**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 42 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES KARANJA KARERA.....ACCUSED**

**RULING**

The accused **JAMES KARANJA KARERA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were given as follows

> ***"On the 4th day of May 2011 at Turasha Village in Kipipiri District within Central Province murdered JOYCE MIRUGI KIMEMIA".***

The accused pleaded **'Not Guilty'** to the charge. His trial commenced before **Hon. Justice William Ouko** (as he then was) on 17/9/2012. The Hon Judge heard the first five (5) witnesses. Thereafter I took up the conduct of the trial and heard the remaining three (3) witnesses. A total of eight (8) witnesses testified in this case.

**PW6 GEOFFREY NJUGUNA KEMEMIA** told the court that the deceased was his daughter-in-law (the wife of his son) whilst the accused was his nephew. The deceased lived alone in her compound with her three young children as her husband worked away in Nairobi. The accused also had lived in the same compound for several years and he used to assist the deceased with farm work.

The evidence of **PW6** is that on 4/5/2011 at about 4.00am he was asleep in his house. He heard the deceased calling out to him saying ***'Baba nakufa na unalala'*** ie **'father I am dying whilst you sleep'. PW6** woke up and rushed to the deceased's house. He found the deceased being held by her son Kevin **PW7**. She was bleeding profusely from a wound in the left front of her chest. **PW6** asked deceased what had happened and she replied that **'Karanja'** had stabbed her. **PW6** called other neighbours and rushed the deceased to Gilgil Hospital. She however succumbed to her injuries and died.

**PW7 KEVIN KIONGO** was the son of the deceased. He told the court that he was at home on the night in question. **PW7** stated that at about 8.00pm on 3/5/2011, himself his mother (the deceased) and his two sisters took supper together. Thereafter they all retired to bed. **PW7** slept in the same room with his sisters whilst the deceased slept alone in her own bedroom. Their father was away at work in Nairobi.

At about 2.00am **PW7** heard his mother cry out. He got up to check and found her outside already injured. She was bleedings from an injury to the chest. **PW7** and his sisters helped deceased to the house of their grandfather **PW6**. The deceased was rushed to hospital by neighbours but later died. The incident was reported to the police who launched investigations. The accused was later arrested and charged.

At the close of the prosecution case this court must determine whether the prosecution have established a prima facie case sufficient to warrant calling upon the accused to defend himself.

The legal definition of a **'prima facie'** case was given in the oft cited case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] E. A 332** where it was held as follows

> ***"……. It may not be easy to define what is meant by a 'prima facie' case but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence".***

In any murder charge it is of critical importance that the fact as well as the cause of the death of the deceased be proved beyond reasonable doubt. In this case the fact of death is not in any doubt. Aside from **PW6** and **PW7** several other prosecution witnesses state that they saw the deceased bleeding from a wound to her chest on the night in question. **PW5 EZEKIEL KIMEMIA**, was the husband to the deceased. He

told the court that he was urgently summoned from Nairobi after his wife had been injured. He rushed to Gilgil Hospital but found that she had already passed away. All witnesses who knew the deceased very well identify her as **'Joyce Murugi Kimemia'.**

Aside from proving the fact of death the prosecution must also adduce evidence to show what caused the death of the deceased. Ordinarily this would be by way of evidence of the doctor who conducted the autopsy on the body of the deceased.

In **NDUNGU Vs REPUBLIC [1985] e KLR** the court held that

> ***"Where a body is available and the body has been examined, a post-mortem must be produced, the trial court having informed the prosecution that the normal and straight-forward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the medical officer who performs the post-mortem is cross-examined".***

In this case no doctor/pathologist was called to testify and no post-mortem report was produced as an exhibit. The court is being invited to assume that the injury seen by the witnesses on the deceased chest led to her death. Courts cannot make findings on the basis of guess work or on the basis of assumptions. It is a central tenet of law that the onus lies on the prosecution to prove each aspect of their case beyond reasonable doubt. The cause of death must therefore be proved beyond reasonable doubt.

In the case of **CHENGO NICKSON KALAMA Vs REPUBLIC [2015] e KLR**, the Court of Appeal sitting in Malindi held that

> ***"The position then appears that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post mortem examination report of the deceased…"***

This is a case, in which the hearing commenced in September, 2012. From that time to February 2017 a period of about 4½ years the prosecution failed to call in the doctor who conducted the autopsy on the body of the deceased. No convincing reason was given for this omission.

It was an omission which ultimately is fatal to the prosecution case. The cause of the deceased's death remains unproven and thus the charge of murder cannot stand.

Even if the cause of death had been proved (which is not the case here) the evidence available still leaves much to be desired. The prosecution sought to place reliance on a **'dying declaration'** allegedly made by the deceased in which she identified her attacker. **PW6** and the other witnesses all state that the deceased told them that it was **'Karanja'** who had stabbed her. Whilst it is true that the accused who was named **'Karanja'** resided in the deceased's compound, a dying declaration on its own cannot amount to sufficient proof of guilt.

In **DZOMBO CHAI Vs REPUBLIC Criminal Appeal No. 256 of 2006**, the Court of Appeal held that

> ***"Although the court can in law solely rely on such evidence ( a dying declaration) there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction".***

Similarly in **OLALE & OTHERS Vs REPUBLIC [1965] E. A 555,** it was held as follows

> ***"A trial judge should approach the evidence of the dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of accused and not subject to cross-examination, unless there is satisfactory corroboration".***

There was no witness who saw the accused stab the deceased. Indeed **PW7** who was the person at the scene told the court that he never saw the accused in his house at all on the material night. Even after **PW7** woke up to find his mother fatally injured, he did not see the accused anywhere in the vicinity. He states that he found his mother alone. There is no evidence to show that the accused was in the deceased's house on the material night.

**PW8 PC RAPHAEL MATHEKA** was the investigating officer. He told the court that the accused was arrested some distance away at his parent's home.

Under cross-examination by **'Mr Mongeri'** for accused, **PW8** states that a son to the deceased witnessed the attack. **PW7** the deceased's son however contradicted this when he confirmed that he did not see who stabbed his mother.

Therefore I find that even if court were to accept that the deceased through a dying declaration named the accused as he attacker, there exists no evidence to corroborate that dying declaration.

In order to prove a charge of murder it is necessary that the prosecution prove that the accused had the necessary ***'mens rea'*** to commit the offence. In other words there must be evidence of proof to commit the murder.

In this case several witnesses have told the court that the accused suffered mental incapacity. **PW8** the investigating officer told the court that when he arrested the accused, the accused was not lucid and could not answer simple questions. **PW8** went on to state that the accused did not even know the date or year at the time.

As a court I note from the record that at this initial appearance in court, the accused was found unfit to stand trial due to mental incompetence. **PW8** produced a medical report dated 7/11/2011 indicating that the accused suffered mental illness and was not fit to stand trial. It is only following a period of psychiatric treatment whilst in remand that accused eventually recovered well enough to stand trial. It is clear therefore that given his mental illness, the accused had no capacity to formulate the *mens rea* necessary for the offence of murder.

All in all for the reasons given above, I find that this charge of murder has not been proved to the standard required in law. I find that no prima facie case has been established. Accordingly I enter a verdict of **'Not Guilty'** and I acquit the accused in accordance with Section 306 (1) of the Criminal Procedure Code. The accused is to be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered in Nakuru this 12th day of June, 2017**

Mr. Mongeri for Accused

Mr. Chigiti for State

**MAUREEN A. ODERO**

**JUDGE**