REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 72 OF 2014

Lesiit, J.

REPUBLIC.....PROSECUTOR

VERSUS

BANCY MUKAMI NYAMBURA …….....ACCUSED

JUDGMENT.

1. The accused **BANCY MUKAMI NYAMBURA** was charged with Murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence are as follows:

> **"On 26th July 2014 at Hilton Area Gitambaa village Ruiru District within Kiambu County murdered James Mwangi Maina."**

2. The prosecution called a total of six (6) witnesses. The summary of the prosecution case was that the accused and the deceased were living together as husband and wife and had a baby which was a son and was breastfeeding at the time. They also lived with PW1, a cousin of the accused who served them as a housemaid. During the time in question, M, the step-daughter of the accused and daughter of the deceased had visited. It is the prosecution case that on the evening of the 26th July 2014, both the accused and the deceased returned to their house at about 11 pm and that both were drunk and were also quarrelling. The quarrel degenerated into kicks and blows after which the couple went out still fighting with one another. Shortly later the accused returned to the house took a knife and went out with it.

3. By the time the neighbours came out, who included PW2 and 4 and also the cousin PW1, the deceased was lying down on the ground unconscious. Eventually he was taken to the hospital by PW1, PW2, PW4, the accused person and other neighbours. He was pronounced dead by doctors at Ruiru Sub-District Hospital.

4. The accused person gave a sworn statement in which she told the court that she spent the day well with her family that is the husband, the child, PW1 and one M who was a daughter of her husband with another woman. She said that M had visited them that week. She said that Michelle just walked away on the morning of the day in question and efforts to trace her through her mother were not fruitful. She said that, that evening on the husband's request, she escorted him to the nearby club. Later he called her to take him a jacket as it was cold. She said that at 9 p.m. they went back home to find that Michelle had

returned back home at 7 p.m. She said that she addressed Michelle and told her that it was wrong for her to be out so late at night as she could be raped or have trouble.

5. The accused said that is how the quarrel started between her and the deceased, with the deceased accusing her of not loving his daughter and asking her to take her things and leave him. The accused stated that she decided to go out and buy milk to see whether the husband will cool down but as she left the husband attacked her from behind after which she fell down and lost consciousness. She said that as she fell down she noticed that her husband was holding a nail cutter like knife. The accused stated that she woke up the following morning at Ruiru police station. She was later treated at Ruiru hospital for the injuries.

6. The accused produced D.Exhibit. 1, the P3 Form to show that the accused had a cut wound on the left side of the face probably caused by a knife. She said that she learned on the 27th that her husband had died. That the police officer who gave her that information told her that he died because she and the deceased were fighting. She said that she had no recollection of having fought with the deceased. She admitted that she had seen the knife which was exhibited in court as P. Exhibit 1 in her house and that it was an instrument of a kind which her husband used for wielding. She denied going back to the house to pick the knife from the kitchen. The accused also said that she never saw PW1, PW2 and PW4 on the material day.

7. The case was prosecuted by Mr. Riungu Learned Prosecution Counsel while Mr. Muchiri defended the accused person. Both counsels filed written submissions which I have considered.

8. Mr. Muchiri in his submissions urged the court to find that the weapon produced as P. Exhibit 1 was not proved to be the murder weapon since no DNA profile was generated from the blood stains found on the instrument. Counsel also urged the court to find that it was the duty of the prosecution to prove that the accused person was motivated by malice aforethought beyond any reasonable doubt and the prosecution had failed to proof it. Mr. Muchiri urged that no witness saw the accused person inflict any injury on the deceased neither did any witness see what exactly happened or how the injury to the deceased was caused. Counsel also urged the court to find that the accused person was being blamed unfairly for the deceased death only because she survived the attack.

9. Mr Muchiri also urged the court to consider the accused defence which was to the effect that she quarrelled with the deceased over her step daughter and that the accused inflicted a deep cut on the cheek about 10cm long as a result of which she lost consciousness and she was not aware of the event which followed after sustaining the cut.

10. Mr. Riungu, learned Prosecution Counsel urged the court to find that the prosecution had told the court that the accused person was fully aware of her surrounding when she went out with the deceased and also at the time she returned to the house and picked the knife before locking the door and returning to where the deceased was. Counsel urged the court to find that the prosecution witnesses who were at the scene at the time of the incident all identified the accused person as the one who was outside with the deceased when he was injured.

11. Mr. Riungu urged the court to find that the prosecution had proved malice aforethought as prescribed under **section 206 (b)** of the **Penal Code** which provides that malice aforethought is proved where it is shown that the accused person had knowledge that the act or omission causing death will probably cause the death or grievous harm to the deceased even though such knowledge is accompanied by indifference that the act or omission causing death will probably cause death or grievous harm. Or by a wish that it may not be caused.

12. Mr. Riungu urged the court to find that the prosecution had proved that it was the accused person who was last seen with the deceased as they walked out of their house. That the prosecution had proved that the accused person returned to the house and picked a knife and soon thereafter the deceased was found dead. Counsel urged that the prosecution through PW2, 3 and 4 placed the accused person at the scene and also corroborated the evidence of PW1.

13. Counsel relied on the case of **Rep. vs. Michael Munyuri (2014) eKLR** which he said was a case of similar circumstance as the instant one. Counsel also relied on the case of **Roba Galma Wario vs. Republic (2015) eKLR** which I have considered.

14. The accused is charged with one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. **Section 203** of the penal code provides as follows:

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

15. The burden of proof lies with the prosecution to prove that the accused person attacked the deceased causing him injuries as a result of which he died. The prosecution must prove that at the time the accused attacked the deceased he had formed an intention to either caused death or grievous harm to the deceased.

16. 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 constitutes malice aforethought under **section 206** of the Penal Code. **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought in the following terms:

> **"206. 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 of or 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."**

17. There are three issues for determination in this case:

> **1) Whether the prosecution has adduced sufficient evidence to establish that the injuries which led to the deceased death were inflicted by the accused person.**
>
> **2) Whether the witnesses who testified in this case were credible.**
>
> **3) Whether the prosecution has established the motive for the attack on the deceased.**
>
> **4) Whether the prosecution has established that the accused had formed the necessary malice aforethought when he inflicted the injuries in question on the deceased.**
>
> **5) Whether the accused defence can stand in the face of the evidence by the prosecution.**

18. The Prosecution is relying on circumstantial evidence to prove the case against the accused there being not a single eye witness of the attack on the deceased. The principles which apply in determining whether the evidence adduced qualifies as circumstantial evidence and whether it is sufficient to found a conviction is well settled.

19. Regarding circumstantial evidence, the test applicable was set in the celebrated case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** where the learned Judges of the Court of Appeal

stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,**
>
> **(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
>
> **(iii) 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."**

20. Further principles of testing circumstantial evidence are set out in the case of **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135,** where the Court of Appeal held:

> **"In order to justify the inference of guilt, the inculputory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt**."

21. More principles are set out in **SAWE –V- REP[2003] KLR 354** , where the Court of Appeal held as follows:

> **"1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**
>
> **2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**
>
> **3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**
>
> **4. ...**
>
> **5. ...**
>
> **6. ...**
>
> **7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

22. And in the English case of ***R. vs. Taylor Weaver & Donovan*** **(1928) 21 Cr. App. Reports 20,** the court held:

> **"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."**

23. The prosecution relied on the evidence of PW1 which shows that the accused and the deceased went home drunk, and that upon entering the house they started quarrelling. According to PW1 both were drunk and the reason they quarrelled was over food which was caused by the accused when she declined to serve the deceased some food. PW1 said that the accused returned to the house and picked a knife moment before the deceased was found lying outside unconscious by PW2, 3 4 and 1.

24. The Prosecution counsel urged the court to find that the accused had been placed at the scene where the deceased was fatally wounded. On the other hand the accused defence was that she lost consciousness after the deceased attacked her and woke up on the following day.

25. The prosecution has adduced evidence which placed the accused at the scene where the deceased met his death. The evidence of PW1 clearly places the accused at the scene of attack. That evidence is corroborated by that of PW2 and 4 all who confirm that the accused was at the scene and secondly that the accused was fully awake throughout that time and also accompanied the three witnesses and others to the hospital. PW1, 2 and 4 said that the accused walked into the hospital where the deceased had been wheeled. She was also the person to whom the doctors informed that the deceased had died.

26. I tested the accused defence that she fell unconscious shortly before the fatal injury was inflicted on the deceased. That evidence did not receive any support from the evidence of the prosecution witnesses. I also noted that when all the witnesses testified that the accused was present, alert and conscious throughout the time from when the deceased was removed from the scene to the time they were informed at the hospital that he had died, no question was put to them that they were lying.

27. One may argue that PW1, 2 and 4 knew the accused before and could have lied. I found that the evidence of PW5, one of the Officers on duty on the night of the incident corroborated the evidence of PW1, 2 and 4 that the accused was fully alert and awake on the night of the incident. PW5 found the accused being treated for an injury on the face.

28. I find that the accused defence that she lost consciousness before the deceased was fatally wounded and that she woke up the next day was not only a lie but also an afterthought. I reject that defence.

29. The issue of motive also arises. When asked what the accused and the deceased were quarrelling about, PW1 stated that the only issue she heard them discuss was about food when the deceased asked the accused to serve him and she declined.

30. The accused defence was that she had quarrelled her step-daughter for coming home at 7pm that evening when the accused started quarrelling her, accusing her of hating his daughter and daring her to pack and leave his house. The accused said that the step-daughter was 15 years old and was in standard 7.

31. Regarding M PW1 testified that she was a child and that she was in standard 3. Further the fact of Michelle having gone away from the house, or of returning home at 7pm never arose in PW1's evidence. Despite that evidence of PW1, the defence did not challenge her evidence nor challenge the issue of in which class M was. I find that the accused was trying to create a reason for the quarrel she had with the deceased but in the process lied about Michelle.

32. Regarding motive in **Choge vs Republic (1985) KLR 1,** the court of appeal held as follows:-

> "**Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.**"

33. The law does not require the prosecution to prove motive even though if proved it would aid in strengthening circumstantial evidence against an accused where the prosecution is relying on circumstantial evidence. In this case the prosecution has failed to establish a motive against the accused. The quarrel over food cannot form a basis for an attack of the nature that took place in this case.

34. There was other evidence which suggests that the accused and the deceased quarrelled often and

especially when drunk. It was the evidence of PW1 that the accused and deceased were drunk on the night in question and that they quarrelled the moment they arrived home. The reason for the quarrel was not apparent to PW1 but she was able to decipher that food was one of the reasons for it.

35. Regarding the credibility of witnesses I noted that there was some inconsistency between the evidence of the prosecution witnesses. PW2 testified that while at the hospital with PW1, 3, 4 and others the accused confessed to the doctor that she was the one who killed the deceased. None of the other witnesses stated that they ever heard the accused admit responsibility of the deceased death.

36. The other inconsistency in the prosecution case was in PW2 and 3's evidence. PW2 testified that he heard people talking loudly and on going outside he found the deceased lying down unconscious. PW3 on the other hand testified that when PW2 called him on phone about the incident, he told him that the accused and the deceased were fighting. PW5, the Officer who handled the murder of the deceased when it was reported to Ruiru Police Station testified that the report received at the station was that the deceased was stabbed by his wife. PW5 testified that he proceeded to the hospital where the deceased had been rushed. He found that he had succumbed to his injuries. He said that he arrested the accused the same night for the deceased death.

37. The evidence of PW1 is consistent with the report made to the police regarding the culprit for deceased injuries. It was also consistent with the report PW3 testified was made to him by PW2 through the phone. Having analyzed the evidence adduced by the prosecution I find that there was some inconsistency in the evidence of PW2. PW2 was not fully candid about the fight which preceded the fatal injury to the deceased given what he told PW3 that he had heard before leaving his house. Regarding the accused confession to the doctor, I found it hard to believe it was made as no one else who was present at the time the alleged confession was made said that he heard it.

38. Even without the evidence of PW2, I find that there is sufficient circumstantial evidence to establish that the accused was the one with the sole opportunity to cause injury to the deceased on the night in question. The inconsistency in the evidence of PW2 does not go to the root of the prosecution case, nor does it affect the veracity of the evidence and is therefore immaterial.

39. The prosecution has established that the accused and the deceased had quarrelled before they fought with fists and blows and also pushed and shoved each other out of their house.

40. The prosecution has established that the accused returned to the house and picked a knife and shortly later the deceased was found unconscious with stab wounds. I find that from the circumstantial evidence adduced before this court that it is the accused and no one else that could have inflicted the fatal injuries on the deceased.

41. Regarding malice aforethought the legal position is that the same can be inferred from the nature of the injury causing death and the manner in which it was inflicted. In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR),** BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

> **"when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.**
>
> **In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."**

42. PW5 produced the post mortem form on the deceased as P. Exhibit 4. According to this report the accused suffered two stab wounds and heamatoma together with bruises on the elbow and lower back.

The stab wounds perforated the heart and the diaphragm causing massive internal bleeding. The cause of death was chest injuries due to penetrating trauma. I find that when the accused set upon the deceased, she must have known that the acts of stabbing the deceased person twice in the chest area with a sharp instrument it would cause death or grievous harm to the deceased. I find malice aforethought under **section 206 (b)** of the **Penal Code** has been established.

43. In regard to the accused defence that he lost consciousness and did not cause any injury to the accused. I have found that the accused lied to the court regarding the cause of the quarrel. She also lied about the knife when she said that she never went for any. The accused was injured but the injury was not classified as to the degree. The accused was stitched and treated for it. However the evidence is clear that the accused never lost consciousness at any time during the night in question. The accused defence was a denial that she was not the one who inflicted the injury on the deceased. That defence is a bare denial, is a complete lie and cannot stand.

44. I find that the accused was in full control of her senses at the time of this incident. She went in to get the knife she used to stab the deceased. Having walked back to the house to pick the knife and then using it to stab the deceased twice in the chest is proof that she had made up her mind to cause either death or grievous harm to the deceased

45. I have come to the conclusion that the accused inflicted fatal injuries to the deceased which resulted in his death. And that at the time she inflicted the said injuries, she had formed the intention to cause grievous harm or death to the deceased. The prosecution has proved the charge of murder contrary to **section 203** of the **Penal Code**. Accordingly I reject the accused defence, find her guilty of murder as charged and convict her under **section 322** of the **Criminal Procedure Code**.

SIGNED AND DELIVERED THIS 8TH DAY OF DECEMBER, 2016.

LESIIT, J

JUDGE