



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 17 OF 2015**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**CARL GARY SINGLETON ..... ACCUSED**

**RULING**

**1. Carl Gary Singleton**, the accused herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that the accused on the 22<sup>nd</sup> day of November, 2014 at Kihara in Gigiri within Nairobi County, murdered **Peris Ashley Agumbi**.

2. The Prosecution called a total of nine (9) witnesses. Brief facts of the Prosecution case are that the accused and deceased were cohabiting at Neptune apartment in Gachie. On the night of 19<sup>th</sup> November 2014 there was a disagreement between the two of them and the accused threw the deceased out of the house. The deceased was a known patient of diabetes and hypertension. She left the house minus her medicines. She reported the assault at Kihara Police Post and went to Kihara Sub-district Hospital the same night. Her condition worsened on 21<sup>st</sup> November, 2014 and she visited Agakhan Hospital, Avenue Hospital and Ladnan Hospital where she died on 22<sup>nd</sup> November, 2014. The accused was arrested and charged.

The cause of death was found to be acute complications related to uncontrolled diabetes (Exhibit 6).

**3. PW1, Ida Atieno Tuju Agumbi** is the mother of the deceased. She testified that on 21<sup>st</sup> November, 2014 she was away in Nyanza for a funeral when the deceased called and told her she was unwell and needed some money. She called her using a phone of Camilta Nabwire. PW1 sent the deceased Kshs.1,000/- through Camilta's phone and she asked Camilta to take the deceased to Agakhan Hospital and she also asked her sister Loice to go check on the deceased. She was later admitted at Ladnan Hospital, along Thika Road where she died on 22<sup>nd</sup> November, 2014.

**4. PW2 Dr. Charles Maina** is a doctor based at Agakhan Hospital. He attended to the deceased on 21<sup>st</sup> November, 2014. She had been brought at 8.10 pm with abdominal pain, increased thirst, diarrhea, vomiting, headache, belaboured breathing, assault, dehydration, elevated blood pressure of 160/106, elevated pulse rate, elevated heart rate of 138 per minute, enlarged thyroid, elevated blood sugar. A blood test showed she had severe metabolic acidosis, meaning there was a lot of acid build up in the blood. The deceased had type 1 diabetes. She was transferred to another facility as the aunt was not able to pay the fee for admission to HDU. The witness produced the medical report and transfer form (Exhibit 1a and b)

**5. PW3 No. 234778 Inspector Davison Luchacha** received a report from the deceased on 19<sup>th</sup> November,

2014 at 22.25 hours. She told him the accused had assaulted her and destroyed her medicine for diabetes by flashing it in the toilet. He confirmed she went to the hospital after he gave her a note. She returned the next day with a treatment card and was issued with a P3 form, which was later filled (Exhibit 2). The deceased led them to where they stayed but the accused refused to open for them. She was taken back to Kihara Hospital. On 23<sup>rd</sup> November, 2014 the accused was arrested.

**6. PW4 Dr. Mary Wambui Njoroge** of Kihara Sub-district Hospital produced a filled P3 form on behalf of Dr. Ndungu Muchiri (Exhibit 2). She said the deceased came to the hospital on 20<sup>th</sup> November, 2014 under escort, having reported to the police on 19<sup>th</sup> November, 2014, 22.25 hours. She had been assaulted and was on medication for hypothyroidism and diabetes. The report shows the treatment administered to her.

**7. PW5 Dr. Boyani Mogeni** worked at Avenue Hospital. He confirmed that the deceased had visited the facility on 21<sup>st</sup> November, 2014 and was transferred to Ladnan Hospital after she had been treated.

**PW6 Dr. Jonathan Wala** is the one who attended to the deceased while at Ladnan Hospital. He stated that she was at the HDU and was on oxygen, intravenous fluids and insulin. This was on 22<sup>nd</sup> November, 2014. He explained all about the condition of the deceased.

**8. PW7 Stephen Matinde Joel Weibe** a Government analyst stated that upon examining all items sent to them as per the Report (Exhibit 5a), he found no toxic substance in any of them. The high vaginal swab (HVS) and blood were found to have no semen or spermatozoa.

**PW8 Everline Mukatisti Musila** heard screams from the Neptune Apartments 4<sup>th</sup> Floor. This was on 19<sup>th</sup> November, 2014 at 10 pm. She then heard a man shout “out” and within minutes, a lady emerged from the gate. The lady was the deceased and she requested for help and she looked frail. The deceased told her, the accused who had an anger problem had reprimanded her for making noise for him, by flashing the toilet. He had then attacked her and held her neck, choking her.

9. She further stated that, she used her phone torch light to check on her and confirmed that the deceased’s neck had bruises and was swollen. She also mentioned to her that she had a sickness which caused the neck to swell at the same time, had diabetes and high blood pressure.

She requested PW8 to escort her back to the house to take her drugs as she had not taken her 2<sup>nd</sup> dose for the day. They went upto the gate but there was no one there. She could not communicate with anyone as she had left her phone in the house.

10. From wherever they stood, they could see the accused throwing out things from the house into the dumping site. There was sufficient light which enabled them to see. The witness then called Inspector Luchacha of Kihara Police Post and notified him of the deceased’s issue. She organized for the deceased to be taken to the post to report. On 23<sup>rd</sup> November, 2014 she learnt of the deceased’s death and the accused’s arrest.

In cross-examination, she said the deceased had insisted on getting her drugs from the house and not buying any. She never told her that the accused threw away her medicine.

11. PW9 I.P Maurice Chemesis is the Investigating Officer in this case. He produced the post mortem report (Exhibit 6) by consent of both the Prosecution and the defence. He gave a summary of the evidence given by the witnesses. He added that he had learnt that the accused had destroyed the deceased’s drugs by flashing them in the toilet. In cross-examination, he confirmed that the deceased’s body had no injuries though the P3 report (Exhibit 2) showed she had injuries.

12. The O.B abstract No. 15/19/22/2014 (Exhibit 7) contains a report by the deceased recorded on 19<sup>th</sup> November, 2014 22.25 hours. In it, she reported that the accused destroyed her spectacles and diabetes type 1 and hypertension medicines.

13. After the Prosecution closed its case, **Mr. Okeyo** for the State submitted that, death had been established as well as a prima facie case. A summary of his submission is that the flushing into the toilet of the deceased's medicine by the accused "her husband" led to her failure to take her daily diabetes and hypertension medication. This failure to take the medicine led to a complication leading to her death. He submitted that this fell under the circumstances of malice aforethought as defined under Section 206 Penal Code.

14. **Mr. Okullo** for the accused filed written submissions. He submitted that the Prosecution case is based on the deceased's dying declaration. The defence had no opportunity to cross-examine her on it. He referred to the case of;

(i) **Aluta –vs- Republic [1985] KLR 547**

(ii) **David Agwata Achira –vs- Republic Criminal Appeal No. 47 of 2003**

He stated that there was no evidence to show that the accused had indeed destroyed any insulin drugs.

15. He further submitted that malice aforethought had not been established. That the Prosecution had not adduced any evidence to show that the accused had any intention to cause, or knowledge of, probable death or "grievous harm". On the cause of death, he referred to Section 213 Penal Code submitting that from the post mortem report, the alleged flushing of the medicine by the accused was not the immediate or sole cause of the deceased's death. He referred to a recent UK Supreme Court decision in **Republic – vs- Hughes [2013] 1 WLR 2461** to support his position on this.

## **DETERMINATION**

16. After considering the evidence adduced and submissions by both the Prosecution and the defence, the issue falling for determination is: whether this evidence on record establishes a *prima facie* case requiring the accused to be placed on his defence. In other words, has the Prosecution established a prima facie case against the accused?

17. What is a *prima facie* case? The Black's Law Dictionary at page 638 defines *prima facie* evidence as;

***"Evidence that will establish a fact or sustain a judgment unless contradictory evidence is provided."***

It further defines a prima facie case as;

***"1. The establishment of a legal required rebuttable presumption.***

***2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favour."***

18. The Court of Appeal in the case of **Bhatt –vs- Republic [1957] EA 332** gave an explanation of what amounts to a prima facie case when it stated;

***"Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to suggesting that the Court would not be prepared to convict if no defence is made but rather hopes the defence will fill the gaps in the Prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true as Wilson J. said that the Court is not required at that stage to decide finally whether the evidence is worthy of credit or whether***

***if believed it is weighty enough to prove the case conclusively: That determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case” but at least it must mean one which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”***

19. Bearing in mind what the ***Bhatt case*** above has stated on what a prima facie is, this Court will now examine the evidence adduced to determine whether it meets the requirement. Is it the kind of evidence that the Court would confidently find a conviction if the accused person elected to remain silent?

20. There is no dispute on the fact of death. There is also no dispute as to the cause of death as stated in the post mortem report (Exhibit 6) which is; ***“Acute complications related to uncontrolled diabetes.”***

PW2, PW4, PW5 and PW6 who are all medical doctors explained what the deceased was suffering from and how they managed it. It came out clearly that the deceased suffered from;

- Diabetic Keto acidosis;
- Gastroenteritis medical condition for diarrhea and vomiting;
- Graves’ disease arising from thyroid disorder;
- Bruises and blisters (swelling with fluid) on upper limb 2.

21. The next issue would be how the accused was connected to the acute complications related to the uncontrolled diabetes. There is no dispute that the accused and deceased were in an intimate relationship and even living together in Neptune Apartments in Gachie. On this 19<sup>th</sup> November, 2014 night, they had been together when they had a scuffle and the deceased was thrown out of the house.

From the evidence on record, the first person who came into contact with her after this is ***PW8 Everline Mukatisti Musila***. This was at 10 pm. This witness testified that the deceased pleaded with her to take her to their house so that she could take her medicine for her various conditions as she had not taken her 2<sup>nd</sup> dose for the day. She escorted her but they found the gate locked and there was no one to allow them in.

In cross-examination, she was categorical as she stated; ***“she never said the accused threw away her medicine. She said her medicine was in the house. She said if she did not take the medicine, she could not sleep.”***

22. After failure to gain access into the house, the deceased went to the Police Post. The OB abstract (Exhibit 7) shows she was there at 22.25 hours and reported that the accused had assaulted her and flashed her diabetes and hypertension medicines in the toilet. She was referred to the hospital.

The same OB abstract shows that under OB No. 16 of 20<sup>th</sup> November, 2014, 19.10 hours, she was at the Police Post reporting that she had in the company of their caretaker managed to gain entry into their house. She found that the accused had destroyed her personal items and ***had used scissors to cut into pieces diabetic and hypertension pills.***

23. According to PW3 No. 234778 Inspector Davison Luchacha, the deceased went to hospital on 19<sup>th</sup> November, 2014 and came back to the Police Post on 20<sup>th</sup> November with a medical card. PW4 Dr. Mary Wambui Njoroge, stated that the deceased had actually been escorted to the medical facility on 20<sup>th</sup> November, 2014 for treatment. This contradicts PW3 on exactly when the deceased first sought treatment.

The P3 Form at page 1 (Exhibit 2) shows that the deceased was on treatment for hypothyroidism and

diabetes. This is information she gave to the medical health personnel. ***This was on 20<sup>th</sup> November, 2014***, a second day after the incident. If she was on treatment, then it is clear she ***never*** mentioned that she was ***not*** in possession of her drugs. I want to pose her for a while.

24. Was the medicine flashed in the toilet on 19<sup>th</sup> November, 2014 before the deceased left the house? If it was flashed before she left the house, why was she asking PW8 to take her back to the house to collect medicine that had already been flashed in the toilet? She assured PW8 that the medicine was in the house.

Secondly, if it was flashed after she left the house, how had she got the information about the flashing of the medicine that was entered in the OB (Exhibit 7) at 22.25 hours of the same day? This does not just add up as she never re-entered the house that night.

Thirdly, in the report in OB (Exhibit 7) for 20<sup>th</sup> November, 2014, she reported that the accused had cut her diabetes/hypertension drugs with a pair of scissors. She found this out when she allegedly re-entered the house on 20<sup>th</sup> November, 2014 1800 hours, while in the company of the caretaker. Which was this medicine that was cut into pieces and which was the one that was flashed into the toilet? There is an element of inconsistency here.

25. PW1 who is the mother to the deceased, told the Court that the deceased was a 4<sup>th</sup> year student at the University of Nairobi. PW1 did not know she was living with the accused until this fateful day. By all standards, the deceased was above the age of 18 years and she was educated. She was referred to the hospital on 19<sup>th</sup> November, 2014 after reporting the incident. She never went to the hospital as directed, yet she knew she needed to take medicine which she did not have with her.

On 20<sup>th</sup> November, 2014, she was taken to the hospital under police escort and still did not tell whoever attended to her that she did not have her medicine for diabetes.

26. The movements of the deceased from the time she reported the incident to the time she was rushed to Agakhan hospital are a bit clouded. There is a lady called Camilta Nabwire whose phone the deceased used to contact her mother, on 21<sup>st</sup> November, 2014. Where was she as she made these calls? Camilta told PW1 that the deceased's condition was worse and she had been discharged so she was taking her to Agakhan Hospital. She had been discharged from where? PW4 never said the deceased had been admitted at Kihara Sub-district Hospital. The only person who could have explained to this Court what was happening around the deceased's life was the said Camilta Nabwire.

27. This Camilta was not called as a witness by the Prosecution, yet to me, she was a very crucial witness. I am aware that Section 143 of the Evidence Act provides that;

***“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”***

The Court of Appeal in the case of ***Bukenya & Others –vs- Uganda [1972] EA 549*** set out the rule that has been applied with approval by our own Court of Appeal that;

***“(i) ...the (Prosecution) must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.***

***(ii) ...the Court has the right and the duty to call any person whose evidence appears essential to the just decision of the case.***

***(iii) ...where the evidence called is barely adequate the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the Prosecution.***

28. There is no witness who has told this Court exactly where the deceased was and what she was doing

from the time she made a report to Kihara Police Post upto the time she landed at Agakhan Hospital. Camilita could have unravelled this. The reason is that it was in the interest of justice for this Court to know why the deceased, a 4<sup>th</sup> year university student did not find it necessary to access drugs for her special condition when she knew the implication of failing to do so. Had she wanted to, she could have accessed the drugs. I find that failure by the Prosecution to call Camilita Nabwire as a witness draws an adverse conclusion against the Prosecution which he knew that her evidence was not going to support its case.

29. The Prosecution relied so much on the report of the deceased to the effect that the accused flushed her medicine in the toilet. The evidence available shows otherwise, as I have outlined above.

The statements by the deceased on whether the medicine was flushed in a toilet or cut with scissors is wanting. There is no consistency in it when one considers the evidence in its totality. In fact, the question that keeps popping up is whether there was any such medicine in the first place.

30. I have also considered the fact that this was not a case where the deceased was locked up somewhere without her medicine. She could have accessed medicine from any medical facility had she elected to do so.

31. It is not denied that the accused assaulted the deceased. The P3 (Exhibit 2) shows that the deceased suffered bruises and blisters on the upper limb. The assault was not the cause of death and neither was it related to the cause of death (Post mortem report Exhibit 6).

32. I find that in this case the element of suspicion was elevated so high making the Investigating Officer lose track on what evidence he was supposed to avail in Court. In the case of ***Sawe –vs- Republic [2003] KLR 364***, the Court of Appeal stated thus;

***“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”***

33. The evidence adduced herein and relied on by the Prosecution is incredible and therefore wanting. If this Court were to place the accused on his defence and he lawfully elected to remain silent would it go ahead to convict on the basis of the evidence before it? My answer would be “NO”.

34. In conclusion, I find that the accused ***Carly Gary Singleton*** is not guilty of the murder of ***Peris Ashley Agumbi*** and I acquit him under Section 306 (1) Criminal Procedure Code. He shall be set free unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed and dated this 8<sup>th</sup> day of June 2017 at NAIROBI**

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**HEDWIG I. ONG’UDI**

**HIGH COURT JUDGE**