



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO.16 OF 2010

REPUBLIC.....PRESECUTOR

VERSUS

MISHEKI MAINGI KANYAMU.....ACCUSED

JUDGMENT

Misheki Maingi Kanyamu is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. It is alleged that on 14/3/2010 at Kathita area, Katheru Central Location in Meru District, murdered **Emily Wanja**. The prosecution called a total of 6 witnesses in support of their case. Accused was represented by Mr. Gikunda. Accused testified on oath but did not call any other witness.

PW1 Jacinta Kagendo, testified that on 14/3/2010 about 5.30 p.m., she went to Kuwait Bar at Kithaku where she had been working. She was in company of Wanja, the deceased. She went to the room in which she used to live, behind the bar. She started cleaning utensils while Wanja sat on her bed. About 6.30 p.m., she called on Ngeera alias Kamiri (PW2), who worked as a waiter at the bar to come and take the bar utensils since she was going away to work elsewhere; that Ngeera came and collected the utensils and when she was packing her things, somebody suddenly entered the room; that it was getting dark and she thought it was Kamiri and she called out his name three times but he did not respond. On looking up, she noticed it was accused who pushed her and she fell backwards on the bed. She heard the person address Wanja that he would kill her that day. PW1 said she started to scream asking for help. She got hold of the person and as she screamed, he stood up and pushed her out of the door. She said that her house was one roomed, partitioned into two using a sheet; that accused removed Wanja from the inner side where the bed was to the outer side (sitting area). As she ran out, she met people coming in response to the screams. She said PW1 saw the accused lying on Wanja and saw that Wanja was bleeding from the head. She knew accused before but denied knowing that he was Wanja's husband. PW3 said Assistant Chief and Police came and found both Wanja and accused in the room. PW1 denied that there were any other men in the room when accused appeared and she denied that he was injured.

James Ngeera (PW2), testified that on 14/2/2010, about 6.30 p.m., he was at work at Kuwait club when PW1 Kagendo went there with Wanja and they entered the room where PW1 used to live, to collect PW1's belongings.. He heard screams and ran there and found a lady lying down in PW1's room near a table; that she was bleeding. On entering the room, he also saw Maingi the accused holding a knife and was standing next to Wanja. He locked the door of the house and called the Assistant Chief. He knew accused as husband of the deceased. He identified the knife that accused had as the one with metallic handle (PEX.No.1). PW2 denied knowing if there had been any other people in the room but had seen PW1 and deceased enter the room. He denied seeing any injuries on the accused.

PW3 John Mbundi Kirera is the Assistant Chief of Katheru Sub-Location. On 14/3/2010, about 7.00 p.m., he received a call from PW2 who informed him that there was a fight at Kuwait Bar. He arrived there about 7.30 p.m. He found a person had been locked up in a room. He used a torch and on peeping through the window, saw accused Maingi standing next to his wife who was lying on the floor and was bleeding from the head. PW3 called the Officer Commanding Station (OCS), he came, opened the door to the room; that Wanja was already dead and a blood stained knife was next to her body. PW3 knew both accused and deceased. PW3 said that Maingi was bleeding from the left hand.

PW4 Peter Mbaya, was at Kuwait Bar on 14/3/2010 about 6.30 p.m. when he heard screams emanating from a room and he heard somebody saying that the door be locked so that the person could not escape. On arrival at the scene, he found the door had already been locked. The Chief arrived, but PW4 neither saw the accused nor the deceased. He did not know accused before.

The post mortem was conducted by **Dr. Macharia** and the post mortem report was produced in court by **Dr. Steven Chege (PW5)** of Meru Level 5 Hospital. The Doctor found that the deceased had sustained a stab wound on left side of the forehead and internally, there was a compound fracture of the frontal bone with intracranial bleeding. He was of the opinion that the cause of death was a penetrating head injury caused by a sharp object (PEX.No.1).

PW6, CPL Tarcisio Wahome, took over the investigation of the case from **IP Makori** who is said to be deceased. He produced the knife identified by PW2 as an exhibit (PEX.NO.2). Two other knives that were found in the room were also kept as exhibits (PEX.No.3 and 4). The other two knives found in the room were also said to be blood stained.

In his sworn defence, accused said that indeed, the deceased was his wife with whom they had two (2) children; that on 14/3/2010, he passed by Kuwait Bar to take a drink; that the counter was closed and he went to the rear side of the bar. On entering a room, he found Kagendo with his wife Wanja, who was seated on a bed with a man who had placed his hand on his wife's shoulder. He demanded to know what was going on and that the man told him that he was making noise; that he ordered his wife to stand; that the man stood up and started to push him and a fight broke out. He denied having anything in his hand. He got injured on the hand and chest; and he lost consciousness and had no idea who injured his wife. He came to and found himself alone with the wife locked up in the room. He denied knowing where the man he argued with went to and had never seen him before. He denied having had any dispute with the wife and had nor reason to injure her; that they had had minor issues of her coming home late between them but had resolved them. In cross examination, he admitted to having killed the wife but without intending to do so.

After the close of the defence case, Mr. Gikunda, Counsel for the accused submitted that the accused never intended to kill the wife but that it was instantaneous when he found the wife with a stranger and wanted to know what was going on; that there was no direct or indirect evidence to link accused to the offence of murder.

Mr. Mulochi, Counsel for the State, on the other hand urged that PW1 was categorical that she saw accused strike deceased. PW2 went to the scene and found accused still holding the knife; that PW1 and 2 had no reason to frame the accused.

To prove an offence of murder, the prosecution has the duty to prove the following three ingredients beyond reasonable doubt:

1. **The death of deceased;**
2. **That accused caused the death by an unlawful act or omission;**
3. **That the accused had malice aforethought.**

Dr. Macharia who performed the post mortem on the deceased found that the deceased had sustained a

stab wound on the left side of the forehead; compound fracture of the frontal bone with intracranial haemorrhage. He formed the opinion that the cause of death was a penetrating head injury caused by a sharp object. PW1 was with deceased when they were accosted and saw deceased dead. PW2, 3 and 6 went to the scene of the murder; saw deceased lying in the room dead. The fact of the death is not disputed.

Although at first the accused was denying having known how the deceased met her death, in cross examination, he did admit having killed the deceased but stated that he did not intend to kill her. He did not explain how it had happened having initially denied having any knife. According to PW1, she was alone with deceased when accused suddenly burst into her room and pushed her out before attacking the deceased. PW1 saw the deceased bleeding soon after the attack. She denied that anybody also was in the said room though accused says there was. Having ultimately admitted to killing the deceased, accused should have explained how it came about and what role the 3rd party played.

In view of the accused's own contradictory testimony as to how deceased was injured, I am inclined to and I do prefer PW1's testimony that accused attacked the deceased and there is no evidence that there was another man in the room.

Accused's testimony of how he came to PW1's room is unconvincing. Accused said he had come to drink at the bar and play games, but that he found nobody at the counter of the bar yet PW2 told the court that he was serving people in the bar and there were several customers, 15-20. It seems PW2 never saw accused enter. Having heard PW1's testimony, I am convinced that accused trailed his wife to the bar and followed them to PW1's room. The assistant Chief PW3, told court that accused had reported to him earlier that week that his wife had changed, was selling in a club, and was having extra marital affairs and was now a prostitute. PW3 said that before that, accused and deceased used to fight over tea farm. That evidence was not challenged on cross examination. Accused was therefore, not truthful when he alleged that he had no dispute with the wife. Accused suspected the deceased of having extra marital affairs and that is why, I believe he trailed her to the room on that day.

PW1 maintained that it is accused who stormed into the room and attacked them and pushed her outside and she screamed for help which attracted people including PW2. PW2 was the first at the scene and he is the one who locked the door so that the accused could not escape. When PW2 arrived at the scene, he said that accused was still holding a knife in his hand. In his defence, accused denied having had anything in his hand yet in the end he admitted having stabbed the deceased but that it was not intentional. There is evidence that there were two other knives in the said room. Being a residential house where PW1 lived and cooked, it would be expected that there was a knife or knives. Unfortunately, the knives were not shown to PW1 at the time she testified to determine whether or not one or all of the knives belonged to her. Whatever the case, the weapon used to injure the deceased was a sharp object and I believe it is the knife that PW2 saw accused holding. I am satisfied that it is the accused who stabbed the deceased and he did not manage to escape from the scene.

The accused told the court that he was injured on the hand and chest. PW4 who arrived at the scene and found deceased already dead said that indeed, accused was bleeding from the hand. There is no evidence that accused ever lost consciousness as he alleges or that he was treated anywhere. When he came to court for plea, there is no evidence that he was ever taken for treatment. PW2 said he saw accused standing over the body of the deceased. If at all accused was injured, it was very minor and it cannot be ascertained how he received these minor injuries. If there was a struggle, it must be the deceased who tried to defend herself because it is the accused who sneaked on PW1 and the deceased and made the attack.

The dead do not tell tales PW1 told the court that the accused suddenly burst into their room and attacked them. It cannot be ascertained whether or not accused went to the room with the intention of doing grievous harm to the deceased because the prosecution did not clarify whether or not the knives found at the scene all belonged to PW1 or the accused came while armed. For the above stated reasons, this court is unable to establish malice aforethought as against the accused. Because of the suspicions he had against the deceased, accused may have reacted instantaneously after he found deceased in the said room.

The death is not in dispute but there may have been a struggle between accused and deceased that resulted in accused fatally injuring the deceased.

For the above reasons, I will find that the prosecution has proved beyond any doubt that accused caused the death of the deceased unintentionally. I will convict him of the lesser charge of manslaughter contrary to **Section 202 as read with Section 205 of the PC** and convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF APRIL, 2016.

R.P.V. WENDOH

JUDGE

12/4/2016

PRESENT

Mr. Mulochi for State

Mr. Gikunda for Accused

Peninah/Ibrahim, Court Assistants

Present, Accused