



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 98 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

CHRISPINUS NATEMENYA KHAKALI.....ACCUSED

JUDGEMENT

Background

Chrispinus Natemenya Khakali, hereinafter referred to as the accused, is charged with murder contrary to section 203 and read with section 204 of the Penal Code. It is alleged in the particulars of the offence that on 8th September 2013 at about 11.00pm at Wanyee Estate in Riruta Satellite in Nairobi the accused murdered Rose Makhungu, hereinafter referred to as the deceased. The accused denied committing this offence necessitating the hearing of this case. The prosecution called a total of nine (9) witnesses in support of their case. The defence called one witness, the accused.

Sylvia Musimbi, PW1, was in the same house with the accused and the deceased with their two children. She witnesses what happened. Paul Mutsotso Mukoko, PW2, brother to the deceased was telephoned by the accused on 8th September 2013 at 10.00pm and told to go and pick the body of his sister, deceased. He went to the scene and saw the body of his sister with stab wounds. Frederick Isiji Shahinza, a neighbour, was awakened by screams and when he went out of his house he saw A, the accused's and deceased's child who informed him that her father (accused) had stabbed her mother (deceased). He went to the scene and saw the deceased lying on the ground in a pool of blood. CPL Elizabeth Thuku (PW6) and PC Barnabas Too (PW5) from Riruta Police Station were informed of the crime while on patrol and went to the scene and saw the body of the deceased. They found the accused seated on a sofa and according to them he looked disoriented. The officers recovered a knife and a metal bar which are said to be murder weapons. CPL Polycarp Magai (PW8) in company of CPL Gideon Mugambi both from CID Dagoretti Police Station visited the scene. CPL Magai investigated the matter assisted by CPL Mugambi.

Prosecution case

The accused and the deceased lived together as man and wife. They had two children initialed as A and B. At the time of the events giving rise to this case, the two lived at Wanyee Estate in Riruta Satellite in Nairobi. The house they lived in was one roomed. It had a curtain partitioning the living area and the bedroom. On 8th September 2013 the couple left in the morning to spend another uneventful day. They returned home in the evening. Sylvia Musimbi (PW1), a niece of the deceased who was living with them, prepared dinner which the family took and settled to watch the TV before retiring to bed. It is not clear

from the evidence whether PW1 and the two children of the couple slept in the same area partitioned as the bedroom or in the living area. PW1 had even warmed water for the deceased to wash her feet and from her evidence the accused helped wash the deceased's feet.

The deceased went to bed first prompting the accused to ask her why she had gone to bed without informing him. He followed her to bed and shortly thereafter, a quarrel ensued between them. The deceased claimed that the accused was responsible for the pregnancy of one Rose a cousin of the deceased to which the accused denied. The deceased telephoned her sister, brother and accused's mother over the issue. The quarrel degenerated to physical assault. The accused picked a knife and stabbed his wife on several parts of her body. He also picked a metal bar and hit her repeatedly with it. The deceased died. The accused attempted to hang himself using a bed sheet but was rescued by neighbours. Police from Riruta Police Station were informed and arrived at the scene. They took the accused away and later removed the body to the City mortuary after the scenes of crime personnel had photographed it.

The police recovered a kitchen knife beside the body of the deceased. The knife had a wooden handle and it had a bend blade. They also recovered a metal rod from the scene. The knife produced in court as exhibit 2 and the metal bar produced in court as exhibit 3 were submitted to the Government Laboratory for examination and comparison with the DNA profiles generated from a blood sample obtained from the deceased. The analysis was conducted by Lawrence Kinywa Muthuri (PW4) who confirmed that the knife had stains blood he classified as human. The blood on the knife matched the blood sample extracted from the deceased laying to rest the fact that the knife came into contact with the deceased.

The post mortem examination on the body of the deceased was conducted by Dr. Dorothy Njeru (PW7) on 13th September 2013. The doctor found multiple stab wounds on the body of the deceased. There were stab wounds on the right cheek measuring 5cm long; on the right and left armpit measuring 5cm long; on the left and right thigh; on the left side of the abdomen measuring 5cm long and the umbilical region measuring 15cm long. All the wounds were sharp on one edge which the doctor explained to mean that a sharp instrument had been used to inflict those injuries. There was bleeding in the chest cavity with ½ litre of blood collected there and the right lung was incised. There was 1 litre of blood collected in the stomach and the intestines. The blood vessels supplying blood to the intestines were also punctured. The doctor found no other injuries. After the examination the doctor formed the opinion that the cause of death was chest and abdominal injuries due to penetrating force stab wounds.

The prosecution told the court that it has proved beyond reasonable doubt that the deceased killed his wife intentionally and urged the court to convict him for murder as charged. The prosecution told the court in submissions that the accused intended to kill his wife because he continued stabbing her repeatedly and also used a metal rod to hit her.

Defence case

The defence called the accused as the only witness. He gave his evidence under oath. He testified that on 8th September 2013 around 9.00pm while in the living area of their house, he asked the deceased about her friendship with her boss one Benson Wanyama. When they retired to bed, the deceased received a text message in her mobile handset from the same person. The message, which the accused read, stated in Kiswahili that "*nakupenda sana. Wewe utakuwa wangu wa maisha*" translated roughly to mean "*I love very much. You will be mine forever*". He told the court that he asked the deceased about that text message but she did not respond. Instead she stood up and took her phone. She then called her sister, her mother, and accused's mother and claimed that the accused had an affair with Rose, a cousin of the deceased's; that he asked her why she had changed the story but the deceased did not respond to him; that they started quarrelling and fighting using fists; that he picked something from the table which he did not know what it was and stabbed the deceased with it; that he also picked an iron bar and hit her with it. The accused said he was very angry and could not reason when he attacked the deceased. He said he had not planned to kill the deceased and after he realized what he had done he decided to kill himself but was rescued.

The accused was cross examined and admitted that he knew it was the knife he had picked and stabbed

the deceased with after the stabbing her. He said that he picked the metal bar knowing very well what it was and hit the deceased with it even after he had stabbed her with the knife.

Mr. Wanyanga for the accused submitted that the accused had no mens rea although he used excessive force. Counsel urged the court to convict the accused on the lesser charge of manslaughter. Counsel submitted that the accused committed the offence out of anger. Counsel told the court in further submissions that the deceased received a text message from her boyfriend and when the accused asked her about it she instead accused him of unfaithfulness with Rose her cousin and started calling her relatives about it; that this enraged the accused leading to a quarrel and later physical confrontation. The defence relied on two authorities: **Criminal Case No. 32 of 2010 Republic v. Paul Mutinda Leonard [2014] eKLR** and **Criminal Case No. 37 of 2012 Republic v. Ethan Chege Wanjiru [2014] eKLR** in support of its case. In both cases, the court reduced murder to manslaughter.

Analysis and determination

The prosecution bears the onus of proving this case beyond reasonable doubt. The prosecution has to prove that the deceased died as a result of an unlawful act or omission perpetrated by the accused person with malice aforethought. I have carefully considered all the evidence from the prosecution and the defence. The fact that the deceased died as a result of chest and abdominal injuries due to penetrating force stabs is not in issue. There is expert evidence of Dr. Njeru to that effect. The fact of death and the accused as the person who caused that death is not contested by the defence. The accused admitted in court to stabbing his wife and also hitting her with a metal bar causing her death. This settles the two ingredients of murder, namely that death of Rose Makhungu occurred on 8th September 2013 and that the said death was caused by the accused by stabbing her with a kitchen knife and also hitting her with a metal bar, both acts being unlawful.

This leaves one issue for determination, the issue of mens rea on the part of the accused. Did the accused possess the necessary mens rea? If the answer to this question is in the affirmative, then the charge of murder stands against the accused. If the answer is in the negative, then this court must make a finding of guilty to a charge of manslaughter. I need not repeat that it is the prosecution who must prove mens rea as defined under section 206 of the Penal Code.

The only evidence on record in regard to what happened is that of Sylvia Musimbi and of course that of the accused. Sylvia did not see the stabbing but she said she saw the deceased bleeding from her body from what looked like a stab wound. She testified of a disagreement between the accused and the deceased. According to her the cause of the disagreement was the allegation by the deceased that the accused had impregnated deceased's cousin called Rose. Sylvia did not mention anything about a text message that the accused said was the cause of the quarrel.

On cross examination, Sylvia said that deceased's cousin Rose was pregnant and the deceased blamed the accused for that pregnancy. She said that the deceased telephoned her sister and brother as well as accused's mother over the issue.

I have examined all the evidence with great care. The couple had no issue during the day and early evening. In fact the court was told that at one time in the course of the evening, the accused washed his wife's feet. However on going to bed, there seemed to have been issues. According to Sylvia, the issue was over the pregnancy of Rose deceased's cousin which was blamed on the accused. According to the accused the issue was a text message to deceased from her boyfriend that caused him to ask his wife about it who instead blamed him over the pregnancy of Rose. This court has no other evidence and has either to believe Sylvia or the accused. It is not in issue that the couple quarreled and a fight ensued. That fight must have been caused by what each, Sylvia and accused, told the court.

It is for the prosecution to prove that the accused possessed malice aforethought. The evidence on record portrays a couple at peace with each other until they went to bed. Something must have triggered the change of that atmosphere. This could have been either what Sylvia stated or what the accused stated. The circumstances surrounding the time after the death of the deceased are also relevant. The accused

attempted to commit suicide. The police who arrived at the scene said they found him in a confused state. The letter from Dr. Kamunge dated 16th September 2013 on the mental status of the accused shows that the accused was unstable mentally. He was found to have auditory hallucinations and indeed could not take the plea on the first day he was arraigned in court due to his mental state.

When I take all the circumstances surrounding the commission of this offence, I find that I harbour doubts that the accused had formed the intention to kill his wife. Whatever triggered his rage, he seemed to have acted out of deep emotion after the couple quarreled over their domestic issues. Although I find the accused used excessive force I feel that it is possible to use such force without having formed the intention to kill. Consequently, I find that the offence of murder has not been proved beyond reasonable doubt for lack of proof of the intention to commit murder. I therefore acquit the accused of murder and instead convict him, which I hereby do, of manslaughter under section 202 of the Penal Code. This is the offence I find has been proved beyond reasonable doubt. It is so ordered.

Dated, signed and delivered this 11th day of May 2015.

S. N. Mutuku

Judge