



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO.25 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JAPHASON KARIUKI THUMBI *alias* BABA THUMBI.....ACCUSED

JUDGMENT

The accused, Japhason Kariuki Thumbi *alias* Baba Thumbi was charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 18th January 2010 at Kiambiu Estate, Buru Buru in Nairobi County, the accused, jointly with others not before court, murdered Rachel Wanjiru Maina (deceased). When the accused was arraigned before this court, he pleaded not guilty to the charge. The prosecution called nine (9) witnesses in its bid to establish its case on the charge against the accused. After the close of the prosecution's case, the accused was put on his defence. The Accused gave unsworn evidence in his defence. In essence, the Accused gave alibi defence. It was his defence that he was not at the scene when the deceased was killed. He learnt from the neighbours that it was his estranged wife that assaulted the deceased and caused her death.

The hearing of this case commenced before Mwilu J (as she then was). She heard five (5) witnesses before this court took over the proceedings. Both the prosecution and the defence did not have any objection to this court proceeding with the case from where it had reached. The facts of this case according to the prosecution witnesses are as follows:

The deceased Rachel Wanjiru Maina was a resident of Kiambiu Estate within Buru Buru area. The estate is also referred to as Kosovo. The estate is an informal settlement. The deceased owned a plot within the estate. In the plot, she had constructed several rental premises. The deceased lived in one of the premises within the plot with her two sons PW1 Harrison Munyaka Wanjiku and PW3 Haron Maina Wanjiku. PW1 run a barber shop within the plot. The estate is not adequately served by both electricity and water supply. Some residents within the estate were connected to the electric grid while others had water supply. At the material time, the deceased was connected to the national electricity grid. However, she was not connected to the water supply. Her family used to get their water supply from the nearby plot where the accused and his wife resided. The accused had illegally connected electricity to his house from the deceased's house.

According to PW1 and PW2 Jackline Kageno (PW1's wife), the relationship between their family and that of the accused was good prior to the incident that resulted in the death of the deceased. According to PW1 and PW2, whenever the accused and his wife disagreed, the wife of the accused sought refuge in their home. This appears to have incensed the accused. This was the beginning of their disagreement. With a view to repairing their relationship, the deceased refused to accord refuge to the accused's wife

when they had a disagreement. According to the two witnesses, the wife of the accused referred to as Mama Thumbi did not take kindly to this snub. She developed hostility towards the deceased. The relationship between the two families further deteriorated when the deceased made a report to Kenya Power & Lighting Company Limited of the illegal electricity connection to the accused's house. The report resulted in electricity being disconnected from the accused's house. In retaliation, the accused and his wife denied the deceased and her family access to the water supply.

On the material day of 18th January 2010, a quarrel ensued between the deceased and Mama Thumbi. According to PW1 and PW2, Mama Thumbi provoked an argument with the deceased by accusing the deceased, firstly, for being the cause of electricity being disconnected to their house, and, secondly, for engaging in witchcraft. The argument became heated. PW6 Michael Kihara Mwangi testified that the deceased and Mama Thumbi fought. PW1 and PW2 recalled that the altercation did not go on for too long before Mama Thumbi moved from where the fight had taken place. They saw her make several calls. They did not know whom she was talking to. After a short while, the accused with a group of men identified as Kajiti, Kamau, Karoboi and Wangiga came to their compound. They were accompanied by Mama Thumbi. The accused assaulted the deceased. The deceased was hit with a stone on her head. She was beaten by the group. The accused held the deceased to the ground and called on his wife Mama Thumbi to stab the deceased. PW1 and PW2's attempts to rescue the deceased was thwarted when they were, in a similar fashion were assaulted and beaten by the group. PW1 and PW2 saw Mama Thumbi hold a knife. After being instructed by the accused to stab the deceased, Mama Thumbi stabbed the deceased on her chest area. PW2 testified that her screams for help were not answered by the neighbours because the accused was reputed at the time to be a member of the infamous Mungiki gang. After the deceased was stabbed, the accused and his group left the scene.

PW1 and PW2 went to the deceased's rescue. They saw that she was bleeding from a wound on her chest. They took her to a nearby clinic where they were referred to Kenyatta National Hospital. The deceased was admitted there but succumbed to her injuries a few hours after her admission. According to the post mortem report prepared by PW4 Dr. Njau Mungai, on external examination, he saw that the deceased had sustained a stab wound on the right Para-vertebral region above L. There was a penetrating wound of about 20cm deep and 45mm long. There was a slit on the skin. On internal examination, he noted that the right lung had collapsed. The diaphragm was lacerated. There was blood which had accumulated on the right chest cavity. He formed the opinion that the cause of death of the deceased was chest injury as a result of assault and stab injury. The post mortem report was produced as **prosecution's exhibit No.1**. Prior to the post mortem, the body of the deceased was identified by PW3 Haron Maina Wanjiru, a son of the deceased.

A report of the incident was made to Eastleigh Patrol Base. The case was referred to CID Buru Buru who investigated the case. PW5 PC Eliud Muhia, a Scenes of Crime officer, visited the City Mortuary on 27th January 2010 where the body of the deceased was preserved. He took photographs of the body of the deceased and prepared a report. The photographs and the accompanying report were produced as **prosecution's exhibit No.2(a)** and **(b)** respectively. The case was investigated by PW7 PC Joseph Wanjohi. He told the court that after the incident, the accused and his accomplices disappeared from the area. The accused was arrested about two months after the incident. In his testimony, PW7 testified that the accused, in company of others, assaulted the deceased causing her to suffer fatal injuries due to differences that arose from the use of electricity and the water within the informal settlement. He told the court that, despite making effort, he was not able to trace either Mama Thumbi or the other accomplices of the accused so as to bring them to book. However, it was PW7's evidence that the accused was the main culprit in the assault and subsequent fatal stabbing of the deceased.

PW9 Sgt Dishon Angoya, then based at Kamukunji Police Station, recalled that on 10th March 2010 at about 10.00 a.m. while he was on patrol with two of his colleagues, he was informed by Inspector Matoke, the officer-in-charge of Eastleigh Patrol Base that a suspect of the murder had been apprehended by members of the public at the Bus Station. Inspector Matoke requested PW9 to go to the scene and arrest the suspect. PW9 rushed to the scene and found the accused having been surrounded by members of the public. From the testimony of PW8 Dr. Zephaniah Kamau, it was apparent that the accused had been beaten by members of the public prior to his arrest. He had injuries consistent with such beatings.

PW9 arrested the accused and escorted him to Kamukunji Police Station where he was later transferred to Buru Buru Police Station. After concluding his investigations, PW7 was of the view that there was sufficient evidence to have the accused charged with murder. PW8 Dr. Zephaniah Kamau examined the accused and was of the opinion that the accused had the requisite mental capacity to stand trial for the charge of murder brought against him.

In his defence, the Accused denied that he killed the deceased or participating in concert with others in the assault that resulted in the death of the deceased. He narrated how, due to his wife's drunkenness and infidelity, he made the decision to move away from his matrimonial home. He told the court that at the material time it was alleged that the deceased was fatally stabbed, he was not living with his wife (Mama Thumbi). He testified that after the incident, he learnt from a neighbour that the deceased had fought with his wife. During the fight, his wife stabbed the deceased on the chest. He was shocked by this information. He told the court that since it was known who had killed the deceased, the police should pursue her. He reiterated that he was not at the scene when the incident occurred. He pleaded his innocence of the charge.

In criminal cases, it is the duty of the prosecution to establish the case it has brought against the accused to the required standard of proof beyond any reasonable doubt. The prosecution has the burden to establish its case. This burden does not shift to the accused. In essence, no burden or responsibility is placed on the accused to prove his innocence. In the present case, the prosecution adduced eye witness account of what transpired on the 18th January 2010. According to the three eye witnesses, PW1, PW2 and PW6, the wife of the accused went to the deceased's plot and provoked an argument. It was the prosecution's evidence that there existed a grudge between the family of the deceased and that of the accused as a result of electricity and water usage. The three witnesses testified that the argument between the deceased and Mama Thumbi (the accused's wife) degenerated into a fight. Mama Thumbi called for reinforcement from her husband. The husband (the accused) arrived at the scene with several accomplices.

They then assaulted the deceased before the accused pinned the deceased on the ground and instructed Mama Thumbi to stab her. Mama Thumbi obliged and stabbed the deceased in the chest area. Although effort was made to have the deceased attended to medically, the stabbing proved fatal. The deceased succumbed to her injuries a few hours after the assault. The doctor who performed the post mortem was in no doubt that the cause of death of the deceased was excessive bleeding due to the stab wound on the chest. The post mortem report was produced as an exhibit by the prosecution. In his cross-examination of the prosecution witnesses, the accused suggests that he was not at the scene when the incident took place. The Accused, reiterated the thrust of his defence that he was not at the scene when the incident took place. The Accused testified that he was informed that it was Mama Thumbi, his wife who killed the deceased after a quarrel. He was the wrong person on the dock. On the other hand, it was the prosecution's case that it was the Accused and his accomplices who responded to the cries of help by Mama Thumbi that led to the assault and death of the deceased.

This court has carefully evaluated the evidence adduced by the prosecution and the defence pro-offered by the Accused. As stated earlier in this judgment, the prosecution adduced eye witness account of what transpired on the material day. According to the prosecution witnesses, PW1, PW2, PW3 and PW6 testified that Mama Thumbi, the wife of the Accused fought with the deceased as a result of differences that arose from the use of electricity and water supply. Both the electricity and water supply had illegally been connected to the informal settlement. The Accused had illegally connected electricity from the deceased's house. The Accused was selling water which he had illegally connected to his compound. It was apparent from the evidence adduced that Mama Thumbi was not happy when electricity to her house was disconnected by Kenya Power and Lighting Company. She attributed this disconnection to the report that had been made by the deceased. She refused to allow the deceased and members of her family access to the water supply.

On the material day of 18th January 2010, a quarrel ensued between the deceased and Mama Thumbi. From the evidence adduced by the prosecution witnesses, it was clear that it was Mama Thumbi who provoked the quarrel. The two fought. They were separated. Mama Thumbi was seen making several

calls. After a while, the Accused and his four accomplices identified as Kajiti, Kamau, Karoboi and Waginga arrived at the scene. They went to where the deceased was and started assaulting her. The prosecution witnesses heard the Accused call his wife (Mama Thumbi) to stab the deceased. Mama Thumbi had a knife. She stabbed the deceased on the chest. It was this stabbing on the chest that caused the death of the deceased. The post mortem report produced by the doctor established that the stab on the chest resulted into the deceased sustaining excessive internal bleeding into the chest cavity that caused her death. PW1 and PW2, the sons of the deceased and other neighbours were not able to intervene to rescue the deceased because the Accused was reputed to be a member of Mungiki gang that terrorized members of the public in the area.

This court assessed the evidence adduced by prosecution witnesses as consistent, credible and gave a true account of what transpired on that material day. It was clear from the evidence adduced by the prosecution witnesses that the Accused and his accomplices intended to cause injury on the deceased. It was therefore no surprise that the deceased was killed as a result of the assault. The evidence adduced by the Accused in his defence does not exonerate him from the crime. This court was not persuaded by the alibi defence that he adduced in court. The thrust of his defence to the effect that he was not at the scene when the deceased was fatally stabbed is incredible. The Accused was well known to the prosecution witnesses at the scene prior to the incident. The said witnesses had no reason to frame the Accused for a crime that he did not commit. This court therefore holds that the prosecution did prove, to the required standard of proof beyond any reasonable doubt, that it was the Accused, in company of others, who caused the death of the deceased.

The issue that remains for determination is whether the Accused killed the deceased with malice aforethought. Malice aforethought is defined under **Section 206** of the **Penal Code** thus:

“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 grievous 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 a grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c. an intent to commit a felony;

d. an 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.”

In the present case, it was clear that in causing the deceased to be stabbed with a knife on her chest, the Accused intended to cause the death or grievous harm of the deceased. It may be argued that Mama Thumbi was provoked into the fight with the deceased. However, the evidence adduced clearly points to the fact that it was Mama Thumbi who provoked the fight and was assisted in the assault of the deceased by the Accused and his accomplices. Taken in the context that there existed a grudge between Mama Thumbi and the deceased, this court cannot reach a finding that the circumstance in which the fight took place was so heated that the Accused and his accomplices did not have sufficient time to cool. This court holds that the killing of the deceased was premeditated and deliberate. The death of the deceased was a natural consequence of the Accused's and his accomplices' deliberate unlawful act.

In the premises therefore, this court holds that the prosecution proved its case on the charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The Accused is accordingly convicted of murder. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MAY 2016

L. KIMARU

JUDGE