REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 27 OF 2015

REPUBLIC...PROSECUTOR

Versus

JOHN NDUNDA MUTUNGA.................................ACCUSED

JUDGEMENT

JOHN NDUNDA MUTUNGA, the accused in this matter stands charged 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 charge being that on the night of 30/7/2013 the accused while at Kitengela township within Kajiado County murdered Eunice Syombua Mutunga, herein referred as the deceased.

The accused pleaded not guilty to the charge. He was represented at the trial by Mr. Kamolo advocate while the prosecution was conducted by Mr. Alex for the state.

The prosecution called eight (8) witnesses to testify and prove the guilty of the accused person beyond reasonable doubt. The evidence at the trial can be briefly summarized as follows:

On the date of the incident 30/7/2013 PW4 a neighbour to the deceased and accused person told this court that a fight broke between them at about 10.11 pm. PW4 further testified that the accused beat the deceased continuously which was able to hear in view that both houses are build of iron sheets. In the course of that night PW4 heard and witnessed the accused throwing the deceased out of the house in order to appreciate the gravity of the incident. PW4 stated that she went out of her house and saw the deceased slated at the door step in fear of the threats issued by the accused. PW4 restrained herself from making any move of intervention. This fight between the accused and the deceased lasted at most the whole night. According to PW4 in the early hours of 31/7/2013 the demands over refund of money could be heard from the accused to his wife the deceased. In the course of that morning PW4 deposed that accused was seen pouring some sand at the door to their house and she could notice some kind of red coloured water. After a while PW4 told this court that the accused left shortly. That is when PW4 and PW5 – Rose Wambere made attempts to find out the well being of the deceased. On entering the house PW4 and PW5 deposed that they saw the deceased on the bed covered with a blanket. The testimony of PW4 and PW5 further discloses that the accused walked in again whereby he locked the house and left the compound. It is also the evidence of PW4 that she left the house to attend to her own personal engagement including taking her chid to the hospital. According to PW4 when she returned back to the compound there were many people conversing the death of the deceased.

In cross-examination by the defence counsel Mr. Kamolo PW4 testified that during this material day the other tenants were not within the plot save herself and the deceased family. In so far as recognition of the

accused was concerned PW4 stated that the nature of iron sheets used to construct the walls are not sound proof. That therefore according to PW4 made her positively recognize the voice of the accused and the deceased. It was also the evidence from PW4 that the fight between the accused and deceased went for so long including the early hours of 31/7/2013.

The evidence of PW5 further indicate that she heard the accused and deceased quarrel on the fateful night this according to PW5 was due to voice recognition of the two whom she had known for about three months as close neighbours in the plot. During cross-examination PW5 told this court that at one time she entered the house with PW4 trying to call out the name of the deceased but she did not respond. It was further her testimony that they could not immediately notice any physical injuries on the deceased body.

PW6 PC Leah Wanjiru a police officer attached to Kitengela Police Station testified on booking a report on a murder incident which occurred on 30/7/2013. PW6 further testified that she made arrangements to visit the scene in company of other police officers. PW6 further testified that on arrival at the house of the deceased her body with physical injuries lay on the bed covered with a blanket. Upon arrival at the scenes of crime PW6 looked for a vehicle to transport the body of the deceased to Machakos District Hospital Mortuary. PW6 further deposed that she attended the postmoterm which was conducted by PW7 Dr. Fredrick Otieno.

On examination of Syombua’s body (deceased) he found the following external injuries; scratch marks on the neck, blood clots on the face, defense scratch marks on the hands, scalp had deep contusions with hematoma on the occipital region, subdural haematoma features of increased intracranial pressure.PW7 concluded in his report exhibit 2 that the cause of death was severe head injury caused by blunt trauma.

PW8 Cpl Dickson Musya in his testimony told this court the role he played alongside PW6 in investigating the murder incident the highlights of the investigations being receipt of the area chief PW1 – James Mwangi. According to PW1 his attention was drawn by the village elder regarding a suspect of murder who was about to be lynched by members of the public. The action taken by PW1 was to arrest the suspect and take him to Kitengela Police Station. PW1 further testified that he visited the scene and saw a body of a lady lying on the top of the bed in her house. That is the report he had to make to PW8 which triggered the investigations.

It was further the evidence of PW8 that during the investigations the body of the deceased was sent for postmortem at Machakos Hospital. In the mortuary PW8 stated that the body was identified by PW2 Fideris Mutunga and PW3 Amos Ndambuki a son and sister in-law to the deceased respectively. According to PW8 evidence, on completion of the investigations the charge sheet was prepared against the accused and forwarded to the Director of Public Prosecutions to prefer the offence of murder.

At the close of the prosecution case the accused was placed on his defence. In his sworn statement he denied the charge of killing the deceased. He denied knowing any victim by the name Syombua Mutunga. The accused further told this court that as a sand broker he continued with his duties normally on 30/7/2013. In the said night the accused testified that he spent the whole night at his work place mixing the sand for loading to the vehicles upto 6.00 am. The accused attributed his arrest to the chief PW1 whom he met in that morning of 31/7/2013 inquiring about the death of the deceased. The accused denied that he has ever lived in the plot where the alleged murder took place. The accused further dismissed reference being made to him in the name and style of alias Tingili.

In view of the defence testimony which raised an alibi defence the prosecution sought leave of the court to avail evidence in rebuttal. The testimony of PW9 Mopia Semarkerr confirmed that the accused had been a care taker at one time. PW9 further confirmed that he had allowed the accused to occupy one of the rooms within the compound without paying rent.

After considering the evidence by the prosecution and the defence this court has also given the rival submissions made by both counsels due consideration. I bear in mind that it is the duty of the prosecution to prove the guilt of the accused person beyond reasonable doubt. See ***Woolmington v DPP*** and also the case of Miller v Minister of Pensions [1947] 2ALL ER 372 when Lord Denning said:

> **"Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice."**

The accused person has been charged under section 203 of the Penal Code which provides as follows:

> **"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

It is against this background and provisions of section 203 the prosecution must establish the following ingredients beyond reasonable doubt:

a. **The death of the deceased.**

b. **That the death of the deceased was unlawful.**

c. **That the accused killed the deceased unlawfully with malice aforethought.**

d. **That the accused has been positively identified and placed at the scene of the crime.**

It is therefore appropriate to analyse the evidence visa viz each of the ingredient set to be proved by the prosecution.

(a) Death of the deceased:

The prosecution led evidence from PW4 Lucy Kavas and PW5 Rose Wambere who testified as immediate neighbours to the deceased and the accused. According to PW4 and PW5 there was a domestic quarrel between the accused and the deceased which escalated into a fight on the night of 30/7/2013. It is clear from PW4 that the accused was beating the deceased over some money and despite plea for mercy that did not deter the accused from assaulting the deceased. The deceased body was recovered from her house having sustained serious physical injuries. PW6 and PW8 retrieved the body which was taken to Machakos Hospital Mortuary where she was certified dead by PW7 Dr. Fredrick Otieno. The admitted evidence and the autopsy report from PW7 indicated that the deceased death was due to severe head injuries caused by a blunt object. PW2 and PW3 positively identified the dead person as Eunice Syombua Mutunga being a mother to PW2 and a sister in-law to PW3.

There is no dispute as to the death of the deceased. The prosecution evidence on this ingredient stands unchallenged.

(b) The unlawful death of the deceased:

It is trite to establish the cause of death in criminal law as it is the link which implicates the offender to the death of another human being. See the case of ***Republic v Kimbugwe S/O Nyogohi & Others [1936] 3 EACA 29.***

The second principle of law is that all homicide are presumed unlawful unless in execution of a sentence within the realm of criminal justice, in reasonable defence to property or person or the cause of death has been accidentally occasioned or through natural causes. See the case of ***Gusambizi S/O Wesonga v Republic [1948] EACA 65, Republic v Nyambura & 4 Others [2001] KLR 355, Republic v Gachanja [2001] KLR 428.***

As regards this ingredient the prosecution alluded to the testimony of PW4 and PW5 who heard the accused beat the deceased. Although it was at night by virtue of close proximity of their houses they could identify positively the voice of the accused and the deceased. The postmortem by PW7 tendered in court as exhibit 2 attributed the death of the deceased to head injury as a result of the injuries inflicted and blunt trauma. This grievious injuries can be traced to the long beatings admitted throughout the night as

evidenced by PW4 and PW5.

There is no evidence that in causing grievious harm to the deceased the accused was acting in self-defence.

What can be deduced from PW4 and PW5 was an attack upon the deceased whose plea to the accused to stop fell in deaf ears. As PW4 and PW5 clearly testified and also from the accused defence one cannot find iota of evidence that there was eminent danger. On the part of the accused which warranted the excessive force made against the deceased. Mr. Kamolo on behalf of the accused advanced the argument that the testimony of PW4 and PW5 should be excluded for reasons of discrepancy and inconsistency. Secondly Mr. Kamolo submitted that nobody saw the accused beat the deceased on any part appraising the testimony of PW4 and PW5.

I am of the conceded view that the deceased and accused person were neighbours to the two witnesses for a long time. PW4 evidence is clear that she saw the accused leave the house in the morning through the gate. The conditions during this time of the day at 6 o'clock cannot be said to be unfavourable for a positive recognition to take place. PW4 added that the accused came back the second time padlocked the house and left the compound. The testimony of PW4 and PW5 on the incident of assault in the night of 30/7/2013 was corroborated by the findings made by Dr. Fredrick in his postmortem report.

I am therefore satisfied that the accused person inflicted bodily injury to the deceased. These acts of assault and occasioning harm were unlawful which eventually led to the deceased succumbing to death. This court therefore finds the ingredient of unlawful death proved beyond reasonable doubt.

(c) That leads me to the question of malice aforethought:

The accused person has been indicted under section 203 of the Penal Code which reads as follows:

> **"Any person who of malice aforethought causes the death of another person by any unlawful act or omission is guilty of murder."**

On malice aforethought, section 206 of the Penal Code sets down what constitutes the ingredient and circumstances which a trial court can infer existence of malice aforethought.

> **"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**
>
> **(a) An intention to cause the death of or to do grievious 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 the death or grievious harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievious injury occurs or not or by a wish that it may not be caused.**
>
> **(c) An intention to commit a felony.**
>
> **(d) An intention by the act or omission to facilitate the escape from custody of or the flight of any person who has committed a felony.**

The standard of proof required of the prosecution under this ingredient is to establish beyond any reasonable doubt that the accused formed the necessary ***mensrea*** to cause harm. That it was that injury which led to the deceased death. As stated sometimes it is difficult to read the mind of a human being. It can only be presumed from the circumstances. That is why courts have developed the jurisprudence around the circumstances by which an inference on manifestation of malice aforethought can be made.

I make reference to some of the decisions by the superior courts. In ***Bonaya Tutut Ipu & Another v Republic [2015] eKLR*** the court stated that malice aforethought is the ***mensrea*** for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter, whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case. In ***Paul Muigai Ndungi v Republic [2011] eKLR*** the Court of Appeal held that:

> **"Malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievious harm to any person."**

In addition the Court of Appeal observed that malice aforethought can be inferred from the nature of injuries. In the case of ***Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 UR*** it was held as follows:

> **"If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to the bleeding which did not become apparent until the death of the deceased some four days later."**

The classic case of ***Tubere S/O Ochen v Republic [1945] 12 EACA 63*** where the Eastern Court of Appeal set out what circumstances can amount to malice aforethought the court held:

> **"That existence of nature of the injuries coupled with area of the body targeted, the weapon used and where it was used, the conduct of the accused before, during or after the commission of the offence."**

The learned prosecution counsel submitted and urged this court to apply the above principles and make a finding that the circumstances demonstrate existence of malice aforethought.

On the part of Mr. Kamolo for the accused he contended that the evidence by the prosecution witnesses was so inconsistent and contradictory with the court left with nothing to infer malice aforethought. However, we must note that from the evidence adduced there was no eye witness to the offence. The prosecution is relying on circumstantial evidence.

The Law Applicable:

It is trite as what constitutes circumstantial evidence. In the case of ***Mohamed & 3 Others v Republic 2005 1KLR*** the court presided over by Osierio J explained what circumstantial evidence is in the following terms:

> **"Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved."**

In the case of ***Mwangi & Another v Republic [2004] 2KLR 32*** the Court of Appeal held thus:

> **"In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidences as proved is incapable on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge."**

In applying the above legal yardstick to this case i have this to say:

The very witnesses in this case on this issue were PW4, PW5 Lucy Kavasi and PW6 Rose Wambere both neighbours to the deceased and the accused. In the evidence of PW1 and PW6 the deceased and accused could be heard quarrelling which escalated into a fight on or about 11 pm. The bone of contention was a

theft of Ksh.500 by the deceased person, for which the accused demanded payment. According to PW4 and PW6 the beatings upon the deceased proceeded for a long time and on their estimation upto the early hours of 31/7/2013. Further in the testimony of PW4 and PW6 despite the screams and alarm from the deceased the accused seemed not to be deterred with his violence acts against her (the deceased). The witnesses also stated to have feared retaliation from the accused in the event they made any attempts to intervene in the fight. The deceased body was later picked from her house as confirmed by the evidence of PC Leah Wanjiru PW6 and PW5 Cpl Dickson Musya and teake to Machakos District Hospital Mortuary. According to PW7 Dr. Otieno testified that he performed the postmortem on 6/8/2013 in the presence of PW2 Mutunga and PW3 Ndambuki. The postmortem report revealed that the deceased had multiple injuries on the head, face, neck and hands which made him make a finding that the deceased died of severe head injury.

In the circumstances of the present case the nature of the weapon used to inflict the injuries was never disclosed nor recovered if it existed. There is no obvious evidence that the accused intention was to kill the wife, the deceased or was aimed at merely to cause harm because of the loss of Ksh.500. It is apparent from the testimony of PW4 and PW6 that the accused was in dispute with his wife (the deceased) on the night of 30/7/2013.

From the provisions of section 206 of the Penal Code and the jurisprudence in the cited authorities the prosecution in proving malice has to demonstrate that the state of mind of the accused had the necessary intent to cause death or grievious harm to the deceased. In dealing with similar circumstances the House of Lords in that case of ***Woomington v DPP [1935] AC 462, 481 Viscort Sankey*** observed as follows:

> **"Throughout the web of English criminal law one golden tread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt subject to what i have already said as to the defence of insanity and also to any statutory exception.**
>
> **If at the end of 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 and the prisoner is entitled to an acquittal. No matter what the chare or where the trial, the principle that the prosecution must prove the quilt of the prisoners is part of the common law of English and no attempt to whether it down can be entertained when dealing with a murder case. The crown must prove death as the result of a voluntary act of the accused and malice of the accused."**

In the present case the prosecution evidence by PW4 and PW6 it is clear a quarrel between accused and the deceased led to a fight. This case based purely on circumstantial evidence does not expose or prove the accused in attacking the deceased was acting in self-defence. In my view applying the above principles i am satisfied that malice aforethought a critical element in the offence of murder has not been proved beyond reasonable doubt. What the prosecution has managed to establish is the offence of culpable homicide which reflects unlawful acts of carelessness which were intentional but lacked the requisite malice. The accused under the pretext of assaulting the deceased under what can be described as a domestic violence scenario ended up to unlawful and inadvertently causing the death of the deceased.

In the persuasive authority from Seychelles in the case of ***DPP v Jones [1977] AC 50*** the Court of Appeal settled the law on involuntary or unlawful act of manslaughter and stated as follows:

> **"(a) An accused was guilty of manslaughter if it was proved that he intentionally did an act which was unlawful and dangerous and that act inadvertently caused death and that it was unnecessary to prove that the accused knew that the act was unlawful or dangerous; that the test was the objective test namely whether all sober and reasonable people would recognize that the act was dangerous and not whether the accused recognized its danger."**

On this point i have the evidence of the unlawful acts by the accused of assaulting the deceased by PW4 and PW5. The beatings as described went on almost the whole night. The grievious harm inflicted upon

the deceased is traceable as the cause of death from the medical report by PW7 Dr. Otieno. According to PW7 the postmortem revealed severe injuries to the head. The accused by targeting the vulnerable and sensitive part of the body could have known and foreseen a risk to disable the deceased system. The accused did this while continuing beating the deceased in their house and repulsed any attempt to intervene the conflict between them by the neighbours.

All these facts put together establishes the offence of manslaughter contrary to section 202 of the Penal Code beyond reasonable doubt against the accused.

In his defence as the perpetrator of the murder the accused raised the defence of an alibi. The gist of the accused alibi centered on the fact that he does not know the deceased nor has he even been a care taker or a resident of the plot where the murder occurred.

The principle of alibi defence was revisited by the Court of Appeal in the case of ***Wangombe v Republic [1980] KLR 149*** where Madam J.A. as she then was stated:

> **"The defence of alibi was put forward for the first time some months after the robbery when the appellant made his sworn statement in court. Even in such circumstances the prosecution for the police ought to check and test the alibi wherever possible.......Udo Udoma C.J also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen a regards checking and testing it."**

The Nigerian Supreme Court in the case of ***Patrick Njorens & Others v The State [1973] ALL NLR 371 at 401-402*** stated as follows:

> **"There is nothing extra-ordinary or Esoteric in a plea of alibi. Such a plea postulates that the accused person could not have been at the scene of the crime and only inferentially that he was not there even if it is the duty of the prosecution to check on a statement of alibi by an accused person and disapprove the alibi or attempts to do so, there is no inflexible and or invariable way of doing this if the prosecution adduces sufficient and accepted evidence of crime at the material time surely his alibi, is thereby logically and physically demolished."**

In this case the accused evidence indicated that he has never been a care taker nor lived at the locus in quo where the deceased was killed. This question was clearly answered by the prosecution that the accused was a care taker to one PW9 Samenkerr. At the hearing PW9 confirmed that the accused occupied one of the houses within the property where the murder incident took place. That therefore placed the defence testimony on whether he has ever stayed in the plot in question as a false statement to the court.

As regards the second aspect of accused alibi of not knowing the deceased or seen in the house where the deceased was killed, this court was presented with the testimony of PW4 and PW5. The accused was identified through voice recognition quarrelling and beating the deceased the whole night of 30/7/2013. The prosecution witnesses describe the houses as made of iron sheets. This was corroborated by the property owner PW9. What the witnesses wanted this court to draw an inference is the fact of the matter that the iron sheet walls are not sound proof. Secondly PW4 and PW5 have been immediate neighbours to the accused for more than three months. The irrebuttable presumption i make is the voice of the accused was not mistaken as identified by PW4 and PW5.

On the evidence touching on identification of the accused i rely on the principles in the case of ***Republic v Turnbull & Others [1976] 3 ALL ER 549*** where the court said:

> **"The judge should direct the jury to examine the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? In what light? Was the observation impended in anyway...? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the**

> **description of the accused given to police by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

I weighed the testimony of PW4 and PW5 both on examination in chief and during cross-examination. The impression i made was that of truthful and honest witnesses who had no reason to fabricate the evidence against the accused. The accused in answer to the charge never impeached their credibility.

The other source of evidence on identification rests on the 31/7/2013 when PW4 saw the accused move up and down within the plot. The accused is described as moving towards the toilet and later going to his house padlocking it walked out carrying a grey paper bag. Besides PW4 the testimony of PW5 was crystal clear that the accused in the morning was seen and heard within the compound asking where is my wife? Where is my wife?

The value and the weight of the evidence by PW4 and PW5 is watertight as it is both direct and indirect piece of evidence which positively identifies the accused and placing him at the scene of the murder.

In the circumstances of this case i find it impossible to say that there were other co-existing factors in this case which weakens or destroys the inference that the accused was the one who killed the deceased. The facts as proven by the prosecution are capable of only one explanation of the accused.

It is therefore manifest from the evidence examined by the prosecution witnesses the charge of murder contrary to section 203 of the Penal Code was not proven. However there is a valance of evidence that the offence of manslaughter contrary to section 202 as read with section 205 has been proved beyond reasonable doubt. It is fitting as per law established to substitute the charge of murder with that of manslaughter which i hereby do by entering a verdict of guilt and convicting the accused under section 202 of the Penal Code.

Dated, delivered in open court at Kajiado on 5th day of May, 2017.

…………………………………..

R. NYAKUNDI

JUDGE

Representation:

Mr. Itaya for Kamolo for the accused present

Mr. Akula for the Director of Public Prosecutions present

Mr. Mateli Court Assistant

Accused present