



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 86 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

DESMOND MUKHAYA MULUSA.....ACCUSED

JUDGEMENT

Introduction

Desmond Mukhaya Mulusa, hereinafter “the accused” has been in custody for about nine years. He was arraigned in court to answer to a this charge on 29th November 2007. His case came to a conclusion on 14th December 2016 when I took evidence from the last defence witness.

The accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the night of 19th and 20th May 2007 at Kawangware 56 within Nairobi Province (as it was then) he murdered Mary Tsisika (the deceased). He pleaded not guilty to the charge.

I took over the proceedings in this case at the defence stage after the case was assigned to me. Directions were given that the case should proceed from where the previous judge had left it which was at the defence stage.

From the record of proceedings, I have noted that the hearing of this case did not commence until 8th May 2012, five years after the accused first appeared in court. My predecessor, Hon. Mr. Justice Nicholas Ombija took evidence from all the eleven (11) prosecution witnesses and made a ruling that the accused had a case to answer thereby placing the accused on his defence. Before Justice Ombija could take the defence case the accused expressed his desire to have another judge handle the matter.

I have read the record to acquaint myself with the proceedings so far and to understand the reasons for the delay in concluding this matter. It is unfortunate that a trial can take this long without the court intervening to ensure that the matter is expeditiously determined and that it does not unnecessarily drag on for long in order to safeguard the rights of the parties. The main reasons for the delay as far as I can discern from the record are numerous and include failure to attend court by defence counsels and sometimes prosecution counsels; change of defence counsels and the delay in determining a preliminary application by the accused. It took almost one year to canvass and determine that preliminary application!

Three defence counsels, all instructed by the court on pro bono basis, have handled this matter on behalf of the accused. On the part of the court, I have noted that the case has changed hands from one judge to another. I am the fourth judge in a span of 9 years to handle this case. It is my view that judges and judicial officers ought to actively take charge of court proceedings and manage trials in a way that ensures

that cases do not stall and that justice is expeditiously dispensed. Judges and Judicial Officers cannot afford to take a passive role on matters that touch on peoples' rights and to some extent lives as this would defeat the very letter and spirit of the Constitution which we have all taken oath to protect and defend.

The prosecution case

The prosecution presented a straight forward case. On the night of 19th and 20th May 2007, Mary Tsisika, the deceased, and the accused were at the home of the deceased playing a game of cards and drinking alcohol. The deceased was married to Benson Shikokoti, PW3. The Bensons lived in Kawangware 56 in a one-roomed house made of iron sheets. It was partitioned with a curtain perhaps to separate the sitting area from the sleeping area. Benson was away at work as a night guard on that material night. It is Benson who had introduced the accused to his wife Mary. The accused, described as a job seeker, stayed with the Benson family for nine months. That evening the accused had not arrived at Benson's home by the time Benson left to work. He had not been at Bensons for three days before the incident occurred.

M N, PW1, aged about ten (10) years at the time (M), was at home with her mother the deceased and the accused. She went to bed about 9.00pm leaving the accused and the deceased drinking alcohol and playing cards. She was woken from her sleep at about 5.00am by screams from her mother the deceased. M told the court that the deceased was calling her to help because the accused was killing her using a knife. M saw the accused sitting on her mother holding a knife. She tried to intervene and stop the accused from assaulting the deceased and in the process she was cut on the right thumb.

PW1's screams attracted neighbours including Martin Wanyonyi, PW2 (Martin). Martin told the court that by the time he arrived at the house of the deceased, he found her still talking and she told him that Msongareri had cut her. Msongareri is the accused's nickname. Martin went out to call other neighbours and by the time he returned to the house of the deceased about five minutes later, the deceased was dead. He assisted M to go to Steven Musila Kalimoni's (PW4) house (Steven). Steven lived at Kawangware Stage 2.

The matter was reported at Muthangari Police Station. Police visited the scene and removed the body of the deceased to the City Mortuary. The accused was arrested on 21st May 2007 by Administration Police Officers from the District Officers' Office in Kibera. One of the arresting officers is APC Jonel Mutwiri, PW5. APC Mutwiri told the court that a Good Samaritan informed him about a murder suspect and led him to where the suspect was. The arrested suspect is the accused who was then handed over to police at Muthangari Police Station. He was charged with this offence.

The Defence Case

Desmond Mukhaya Mulusa, the accused, testified under oath and called one witness. He told the court that on 19th May 2007 he had gone to see the deceased whom he referred to as his cousin. He said he found her in a bar about 300 yards from her home. He said that the deceased asked him and one Steve to assist her to carry some chang'aa to her home and that at about 7.30pm they went to the home of the deceased and started taking chang'aa and playing cards. He said that they found the house closed from outside and M, whom he referred to as sister to the deceased, sleeping inside. He said that they stayed in that house until 8.30pm and left together with Steve with the deceased escorting them to the Matatu stage. He said that they both boarded a Matatu and left and that Steve alighted at Kongo Stage and he alighted at Yaya Stage to board a connecting Matatu to Kibera.

He further narrated how he was arrested on 21st May 2007 by two Administration Police Officers from Kibera Chief's Camp. He said the police officers who found him talking to his sister-in-law on the roadside near the Chief's Camp, took him to Kibera Chief's Camp where he was told to sign a pre-recorded statement whose contents he did not know and that he was taken to Muthangari Police Station where he stayed in custody for a long time.

He denied that the deceased was married to PW3 and said that PW3 had lied to court about this. He

referred to M as deceased's sister. He said the deceased was his cousin and that he had known her for 20 years and that he used to visit her often. He denied that he was present when deceased was killed and said that PW3 lied to the court when he stated that he (the accused) had lived with them for nine (9) months before this incident. He also said that M had lied to the court in stating that he (the accused) attacked the deceased and cut her neck.

Anthony Chilaka Khiranga, DW2, told the court that he lived near the deceased and that on 19th May 2007 he arrived home at 6.00pm; that the Caretaker left him with the gate key and asked him to open for anyone who wanted to get in or leave; that the deceased's house was opposite his and he saw three people arrive around 7.30pm talking normally; that the three were a woman, Steve and the accused and that they left as though they were going to buy vegetables. He said that the woman returned at about 11.00pm with another person whom he (DW2) had not seen before and that the woman did not want him (DW2) to know what was going on. He said he opened the gate for her but did not open the gate for the woman and the person to leave. He said that he heard a child screaming at 4.00am at night but did not bother but continued sleeping; that someone knocked at his door and asked for a torch; that he opened the door and saw it was Wanyonyi and that Wanyonyi did not tell him what had happened. He said he followed Wanyonyi to woman's house and entered; that he saw the woman's body with the head cut off. DW2 identified the woman as Mary his neighbour. He said police did not call him to record statement.

After the closure of defence case, parties agreed to prepare written submissions in support of their respective cases. On 21st December 2016 when this matter was mentioned to confirm that the submissions are in the file, only the prosecution had filed their submissions. By the time of writing this judgement on 2nd January 2017, the defence had not filed their submissions. Despite this failure, this court will proceed to write the judgement and base its reasoning on the law and the evidence on record. The prosecution submitted that they have proved the case against the accused beyond reasonable doubt.

Analysis and Determination

Section 203 Penal Code creates the offence of murder. It states that **“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”** The penalty for murder is death as provided under **Section 204 of the Penal Code**. The burden to prove that death of a person has occurred; that the death was caused by a person before the court (the accused); the unlawful act or omission causing that death and the intention to cause that death on the part of the person causing the death, lies on the prosecution. The standard of proof is beyond reasonable doubt.

Did the death of the deceased in this case occur and if so was it an unlawful death?

The answer is yes. Evidence which this court finds irrefutable is that Mary Tsisika died on the night of 19th and 20th May 2007. PW1 and PW2 testified that the deceased died shortly after she was assaulted. Police Constable David Wanyonyi, PW7, from Muthangari Police Station testified that: **“On entering we found the body of the deceased lying on the floor with a deep cut at the back of the neck”**, in reference to the visit of the scene of the crime on 20th May 2007 at about 5.30 am. Corporal Livingstone Kihanda, PW10, testified that on 20th May 2007 at about 9.20am he visited the scene of crime at Kawangware in company of other police officers. He said that **“The deceased was lying on a mattress with several cut injuries. The rear side of the neck had cuts. She was lying in a pool of blood.”** PW10 took 7 photographs which have been produced in court as Exhibits 1(a) to 1(g).

Dr. Peter Muriuki Ndegwa, PW9, medically confirmed the death of the deceased. He examined the body of the deceased at the City Mortuary on 10th July 2007. At the time of the examination, the body was partially decomposed. The doctor found that the head had been decapitated from the back with neck vessels severed. His opinion was that the cause of death was decapitation using a sharp force trauma. The post mortem report was produced in evidence as Exhibit 2.

Having considered this evidence, I have no doubt in my mind that the prosecution has discharged the onus of proving the act of death by unlawful act, decapitation, beyond reasonable doubt.

Who killed deceased?

This is the next issue to be determined by this court. PW3 was not at home the day his wife Mary was killed. M, the daughter of the deceased and PW3 was at home. She was aged 10 years at the time. By the time she testified first on 8th May 2012 M must have been about 15 years. Her evidence was taken by my predecessor and therefore I did not have the advantage of observing her demeanor as she testified. Her evidence nevertheless appears clear, cogent and consistent.

At the age of 15 years, M was not a child of tender years to require administration of a *voir dire* examination by the court. See **Kibangeny Arap Kolil v. Republic (1959) EA 92** where the Court of Appeal stated that:

“There is no definition in the Oaths and Statutory Declarations Ordinance of the expression in ‘child of tender years’ for purposes of Section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age, of under fourteen years; although as was said by Lord Goddard, C. J., in Republic vs. Campell (1) (1956) 2 ALL ER 272 ‘where a child is of tender years is a matter of good sense of the court.....’ where there is no statutory definition of the phrase”.

M knew the accused. Her mother the deceased also knew him. Her father PW3 knew him and according to his evidence he is the one who had introduced the accused to his family. Benson said that the accused lived with them for 9 months before this incident. M told the court that the accused had lived with them for a long time before this incident. It is not clear where the accused slept when he stayed with the Bensons given the house was a 10-foot-by-10-foot one single-roomed with a curtain partitioning it. M said she slept on a mattress on the floor. M went to bed and left the deceased and the accused playing cards and drinking. Maureen did not mention any other person in company of her mother and the accused. M did not mention that the deceased left the house and came back later. It can be argued that M may have missed all the alleged movements of goings out and comings in because she was sleeping.

M testified that she heard the deceased call: **“M, M, help me. Msongareri is killing me.”** Her evidence that Msongareri referred to the accused and that he stayed with them was confirmed by her father Benson who told the court that he had met Desmond Mukhaya alias Msongareri in 2006 and had welcomed him to his home. Benson said the accused had not been home (at Bensons) for three days prior to the incident. Benson further told the court that on 19th May 2007 as he was heading to work at Kibera as a night watchman he saw the accused at a distance walking towards his (Benson’s) house but they did not talk.

PW2 Wanyonyi told the court that M told him that Msongareri had cut the deceased’s throat. Wanyonyi said he found the deceased still alive and that she could talk. He said that the deceased told him that Msongareri had cut her throat. It is not clear whether indeed the deceased could coherently talk given the grievous injuries she had sustained on her neck.

I have considered this evidence against that of the defence. The accused admits that he was at the Bensons the night of 19th and 20th May 2007. He however claims to have left with one Steve escorted by the deceased. A new twist to the tale was introduced by DW2 Anthony who said the deceased came back with another man after she left with Steve and the accused. It is not clear whether the Steve mentioned here is the same one who testified as PW4. Steven Musila Kalimoni testified to hearing a knock at his door around 5.00am when Maureen was taken to his house after the deceased was attacked and killed.

I find the evidence of the accused and his witness doubtful. I am alive that the law does not place the onus of proving his innocence on the accused. However, his evidence that he had known the deceased for 20 years, that the deceased was not married to Benson and that M was deceased’s sister is contrary to what M, Benson, Steven and Wanyonyi testified. Further, Anthony’s evidence does not add up. The evidence he introduced that the deceased went back with another man was not supported by the evidence of the accused. I have also noted that the defence did not cross examine M, Benson, Wanyonyi and Steven on the evidence adduced by the defence witnesses: that the deceased escorted the accused and Steve and returned with another man; that she was drinking and playing cards with the accused and one Steve. In

my view therefore, this is an afterthought by the accused and his witness. Anthony said that from his house which was opposite that of the deceased he could see deceased, Steven and the accused at 7.30 pm. Given that he said he was opening and locking the door for anyone entering or leaving, Anthony forgot to tell the court that he opened the door for the three to enter. By stating that he could see them from his house, it means that he did not open for them to enter or leave as he claimed.

Evidence by the prosecution as well as the defence places the accused at the scene of the murder on the evening of 19th May 2007. Anthony did not seem keen to tell the court that he opened the door for the accused, deceased and Steve to enter come in that evening. He only seemed keen to tell the court that he opened for them when they were leaving the place and when Mary allegedly returned with another man.

The evidence against the accused, especially the evidence of the actual assault on the deceased, is partially circumstantial and partially direct. Court was told that the room was dark but M heard the deceased calling her and telling her Msongareri was killing her. M saw the accused sitting on Mary holding a knife described as the kitchen knife the Bensons used to chop vegetables. M said she held the deceased to stop him from cutting the deceased and in the process she was cut on the right thumb. This injury was confirmed by Steven. By the time Wanyonyi arrived, the accused had left. In my considered view, any gaps in evidence left by virtue of lack of sufficient light in the room are filled in by evidence by M that the accused was the only person drinking and playing cards with Mary on the fateful night. Further evidence in favour of the prosecution case is the confirmation by the accused and Anthony that the accused was indeed at the Bensons that night.

I am satisfied, after careful consideration of all the evidence, that the evidence in this case points irresistibly to the accused person to the exclusion of any other person as the person who inflicted fatal wounds on the deceased leading to her death. I find no co-existing fact or circumstances which may weaken or destroy the inference of guilt on the part of the accused person. See **R. v. Kipkering Arap Koske (1949) 16 EACA 135.** I find the identity of the accused as the person who assaulted the deceased proved beyond reasonable doubt.

Did the accused intend to kill the deceased?

The final issue for determination is whether the accused in assaulting the deceased and inflicting fatal wounds on her, had formed the intention to kill her. Malice aforethought is defined under Section 206 of the Penal Code to include: (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; and (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.

The injuries inflicted on the accused were fatal. Evidence shows that the accused was seen sitting on the deceased holding the knife and **“slaughtering her like chicken”** in the words of M. In my considered view, one does not cut another on the neck in the manner the accused did in this case without the intention of causing the death of or grievous harm to the victim. The culprit cannot plead ignorance that such an act would cause the death of or to the very least cause grievous harm to the victim. I find that malice aforethought on the part of the accused has been established beyond reasonable doubt.

In conclusion of this matter therefore, it is my finding, and I so hold, that the accused’s defence is an afterthought and the same is hereby rejected. I find, and so hold, that the prosecution has proved all the ingredients of murder against the accused person Desmond Mukhaya Mulusa beyond reasonable doubt. This court therefore finds his guilty of murder and enters conviction against the accused for the offence of murder. It is so ordered.

Dated, signed and delivered this 19th day of January 2017.

S. N. Mutuku

Judge