



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 32 OF 2013

REPUBLIC..... PROSECUTOR

VERSUS

CHRISTINE AKINYI MASHERE..... ACCUSED

JUDGEMENT

Background

Christine Akinyi Mashere, the accused, is charged with murder contrary to section 203 read with section 204 of the Penal Code. It is alleged that on the night of 23rd and 24th December 2012 at Githurai 45 within Nairobi County jointly with another not before the court murdered Margaret Njeri Njoroge, deceased. She is represented by Mr. Oundu, advocate. Ms Ikol, prosecution counsel led the prosecution of this case.

Initially the Honourable Lady Justice Florence Muchemi heard one witness Hellen Wanjiru Njoroge, PW1. On my taking over the proceedings in this case in November 2014 the state applied to amend the charges to read as shown above. This necessitated taking evidence of PW1 afresh. Hearing of the case commenced on 25th February 2015 and at the close of the prosecution case a total of nine (9) witnesses had testified. The accused was the sole witness for the defence.

Facts of the case

On 23rd December 2012 at around 11.30pm, the deceased and one Joseph Mburu hired Peter Kinuthia Ndung'u (PW6), a motor cycle rider from Kasmart Supermarket in Githurai to take them home. Her home was situated at Githurai Kimbo area in the neighbourhood. The deceased was a longtime customer of Peters. Joseph Mburu was deceased's boyfriend. Both the deceased and Joseph were drunk. Peter took them home and charged them Kshs 100 for the ride. On arrival, they found the gate of the home locked from inside. The deceased called the accused who was at the time staying with her doing part-time household duties. The accused did not respond necessitating Joseph to jump over the gate and open it from inside. Peter left the duo safely in the compound.

Inside deceased's house was the accused and Peter Njoroge Ndonga (PW2). Peter Njoroge was nephew to deceased and had come to visit her. At the time, the two children of the deceased named as N (8 years old) and K who was older were away visiting their grandmother at her rural home. The accused, who is said to have disagreed with her husband, had asked the deceased to house her in her two bedroomed house. The accused used to do some chores (cleaning and cooking) for the deceased on part-time basis and go to look for casual jobs elsewhere during the day.

On the material day (23rd December 2012), Peter Njoroge had retired to bed around 9.30pm before the deceased arrived. They shared a bedroom with the accused sleeping on the lower decker bed and Peter Njoroge on the upper deck. Peter Njoroge heard the accused come home around 10.00pm. By this time the deceased and Joseph had not come home. When they finally got home, the accused opened the door of the house for them.

On the morning of 24th December 2012 Peter Njoroge woke up to find Joseph having breakfast. Joseph was in slippers and pajamas. The accused was not in. Peter Njoroge did not find the deceased and sought out from Joseph where the deceased was. He was informed that the deceased had not come home. After having breakfast, Joseph asked Peter Njoroge to escort him to sell a DVD player. They went to the place where deceased used to work. Joseph picked the DVD player and went to sell it. He bought two big paper bags and the two went home. After a while Joseph told Peter Njoroge to escort him. Joseph was carrying the two paper bags he had bought earlier packed with items. After escorting him Peter Njoroge was given Kshs 50 to buy lunch and Joseph boarded a motor cycle and left.

Peter Njoroge went home and whiled the time away until around 6.00pm when he noticed water dripping from the tap inside the house. He decided to fetch and store the water since they did not have any. While mopping the water which had spilled into the deceased's bedroom Peter Njoroge noticed someone under the deceased's bed. He called his mother Jane Muthoni in Kinangop and informed her about it. Jane in turn called Hellen Wanjiru Njoroge (PW1), another sister to the deceased. Hellen lived in Githurai and on receiving the call she went to the home of the deceased. In company of Peter Njoroge Hellen found out that it was her sister the deceased's body under the bed. The matter was reported at the police station at Kimbo. The police visited the scene and collected the body after taking photographs.

The accused was arrested on 27th February 2013 and arraigned in court to answer to murder charges on 1st March 2013. Joseph Mburu is still at large.

In her defence given without taking the oath, the accused told the court that she met the deceased on 21st December 2012; that the deceased gave her some chores to do at her home and when she went home her husband told her to go away to wherever she had been; that she returned to deceased's home where she was accommodated; that she continued doing household chores for the deceased after which she would look for casual work elsewhere; that on the third day she prepared food and retired to bed; that the deceased and her husband came home late and she opened for them and served them food.

She testified further that on 24th December 2012 she woke up in the morning, prepared tea and left. She met her husband and after discussions they reconciled and she went home. She said she was not aware of what had happened at the deceased's home and that after two months she was arrested and charged with this offence. She denied committing killing the deceased.

Murder charge

The prosecution bears the burden of proving beyond reasonable doubt that the accused person before this court, with malice aforethought, unlawfully killed the deceased on the dates stated. The prosecution must prove that death of Margaret Njeri Njoroge occurred; that the death was caused by the accused before the court; that the death was unlawful and that the accused possessed the intention to cause that death.

There is evidence on record to show that the body of the deceased was recovered from under her bed at her home in Githurai Kimbo in Nairobi. Peter Njoroge, Hellen Wanjiru, Police Constable Talaam (PW3), Police Constable Daniel Kieni (PW4) all testified to seeing the body of the deceased at the scene. Hellen also identified the body to the doctor for purposes of post mortem.

The death of the deceased has also been confirmed by Dr. Njau Mungai (PW5) who conducted the post mortem on the body of the deceased on 27th December 2012. He found fractures on the left jaw bone around the eye area; lacerations on the cheek measuring 5cm by 7cm; skull fracture on the temporal region on the left and stab wounds on the left hand, neck and left leg. The doctor's opinion was that the

cause of death was due to head injury and haemorrhage due to blunt and sharp trauma. This evidence in my view is conclusive that the death of the deceased has been proved beyond reasonable doubt. The cause of the death of the deceased was unlawful and I find this proved beyond reasonable doubt.

The evidence as to who caused the death of the deceased is circumstantial. The accused before the court has been charged jointly with another not before the court. There is only one witness, Peter Njoroge, who was in the house where deceased met her death. The others also present, according to Peter Njoroge's evidence, are the accused, the deceased and Joseph Mburu the suspect at large. Peter Njoroge was in the same room with the accused on the fateful night. He said he went to bed at 9.30pm and the accused returned to the house at 10.00pm. Later that night Peter Njoroge heard the accused open for the deceased and Joseph Mburu or so he thought. The following morning, Peter Njoroge found Joseph in slippers and pajamas and thought that he must have spent the night there.

The accused testified to opening the door for the deceased and Joseph on the same date. From the evidence of Peter Kinuthia that he took the deceased and Joseph Mburu home on 23rd December 2012 around 11.30pm and that of Peter Njoroge that he heard the accused opening the door for the deceased the same night, this court can conclusively make a finding that Peter Njoroge, the accused, the deceased and Joseph Mburu all spent the night in the home of the deceased. Peter Njoroge found Joseph Mburu dressed in pajamas and slippers taking breakfast in the morning of 24th December 2012 at 8.00am. This confirms to this court that he spent the night at the home of the deceased.

Peter Njoroge did not testify to hearing anything out of the ordinary that night. He did not testify to hearing the accused leave their bedroom that night except when she went to open the door for the deceased and Joseph. He said when he woke up the following morning he heard Joseph Mburu and the accused talking in the sitting room. He could not however hear what they were saying. His evidence is as follows:

“In the morning I found Christine in the sitting room. She had made breakfast. I could hear her talking with Joseph. I could not hear what they were saying but I could hear their voices.

I left the bed around 8.00am. I found Joseph taking tea at the sitting room. I started watching TV with Joseph. Christine had left by this time. It was not her usual behaviour because she was to clean up and make lunch.”

It is not clear from this evidence if Peter saw Christine that morning or he only heard her voice as she and Joseph Mburu talked in the sitting room.

Further evidence by Peter is that when police visited the scene they entered their bedroom and recovered clothes belonging to the accused under the lower decker of the bed where she used to sleep. He identified the black skirt and white top and said that the accused was wearing these clothes on the evening of 23rd December 2012. Police Constable Gilbert Talaam, PW3, said that the skirt and top were inside a basin under the bed. Both witnesses said the clothes had blood stains. These two clothing items were exhibited in court. It was difficult to see any bloodstains on them. What was visible was dark brown stains which could not be said with certainty to be blood stains.

The Government Analyst Ms Elizabeth Oyiego, PW8, examined the skirt and blouse said to belong to the accused, her blood sample, blood sample from the deceased and the knife. She told the court that the knife and the skirt did not have blood stains on them. She said the blouse was lightly stained with blood. The blouse and blood sample from the deceased did not generate any DNA profiles.

I have examined all the evidence surrounding the issue of the identity of the person who killed the deceased. I find it insufficient to connect the accused with this offence. I find no direct evidence pointing to her as the person or one of the persons who caused the death of the deceased. I also find no sufficient circumstantial evidence implicating her. For the accused to be found guilty there must be either direct or circumstantial evidence linking her to the death. I have no evidence to show that she woke up at night and

killed the deceased or in company of Joseph Mburu killed the deceased. It is true that she left in the morning and did not return to deceased's house as she was accustomed to. She said she met her husband and they reconciled. The defence theory is that after she returned to her husband and on finding out that the deceased had died, she could not return to deceased's home. This could be true or untrue. This court will not be able to know the truth without evidence to that effect.

The only evidence the prosecution have is the clothes allegedly belonging to the accused found with bloodstains. Save for Peter Njoroge's evidence that they belonged to the accused, there is no proof that they belonged to her. The skirt had no blood stains and the bloodstains found on the blouse did not yield any DNA profiles to compare with her blood sample or that of the deceased. The slight blood stains found on the blouse were not confirmed to have come from the deceased or the accused.

The law requires that the prosecution must prove a criminal offence beyond reasonable doubt. This threshold was not met in this case. There are many doubts that remain in this case. Joseph Mburu who came home with the deceased and perhaps spent the night with her in her bedroom may have known something this court does not know. He is at large and was never arrested.

After careful analysis of all the evidence I find that for the reason of the existing doubts I cannot make a finding that the accused had anything to do with the death of the deceased. She will benefit from the existing doubts. As to whether she possessed the necessary intention to cause the death of the deceased is not in issue now that this court has found that there is not sufficient evidence to prove her involvement.

In conclusion therefore, this court enters a verdict of not guilty against the accused. She is hereby acquitted of the murder of Margaret Njeri Njoroge. She shall be set at liberty from custody forthwith unless for any other legal cause she is held in custody. I make orders accordingly.

Dated, signed and delivered this 20th day of July 2015.

S. N. MUTUKU

JUDGE