anterior front of thoracic cavity, perforation of the upper lobe of right lung. This injury according to PW8 cause of death was massive haemothorax and penetrating lung injury.

It is this evidence one draws an inference of malice aforethought on the part of the assailant (accused) in this case. PW4 clearly stated before this court that the accused voluntarily surrendered to the police station with information that she had stabbed the deceased to death. PW9 and PW11 sufficiently corroborate the testimony of PW4 on how the accused was arrested immediately after the incident. The blood stains on the knife and the T-shirt matched that of the deceased as evidenced by the government analyst PW10. That corroborates the prosecution case that the knife recovered at the scene was used to inflict the injuries upon the deceased. It is astonishing to say the accused after the incident took flight from the scene only to surrender at Maile 46 police post.

There is cogent evidence from PW1, PW2, PW3, PW9 and PW11 that the deceased upon being stabbed was left at the scene lying in a pool of blood. The accused was only examined immediately after the offence and was certified to be of good mental status by PW8. The deceased was a husband to the accused and yet after occasioning the injuries she did not bother to take him to the hospital or call for any assistance from the neighbourhood. This court has not been told whether the accused suffered from any mental infirmity or errors of memory to impair her judgement before, during or after assaulting the deceased. There is very little in this case to indicate the nature of the domestic quarrel or fight between the deceased and accused before his death. Similarly the accused never alluded to any altercation or fight with the accused.

As a result there is nothing for this court to go by to draw any inference on the matter. It is not possible for me to presume that the accused in killing the deceased was suffering from diminished responsibility in situations categorized under section 208 (1) of the Penal Code or she acted under provocation as provided for under section 207 of the Penal Code (Cap 63 of the Laws of Kenya). From this evidence it does not appear to me that the accused was at anytime under the influence of alcohol, insanity, acted in self defence, provocation or diminished responsibility. I am therefore satisfied that the prosecution has established malice aforethought on the part of the accused in causing the death of the deceased.

I now turn to the question of the defence case more specifically an alibi defence put forth by the accused. It is trite that the prosecution has the burden to the guilt of an accused person beyond reasonable doubt. It is not the defence or accused duty to prove his innocence. See *Miller v Minister of Pensions [1947] 2 ALL ER 372*. In the case of *Victor Mwendwa Mulinge v Republic [2014] eKLR* the Court of Appeal discussed this issue and stated as follows:

***“It is trite law that the burden of proving the falsity; if at all, of an accused’s defence of alibi lies on the prosecution.”***

See *Karanja v Republic [1983] KLR 501*. This court held that:

***“In a proper case, a trial court may in testing a defence of alibi and in weighing it with all***

**other evidence to see if the accused's guilt is established beyond reasonable, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigations and thereby prevent any suggestion that the defence was an afterthought."**

The Court of Appeal further in the case of *Kiarie v Republic [1984] KLR* held thus:

**"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby "assume any burden of proving that an answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge erred in accepting the trial magistrate finding on alibi because the finding was not supported by any reasons." It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi."**

The courts have also addressed the issue on how to treat alibi defence. In the case of *Republic v Sukha Shigh S/O Waziri Shing & Others [1939] 6 EACA 145* the Court of Appeal for Eastern Africa held as follows:

**"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."**

In the present case the accused never raised the alibi defence before or during the trial. The prosecution was not therefore given a chance to investigate the defence or seek an adjournment to adduce evidence in rebuttal. It is my singular duty to scrutinize and consider the evidence in totality to satisfy myself whether the prosecution has proved the case against the accused beyond reasonable doubt.

Considering the sequences of events PW1, PW2 and PW3 testimonies was categorical that the murder of the deceased took place on or about 7 pm at night. PW4 a police officer at Maile 46 testimony confirmed that the accused submitted herself to the police station after half an hour from the time PW3 reported the incident. According to PW3 at about 7.00 pm he heard screams and cries from the deceased house. In computing time as deduced from the evidence of PW1, PW2, PW3 and PW4 with the accused alibi there is no dispute that she was at the scene of the murder from 7.00 pm. The time description given in her defence between 4 – 6.00 pm is outside the period when the deceased was allegedly murdered. The proximate time in relation of when the offence was committed and accused report to the police post at Maile 46 squarely places her at the scene of the crime. This is a case where PW4 arrested the accused upon arrested. He placed her in police cells. The testimony of PW4 has been corroborated by that of PW9 and PW11.

The question of importance on this aspect of alibi defence is whether the evidence led was such as to justify a conclusion that the accused was not at the scene of the murder. In my analysis i am of the considered view that the evidence by the prosecution has reached the degree of certainty required to positively identify the accused as the perpetrator of the offence in which the deceased lost his life. The alibi defence though belatedly introduced to the case has not controverted nor impeached the testimony by the prosecution witnesses. The defence of alibi though put after four years since the commission of the crime cannot be said to be credible to create a doubt in the mind of the court in order to resolve the matter in favour of the accused. The prosecution witnesses who already testified displace the alibi defence raised by the accused.

What can be drawn from the entire evidence is that the prosecution presented circumstantial evidence of a nature to draw an adverse conclusion against the accused person beyond reasonable doubt. In **Sarkar on Evidence 15<sup>th</sup> Edition reprint [2004] at 66 – 68** the author has stated as follows on what constitutes circumstantial evidence:

**“(1) That in a case which depends wholly upon circumstantial evidence, the circumstances must be such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.**

**(2) That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt; otherwise the accused must be given the benefit of doubt.**

**(3) That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred thereof.**

**(4) Where circumstances are susceptible of two equally possible inferences the inference favouring the accused rather than the prosecution should be accepted.**

**(5) There must be a chain of evidence so far complete as not to leave a reasonable ground for a conclusion therefrom consistence with the innocence of the accused, and the chain must be such human probability. The act must have been done by the accused.**

**(6) Where a series of circumstances are dependent on due another, they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.**

**(7) Circumstances of strong suspicion with more conclusion evidence are not sufficient to justify conviction, even though the party offers no explanation of them.**

**(8) If combined effect of all the proved facts taken together is conclusive in establishing the guilt of the accused/conviction would be justified even though any one or more of those facts by itself is not decisive.”**

In applying these principles to the instant case i am satisfied that there is a nexus between the accused and fatal injuries sustained by the deceased. There is cogent and credible evidence that the accused turned herself to the police after the murder. The accused failed to take measures by calling for help, taking the deceased to the hospital or administering first aid on realizing the folly of her actions. The accused also used a lethal weapon and targeted a vulnerable part of the body herein the chest which diminished any chances of survival of the deceased.

I find no co-existing circumstances which would weaken or destroy the evidence placed before me by the prosecution. In the result i find the accused guilty of the charge of murder contrary to section 203 as read with section 204 of the Penal Code and do convict her accordingly.

**Dated, delivered in open court at Kajiado on 31<sup>st</sup> day of January, 2017.**

.....

**R. NYAKUNDI**

**JUDGE**

**Representation:**

Accused - present

Mr. Akula Senior Prosecution Counsel – present

Mr. Nyaata for the accused - present

Mr. Mateli Court Assistant - present