



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 5 OF 2015

REPUBLIC

VERSUS

L O O

JUDGEMENT

The accused person is 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 the accused, on the 17th day of February, 2015 at Malindi sub-County within Kilifi County murdered V A.

The prosecution summoned seven witnesses in support of its case. PW1 R A O is the deceased's elder sister. On 17th February, 2015 at about 2.00 pm she was at the deceased's place watching TV while the deceased was cleaning the house. Someone entered the house and held the deceased by the neck using one hand. The person was the accused. PW1 realised that the accused had stabbed the deceased twice on the stomach. He also stabbed her on the right arm near the shoulder. PW1 ran to the bedroom. The deceased and the accused fell on the bedroom floor. PW1 who had run into the bed room jumped out of the room and ran out screaming. A neighbor (PW4) was standing outside. The accused ran away. The deceased could not talk and was bleeding. The deceased was taken to Malindi District hospital but passed on. PW1 was also treated at the hospital. She did not know the accused before that date. PW1 later came to know that the accused was the deceased's boyfriend.

PW2 J A O is also the deceased's elder sister. On 17th February, 2015 she was at the beach when PW1 called and informed her that the deceased had been stabbed by someone. She went to Malindi District hospital and found the deceased had already died. She found PW1 being treated at the hospital. While at the hospital the accused was brought on a tuk-tuk. She knew the accused. She had seen the accused in Bondo where she had visited the deceased. While in Bondo, the accused threatened them and was charged in court. The case was withdrawn as the deceased was pregnant at that time. The deceased did not tell her that the accused was her boyfriend. The deceased used to work in Bondo. She relocated to Malindi in November, 2014.

PW3 DR. ABDUL AZIZ MITWANI was stationed at the Malindi District hospital. He produced a postmortem report conducted by dr. Muumin on 19th February, 2015. The deceased was stabbed severally. She was aged 22 years. There was a penetrating wound through the left nipple which penetrated the left apex of the lung. The cause of death was massive haemorrhage and cardiopulmonary failure secondary to the penetrating wound.

PW4 RODGERS NGALA CHOME was the deceased's neighbor at Ngala Estate. On 17th February, 2015 he was in his house resting at about 1.45 pm. He heard his neighbor quarrelling in their home. He knew only three ladies used to live in that house. He heard a male voice. He went near the house. He heard someone saying **“Jirani njoo usaidie amedunga dada yangu – My neighbor come and assist, my sister had been stabbed”**. He saw PW1 coming out of the house bleeding. Shortly, a man came out running and went out of the gate. PW4 screamed while chasing the man. After chasing him for about one kilometer, the man fell down. PW4 asked the man who turned out to be the accused if he had a knife and the accused said he didn't. The accused's T-shirt had blood. The accused opened his chest and his intestines were coming out. The accused was taken to Malindi hospital on a tuk tuk. Two days earlier, PW4 had seen the accused knocking at the deceased's door but he walked away. He had previously seen the deceased talking to the accused several times at a nearby house that was under construction.

PW5 P.C. ANDREW WEKESA was stationed at Malindi police station. He investigated the case. On 17th February, 2015 he was at the Malindi police station at about 2.30 pm when PW4 reported the incident. He went to Malindi District hospital and saw the deceased had already passed on. The deceased had a stab wound on the left side of the breast. There was no other injury. He also saw PW1 with a wound on her armpit. PW1 informed him that the accused entered the house and started assaulting the deceased. PW1 was stabbed while trying to separate the two.

PW5 visited the scene. The permanent house had a bedroom, a kitchen and a sitting room. There was blood on the sitting room, the seats, floor and on the way to the bedroom. They recovered a knife near the bedroom door. He took the deceased's clothes and knife to the Government analyst. His investigations revealed that the deceased and the accused were initially married. The accused was at one time charged in Bondo Court for threatening the deceased's life. It is his evidence that the accused told him that he wanted to kill himself.

PW6 GEORGE LAWRENCE OGUDA is a Government Analyst based at the Mombasa Government Chemist. He received three blood stained exhibits namely the deceased's dress, bra and a knife. He generated DNA profiles on the dress and bra and they matched those from the knife. PW7 Chief Inspector of police BENARD MULINGE KILONZO was stationed at the Malindi police station. On 13th March, 2015 he was asked by PW5 to conduct an identification parade. The accused was identified by PW4, Roders Chome.

In his unsworn defence, the accused testified that the deceased was his wife. The deceased used to live in Kisumu. The accused was working at his sister's m-pesa shop in Mombasa. He asked the deceased to come to Malindi where her sisters were. The deceased came to Malindi. He visited his wife in the company of his brother in law. They were received well. The deceased's sister agreed to open an M-pesa shop for him. He paid a deposit for a house in Malindi where he was to move in with his wife. He re-located from Mombasa to Malindi. A small M-pesa shop was opened in Malindi near the Watamu bus stage.

It is his evidence that he used to stay in the house where he had paid rent. Since there was no furniture, the deceased was staying with her sisters. She would visit him in their house and go back to stay with her sisters. The deceased was H.I.V. positive. He used to go with her to hospital and assist her in getting her drugs. On the material day, he went to where the deceased was staying. The deceased asked him to take her to hospital to take her drugs. They went there and returned to her sister's place. Their child was crying. He asked her to give the child milk. The deceased found the milk in the thermos had gone stale. The accused went to a shop and bought milk. On returning, he found the deceased breast feeding the child. He told the deceased that she had been advised by the doctor not to breastfeed the child as the child had started developing plastic teeth. The deceased did not take it positively. The deceased gave him the child and threw the milk to him. He slapped the deceased.

The accused further testified that the deceased was near a sink. She picked something and stabbed him on the stomach. He realized it was a knife. He removed the knife and his intestines were coming out. He was annoyed and confused and started pushing each other. Someone went in and held him while screaming. He turned and unfortunately cut that person with the knife. He lost consciousness. After

three days, he became conscious and found himself in hospital. He had a bandage on his stomach and had handcuffs. He was told by the police that his wife had died. It was not his intention to kill the deceased. He was later charged with the offence.

The main issue for determination is whether the accused committed the offence of murder as charged. The evidence on record does prove that the deceased died of a single stab wound. Although PW3 testified that the deceased was stabbed severally, PW2 and PW5, the investigating officer, only saw one stab wound on the deceased's body. PW3 was reading from the portion of the post mortem report filled by the police. The post mortem's external findings were that the deceased had a penetrating stab wound about 3.8 cm through her left nipple extending deeply to the breast tissue.

The only eye witness is PW1. Her evidence is that the accused entered the house and held the deceased by the neck using one hand. PW1 did not testify that the accused was holding a knife on the other hand. Unfortunately, the knife was not produced in court when PW1 was testifying for PW1 to identify it and inform the court whether the knife was theirs or came with the accused. PW1 ran to the bedroom and started screaming. From the evidence of PW1, it is not clearly stated how the accused stabbed the deceased with a knife. According to PW1, she realized the accused had stabbed the deceased twice on the stomach. The deceased was only stabbed once on the breast area of the chest and not twice on the stomach. The picture painted by PW1 is that she did not watch the scuffle between the deceased and the accused. She was stabbed and ran to the bedroom. The deceased and the accused were struggling with each other and ended in the bedroom. Both of them fell down near the bedroom. PW1 jumped out of the bedroom and ran away.

According to the investigating officer, the accused told him that he wanted to kill himself since his wife had died. PW5 is a police constable. There was no statement of the accused under inquiry that was produced in court. The evidence of PW5 that the accused stabbed himself cannot be held to be true. The evidence shows that there was blood from the sitting room up to the way leading to the bedroom. The accused and the deceased ended in the bedroom. This is not a picture whereby the accused was chasing around the deceased. What can be deduced from the evidence is that the two were fighting. According to the investigating officer, PW1 told him that she was stabbed when she tried to separate the two. This means the two were holding each other.

The accused's defence is that he was with the deceased that time. There is evidence to the effect that the deceased was pregnant and that is why she opted to withdraw the case against the accused in Bondo. This was in around July 2013. PW2 visited the deceased in Bondo and stayed with her for three weeks but did not see the accused. The accused's evidence is that he was working in Mombasa and asked the deceased to come to Malindi. PW4, Rodgers Chome testified that he used to see the accused and the deceased talking several times. Although the accused gave unsworn evidence, the evidence seems to be credible as it is in tandem with the prosecution evidence. It is the accused's evidence that he used to visit the deceased at her sister's place. The deceased went to Malindi in December, 2014. The child the accused had with the deceased was about one year old as per the accused's evidence. PW1 knew her sister used to have a boyfriend. She later came to realise that the accused the boyfriend.

The offence of murder is premised on the presence of malice aforethought. The evidence on record proves that the deceased and the accused had a child together. According to PW4, he saw the two talking several times. I do not find that the accused went to the deceased's place with the intention of killing her. Even if the accused had threatened the deceased, that is not enough evidence to prove that the accused all along wanted to kill the deceased.

The evidence on record does not prove that the accused went to the deceased's place with a knife. I am satisfied that the deceased and the accused started fighting after the accused had slapped the deceased. It is possible that it is the deceased who took the knife from the sink and started to stab the accused. The accused removed the knife and stabbed the deceased in return. The end result is the deceased's death. The accused is entitled to the benefit of doubt as PW1 did not witness the stabbing. The accused acted in self defence but the end result was the death of the deceased.

I do find that there was no intention to kill the deceased. The incident occurred abruptly and the deceased was stabbed after she had stabbed the accused. The prosecution has not proved beyond reasonable doubt that the accused had malice aforethought.

It is not in doubt that the deceased died out of the injuries inflicted by the accused. It is my finding that the accused caused the death of the deceased. Although he was acting in self defence, he was the cause of the deceased's action after having slapped her. The accused testified that he was annoyed after he was stabbed by the deceased. He acted at the heat of passion and stabbed the deceased in return. The accused caused the death of the deceased but it was not his intention. The accused is not found guilty of the offence of murder but is found guilty of the offence of manslaughter.

In the end, the accused is acquitted of the offence of murder as charged. The accused is found guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and is convicted of that offence.

Dated, signed and delivered in Malindi this 20th day of March, 2017.

S.J. CHITEMBWE

JUDGE