



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
CRIMINAL CASE NO. 17 OF 2016

REPUBLICPROSECUTOR

VERSUS

GODFREY MURURI M'KAIBI ACCUSED

JUDGMENT

1. The Accused Person herein, Godfrey Mururi M'Kaibi ("Accused") is charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of unlawfully killing Lucy Nkoroi Charles on the 2nd day of September, 2015 at Matopeni village in Ruiru Sub County within Kiambu County.
2. The Prosecution called eight witnesses. The accused, according to the Prosecution, attacked the deceased who was his lover and /or significant other on the material day at around 9.00 PM with a metal rod until she succumbed to death at an open compound outside the Deceased's rented house.
3. Protus Munene Mung'athia (Protus) is a brother to the Deceased and testified as PW1. He testified that on 02/09/2015, he received a call from an unknown person who told him that his (Protus') sister had been killed. They immediately left to go to his sister's home where they found a large crowd. He saw his sister lying outside her house. He testified that her sister had a cracked skull and broken legs. He also saw a lot of blood at the scene with the help of the electric lights from the houses. PW1 also stated that he saw a metal rod lying next to her sister's body which was blood stained. He identified the metal rod. He later went to the Police Station where he found the Accused. He also identified the body during the post-mortem.
4. PW2 ERIC MUTUMA testified that he received a call from an unknown number who told him that Munene's (PW1) sister had fought with the husband. He immediately left with Munene to go to the deceased house where they saw a big crowd. He stated that he could hear people say that Munene's sister had been killed.
5. It was the evidence of PW3 INSPECTOR WILSON KHAKALI that on 2/9/15 while on duty he received information from the members of the public that there was a person who was beating a lady at Gitambaya area. They headed to the said area where they found a crowd and they also saw a lifeless body of a lady lying in a pool of blood. The members of the public told them that the lady had been beaten by a man who had disappeared. He observed that the limbs and skull were broken. He also saw a metal bar which had blood stains. They summoned the scene of crime from Thika. They also received a call from Gitambaya Police Post and were informed that a suspect had surrendered at the post.
6. PW4 INSPECTOR JARED WESONGA SEKO stated that he is in-charge of forensic crimes investigations, Thika. That on the said day he received a call from DCIO Ruiru and CPI Mwangi of a

scene of crime in Ruiru. Upon arrival, he found a body lying in a pool of blood. He took photos which he produced in court.

7. The father of the deceased CHARLES MUNGATHIA M'MWIRARIA testified as PW5. He stated that he was called to identify the body of the deceased to the pathologist who told them that the deceased had died from asphyxiation due to the force of the blunt trauma.

8. PW6 CPL LINAH CHESEREK testified that on 2/9/15 she was on duty when she received a call from the OCS who told her together with her colleagues that someone had been killed in Matopeni Area. They went to the scene where they found a woman lying outside a house in a pool of blood with a head injury, both legs were broken and her arms had injuries. They also found a metal bar that was blood stained which she identified in court. She stated that they later learnt that the accused person had reported himself to the Police Station.

9. The Police officer who was at the reporting desk at Gitambaya Police Post PC ROSEMARY MAKENA testified as PW7. She stated that on 02/09/15 an unknown man reported to her that he had killed a lady who had made him angry. PC Makena testified that the person told her that he believed that the lady was dead because he had hit her badly. While she at first disbelieved the story, the officer called Ruiru Police Station to enquire whether any reports regarding murder had been made and the duty officer confirmed that a report had been made and officers were headed there. PC Makena testified that she called the Deputy OCS to inform him that she had a suspect. The person who had turned himself in is the Accused person. The Accused was transferred to Ruiru Police Station.

10. CPL KELLEN SHWACHI the investigating officer in this case testified as PW8. She stated that on 02/09/15 she was called by DCIO Mwangi who instructed her to collect a Scene of Crime Officer and take him to Ruiru. They saw a body of a woman lying in a pool of blood. She recorded witness statements, she had the accused go through mental exams, She also received the Pathologist Form. She produced the metal bar, a sketch plan of the scene, she also produced a copy of the Application in Misc Application No. 126 of 2015 and the order, a mental assessment report for the accused and the post-mortem report.

11. When put on his defence the Accused Person GODFREY MURURU M'KAIBI gave an unsworn statement that on 2/9/15 he left his cook job at 8.00 PM and upon arrival at home he found his girlfriend, the Deceased, lying outside the plot and that shocked him. The Accused Person stated that upon finding his girlfriend in that state, he went to report to Gitambaya Police Station that he had found his girlfriend lying dead. He stated that he did not tell the officer who had killed the Deceased but that he was arrested at the Police Station. According to him, he was taken to Ruiru Police Station where he recorded a statement. The Accused Person maintained that he did not know what had happened to the Deceased and that they were living together in peace.

12. The Defence, led by Mr. Magero, in its final submissions vigorously argued that the Prosecution had not proved its case beyond reasonable doubt. The Defence relied on four attacks on the Prosecution case which I will describe below.

13. First, the Defence argues that the Prosecution evidence here does not meet this high threshold by virtue of the inconsistencies and contradictions in the Prosecution witness. He points out the following inconsistencies or contradictions:

a. First, he says that PW1 (Protasio Munene Mungathia) was an unreliable witness because he claimed that when he arrived at the scene he could clearly see, and that there were about five hundred people at the scene. Mr. Magero faults this testimony because he says if it was 9:00 pm, visibility could not have been clear. Further, he impugns the possibility that there could have been such a large crowd at that time of the night.

b. Second, Mr. Magero argues that PW1 misled the Court by claiming that he arrived at the scene with the Deputy OCS and the Duty Officer yet PW7 contradicted that evidence by testifying that

PW1 did not arrive with them.

c. Third, Mr. Magero says that PW2 contradicted the testimony of PW 8 when the former stated that the Accused Person used to live with the Deceased while PW8 stated that the Accused Person had only gone there to visit the Deceased.

d. Fourth, the Defence points out that the evidence of PW3 and PW4 were contradictory: PW3 said he saw a metal rod – the murder weapon - at the scene while PW4, the Scenes of Crime Officer did not see any such weapon.

e. Fifth, the Defence argues that PW6 contradicted the evidence of PW8: While PW6 claimed that he saw the Deceased with two broken limbs at the scene; PW8, the Investigating Officer said that she saw one broken limb.

14. In my view, after carefully analysing the evidence here, these inconsistencies pointed out by the Defence are minor and immaterial. Inconsistencies are common in criminal trials both because of lapse of memory as well as other factors especially when there has been a substantial lapse of time between the event and the date of the testimony.

15. As noted by the Uganda Court of Appeal in *Twehangane Alfred Vs Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6* it is not every contradiction or inconsistency that warrants rejection of evidence – see *Erick Onyango Ondeng’ v Republic [2014] eKLR CRIMINAL APPEAL NO. 5 OF 2013*. As the court put it:

With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.

16. The inconsistencies in question here are not material at all and they can, in my view, be explained by passage of time or lapse of memory or simply different perspectives. Most of the “inconsistencies” raised by Mr. Magero can be explained easily:

a. On the allegation that the claim that PW1 could not have “clearly” seen since it was at night and that it was unlikely that there was a crowd of 500 people at the scene: PW1 stated that there was moonlight as well as electric security light at the scene hence his claim that he could see “clearly.” What “clearly” meant in the circumstances is a matter of conjecture but certainly not enough to lead to the conclusion that he was not a truthful witness. The same goes to his testimony under cross-examination that the crowd that had gathered was about 500 people. Here, the witness was being asked to estimate and he gave his best shot. In any event, neither of these two pieces of evidence are in any sense material to the case.

b. Did PW1 mislead the Court by telling it that he arrived at the scene with the Deputy OCS and the Duty Officer? I have combed through the testimony of PW1 and I found no place where he made this claim as alleged by the Defence so nothing comes out of this complaint.

c. Similarly, the alleged contradiction in the testimony of PW2 and PW8 about the living arrangements between the Accused Person and the Deceased are not material to the case. Neither PW2 – a friend to the Deceased’s brother – nor PW8 – the Investigating Officer can be said to have personal knowledge of the personal status of the Deceased. In any event, whether the Deceased was living together with the Accused at the time of her death or whether the Accused Person was merely visiting is hardly relevant for purposes of establishing whether the Accused Person murdered the Deceased.

d. The apparent discrepancy regarding the murder weapon is more problematic. Four witnesses

testified to seeing the murder weapon at the scene of crime: PW1 (Protus); PW3 (Insp. Wilson Khakali); PW6 (Cpl. Linah Cheserek); and PW8 (Kellen Shwachi). It is troubling that PW4 (Insp. Jared Seko), the Scenes of Crime Officer did not see the murder weapon at the scene. He therefore did not take any pictures that showed the weapon. I carefully considered this discrepancy but formed the opinion that it was not a result of any attempt by the witnesses to mislead the Court, obfuscate issues or hide evidence. It would appear to be a simple oversight on the part of PW4 given the overwhelming evidence of the four other witnesses who were at the scene and who saw the murder weapon and positively identified it in Court.

e. Finally, the discrepancy between the evidence of PW6 and PW8 about the number of broken limbs is also immaterial. Neither PW6 nor PW8 is a medical doctor and neither did they carefully examine the body of the Deceased. Both were reporting what they saw from viewing the body at the scene. The important point is that the Deceased's body was found lying at the scene with serious injuries. The exact nature of the injuries is laid out in the Post-Mortem Report.

17. There is one evidential issue raised by Mr. Magero in his Final Submissions that I need to comment on briefly. He complains that the Prosecution failed to produce a "credible" post-mortem report and failed to call the doctor who performed the post-mortem on the body of the Deceased. He cited two cases that establish that it is incumbent upon the Prosecution to prove its case by calling admissible medical evidence. It probably escaped Mr. Magero's memory at the time that he was making his submissions that he explicitly stipulated to the production of the Post-mortem report without calling the Doctor. He expressed no objection to the production of the document at the time the evidence was being tendered. It is also noteworthy that the Report had been served on him at the beginning of the case. Thus, to turn around at the submissions stage to protest the admissibility of the document is unavailing.

18. Mr. Magero points out that there was no eye witness and that in the absence of any eye witness, the evidence against the Accused is only circumstantial. Additionally, the Defence argues that our jurisprudence is clear that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- a. The circumstances from which an inference of guilt is sought must be cogently and firmly established;
- b. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the Accused Person; and
- c. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. (See *Abanga Alias Onyango v R CoA No. 32 of 1990*; and *R v Kipkorir Arap Koske & Another (1949) 16 EACA 23*.)

19. Mr. Magero is right that there was no eye witness to this crime. All the witnesses who testified could only testify to what they had been told happened. This includes PW2 (Eric Mutuma Bariu) and PW8 (Cpl. Kellen Shwachi). Both of these witnesses arrived at the scene immediately after the incident and testified that the members of the public they found there told them that the Accused Person had beaten the Deceased to death and that several members of the public had witnessed the incident. However, none of these members of the public who had allegedly witnessed the incident were called to testify.

Cpl. Shwachi explained on oath that members of the public who were present were not willing to record statements because they were apparently terrified by the Accused Person.

20. The question is whether there is enough evidence on record to prove the case against the Accused Person in the absence of direct evidence. First, I find that the presumption in our case law that the failure to call an essential witness would lead the Court to draw an inference that if his evidence had been called it would have been adverse to the Prosecution case does not apply here. This was the holding in *Bukenya & Others Vs Uganda (1972) EA 549* where the former East Africa Court of Appeal held that the

prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case. Here, however, the members of the public were not available as witnesses as they were unwilling to cooperate with the Police and testify and so the inference cannot be drawn.

21. The evidence that formed the crucial link that connected the Accused Person to the murder is the evidence of PW7 (Rosemary Makena). This witness was categorical that the Accused Person presented himself at the Report Desk at Gitambaya Police Post and reported that he had killed his wife.

The witness was the duty officer at the desk at the time. At first, she found the story incredulous and treated the Accused Person as a mentally disturbed person but he persisted in his story. It was only when the witness called the Deputy OCS that she learnt that it was, in fact, true that a murder had been reported and that the Accused Person was the suspect and that is when she understood that the Accused Person was, in fact, mentally stable.

22. The Defence has attacked the evidence on PW7 as inadmissible for being a confession which was not given in accordance with Section 25A of the Evidence Act. This argument is unavailing to the Defence for two reasons. One, is that the Defence raised no objection whatsoever to the admissibility of the evidence during the testimony of the witness. It is only in the final submissions that the Defence raises the issue. Two, and more importantly, the evidence given by this witness does not fit the description of a confession as defined under Section 25A and neither is it self-incriminating evidence. I say so because at the time the Accused Person presented himself to PW7 and narrated his story, he was not under arrest. PW7 did not even know of the commission of the offence. The Accused Person was, therefore, not charged with any offence. He was also not induced at all to give out the information that he did. He simply presented himself to PW7 and narrated his story. Unaware of the commission of the offence or the circumstances surrounding the commission of the offence, PW7 could not have administered a caution.

23. As for the unsworn statement by the Accused Person, I found it to be unpersuasive and incredible. Looking at the totality of the evidence in context, it is safe to reject the Accused Person's story as incredible and a fabrication. Several factors point to this direction. First, the strong concurrence of material details in the accounts of the other Prosecution witnesses is a good pointer to the truthfulness of the prosecution narrative. Second, while not always dispositive, there is no hint of motive for the Police to want to frame the Accused Person and no evidence was adduced to that effect. Indeed, the Accused Person did not claim that any of the Prosecution Witnesses had any motive or reason to frame him or hurt him. Third, I had the occasion to observe the demeanor of the crucial Prosecution witness – PW7 – and assess her credibility. She impressed me as completely credible and truthful. She gave details about her encounter with the Accused Person which make it more likely than not that she is telling the truth. The Accused Person, on the other hand, was quite parsimonious and general in his account.

24. Consequently, in my view, tested against the inherent probabilities, the Accused Person's story is so improbable that it cannot reasonably possibly be true. While the Prosecution case had some blemish in the form of the inconsistencies discussed above, the question is whether those aspects which are unsatisfactory are material enough to affect the Court's evaluation of the inherent probabilities that the witness' narrative is true. The law requires the witness to be satisfactory. It does not require the witness to be perfect.

25. After due analysis of the evidence presented in this case, this is a case that goes beyond mere suspicion as the Defence claims. In my view, therefore, I can confidently say that this was one of the cases where it can properly be said that the "inculpatory fact is incompatible with the innocence of the Accused, and is incapable of explanation upon any other reasonable hypothesis than that of his guilt." See ***R v Kipkering Arap Koske & Another 16 EACA 135***. This series of events put together lead to an unmistakable inference: it was the Accused Person who viciously attacked the Deceased with a metal rod and clobbered her to death.

26. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as

follows:

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

27. To successfully obtain a guilty verdict in a murder charge, the prosecution, therefore, is required to tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

28. On the other hand, malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or
- 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; or
- c. Intent to commit a felony; or
- d. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

29. In this case, the evidence presented by the Prosecution establishes beyond reasonable doubt all the elements of the offence of murder:

- a. It is common that the Deceased died on 02/09/2016;
- b. The evidence also showed beyond reasonable doubt that it was the Accused Person who caused the death through the unlawful act of beating up the Deceased using a metal bar; and
- c. The assault of the Deceased using a metal bar was actuated by malice aforethought: the aim was either to grievously harm the Deceased or to kill her.

30. In the premises, it is my finding that all the ingredients of the offence of murder have been proved in the instant case. Consequently, I find the Accused Person guilty in the murder of Lucy Nkoroi Charles contrary to section 203 as read together with section 204 of the Penal Code. I hereby convict him accordingly.

31. Orders accordingly.

Delivered at Kiambu this 18th day of July, 2017.

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JOEL NGUGI

JUDGE