



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO. 79 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PHOEBE BELDINE MITOWO.....ACCUSED**

**JUDGEMENT**

**Background**

Phoebe Beldine Mitowo, the accused, is charged with murder contrary to section 203 read with section 204 of the Penal Code. It is alleged in the particulars of the offence that on the 1<sup>st</sup> day of October 2011 at Donholm Estate Phase V in Nairobi within Nairobi County murdered Kevin Boschin Gisiora. The accused is represented by Mr. Ochieng, advocate.

This case is one of the oldest cases still pending finalization. The plea was taken on 13<sup>th</sup> October 2011. One of the reasons for this is the number of judges who have handled the matter. Dr. Zephania Kamau, PW1, testified before Honourable Justice Kimaru on 20<sup>th</sup> March 2012. On 13<sup>th</sup> June 2012 Honourable Justice Florence Muchemi took over the proceedings in this case and heard Robert Macfaren Kerongo, PW2. From that time to 13<sup>th</sup> November 2014 the proceedings stalled. One of the reasons for this is that the accused skipped bail and the surety asked the court to allow her to withdraw. The accused's bond was cancelled and she was remanded in custody.

I took over the proceedings of this case on 13<sup>th</sup> November 2014 following the transfer of Justice Muchemi. Hearing started before me on 17<sup>th</sup> December 2014. It has taken this court up to this time to conclude this case because of non-availability of prosecution witnesses as the court file record shows.

**The Prosecution Case**

In support of its case the prosecution called a total of seven witnesses. Dr. Zephania Kamau, PW1, who testified before Justice Kimaru was a formal witness. He examined the accused and found her aged 21 years at the time. He found no injuries on her body and that she was mentally fit to stand trial. Robert Macfaren Kerongo, PW2, testified before Justice Muchemi. On my taking over the trial the defence opted to proceed from where the case had reached without necessarily recalling PW2.

PW2 was the younger brother to the deceased. On 1<sup>st</sup> October 2011 around 5.45am he received a call from the accused who introduced herself as the girlfriend of the deceased. The accused told PW2 that the deceased had stabbed himself at his home in Donholm Phase V. PW2 told the accused to look for means

to take the deceased to hospital. In the meantime, PW2 started driving from Hurlingham to the scene. On the way while at Lunga Lunga area the accused called him again and informed him that the deceased had died. PW2 reported at a nearby Police Post in Industrial Area. In company of police officers PW2 went to the scene. On arrival he found the accused with a police officer identified as Onyango, PW4, on the staircase leading to the house of the deceased. Inside the house they found the deceased lying on the floor with little visible bleeding. There was someone administering first aid on the deceased. They took him to a local clinic. They found no one at the clinic and they went to Mama Lucy Hospital where the deceased was pronounced dead. The matter was reported at the Buruburu Police Station and the accused was arrested and placed in police custody. She was later charged.

CPL Alfonse Onyango, PW4, told the court that he received a call on 1<sup>st</sup> October 2011 around 6.00am from someone whose name he did not give. The caller reported some chaos in a certain house in Donholm Phase V. The caller described to him the house where he was to find a group of people gathered. He went to the scene at a single-storey building. On entering the house he saw the deceased lying down in a pool of blood. He was lying on his side with blood oozing from the mouth and the nose. PW4 saw a stab wound on the deceased's left side of the chest. He noted broken pieces of beer bottles. At the time the deceased was alive but his pulse was low. PW4 found a blood-stained knife near the deceased and collected it.

PW4 further testified that the body of the deceased was taken to Buruburu Police Station where the matter was reported and later taken to the Chiromo Mortuary. In company of other police officers including Simon Mugaya, PW5, PW4 went back to the scene where other exhibits, a piece of blood-stained carpet and pieces of broken beer bottles, were collected. The post mortem was conducted on 2<sup>nd</sup> October 2011 in the presence of PW5 and relatives of the deceased. PW5 further took the accused to PW1 for age and mental assessment. PW4 who is the investigating officer in this case also collected other exhibits from the house including accused's blood-stained clothes which he took to the Government Laboratory for analysis.

Joseph Elly Andar, PW3, is the only witness who spent some time on 1<sup>st</sup> October 2011 with the accused and the deceased. He told the court that he was a friend of the deceased. He said the deceased used to sell *miraa* (khat). He also knew the accused as deceased's girlfriend whom he had met three times at the deceased's house. On 30<sup>th</sup> September 2011 at around 7.00pm he went to deceased's shop to buy *miraa*. He stayed with the deceased until other friends, Carlos and Dave, joined them.

PW3 told the court further that they stayed at the deceased's shop until 12.00am then moved into the deceased's house with Carlos and David. He said the deceased left for town alone. He said that the accused came to the shop but also left. The deceased joined them at around 4.30am and they continued chewing *miraa* and listening to music. Around 5.00am the accused joined them. She went into the accused's bedroom and changed into pink and white checked shorts and lace pink top. She complained of hunger and sent PW3, Carlos and Dave to buy eggs. They left and decided not to return in order to give the accused and the deceased some privacy. PW3 said he received a call around 11.00am on 1<sup>st</sup> October 2011 and informed of the death of the deceased.

Dr. Kizzy Shako testified as PW6. She testified on behalf of Dr. Johansen Oduor who was not available to attend court. She told the court that Dr. Oduor performed the post mortem on the body of the deceased and found a laceration behind the left ear measuring 1cm long and a stab wound on the left upper chest between the nipple and the collar bone. He found a penetrating wound on the left side of the chest with haemothorax (collection of blood) on the same side of the chest amounting to 3 litres. The doctor also found a penetrating wound on the left upper lobe of the lungs measuring 8cm long. He formed the opinion that the cause of death was due to penetrating force trauma.

The last witness Mr. Henry Kiptoo Sang, PW7, is a Government Analyst. He testified on behalf of Mr. Paul Waweru Kang'ethe who has since retired. PW7 testified that Mr. Kang'ethe examined several items including jeans trousers, underpants and two T-shirts belonging to the deceased; accused shorts; bed sheet, knife and a piece of carpet recovered from the house of the deceased. All these items were blood

stained. The DNA profiles from these items matched the blood sample obtained from the deceased confirming it was the deceased's blood that had stained them.

At the close of the case, the prosecution counsel submitted that the prosecution has proved that the accused killed the deceased with malice aforethought following a disagreement over infidelity.

### **The Defence Case**

The accused gave a sworn defence. She told the court that on 30<sup>th</sup> September 2011 she spent the day in town. She said she saw the deceased outside his shop at around 7.00pm as she was going to a certain pub; that she went to deceased's house around 3.45 to 4.00am the following day; that she found the deceased with his friend Joseph (PW3) and two other people she did not know chewing *miraa*, smoking and drinking; that she went into deceased's bedroom and changed into shorts and joined them in the sitting room; she complained of hunger and told the deceased to go and buy her eggs; that the deceased sent his friends to go buy the food; that after the friends left the deceased wanted to discuss about lack of food in the house but the accused was not up to it. She told the court that the deceased could not afford food because he spent all his money in buying drugs as he was an addict. She said that the deceased followed her into the bedroom and started crying stating that he was not happy with the situation between them.

She further testified that the deceased went to watch a movie in the sitting room while she stayed in the bedroom making a telephone call; that the deceased accused her of seeing someone else claiming that he would rather die than lose her; that he started smoking bhang which he used to mix with heroin; that after smoking he calmed down but after a while he started crying again threatening to jump over the balcony but she held him in an attempt to prevent him from jumping.

She testified that after sometime she went to bed and called the deceased to join her after realizing his friends were not coming back; that the deceased went to the balcony and threatened to jump again; that she struggled with him trying to stop him from jumping; that he went to the kitchen and picked a knife and recited an Islamic prayer before aiming the knife at his body; that she tried to distract him by throwing a pillow at him and also hitting him with an empty beer bottle. This did not stop him. He stabbed himself on the chest. The accused said that she pulled the knife from the deceased's chest and tried to pull him towards the sitting room; that she went out and called the watchman who called a pharmacist to assist.

The accused further testified that she called a policeman named Jeremiah who was not available. He gave her a number of another officer to call. She then called the police officer (presumably PW4) and also called PW2, deceased's brother. She testified about the efforts she made to have the deceased taken to hospital until he was pronounced dead at Mama Lucy Hospital. She denied killing the deceased stating that they were only two weeks old in the relationship and she had no reason to kill him.

The accused was cross examined at length by the prosecution counsel. She maintained her story that she did not kill the deceased and that the deceased had stabbed himself.

In his submissions after the close of defence case, counsel for the accused told the court that the evidence given by the accused is confirmed by that of the prosecution witnesses and that the accused evidence was not challenged by that of the prosecution; that the post mortem report confirms the theory that the deceased stabbed himself; that the accused could not make up a story that falls so neatly into place and that the prosecution has failed to prove malice aforethought. Counsel relied on the case of **Solomon Kirimi M'rukaria v. Republic** [2014] eKLR and **Paul versus Republic** KLR 100 on circumstantial evidence.

### **Determination**

For this court to find the accused guilty of murder as charged, there must be proof beyond reasonable doubt that the act of death of the deceased occurred as a result of an unlawful act or omission perpetrated by the accused person before the court. The prosecution must also prove that the accused possessed

malice aforethought as defined under section 206 of the Penal Code at the time of causing that death.

From the evidence in the court file, there is no doubt that the deceased died. This has been confirmed by Dr. Johansen Oduor who performed the post mortem on the body of the deceased as testified by Dr. Kizzy Shako on his behalf. The doctor found that the cause of death was due to chest injuries due to penetrating trauma. This evidence together with that of the other witnesses including CPL Onyango (PW4) and the accused herself proves beyond doubt that the act of death of the deceased occurred. I have no doubt that the death of the deceased was unlawful.

This leads me to the second issue. Was that death caused by the accused before this court? The evidence of Joseph Elly Andar, PW3, and that of the accused herself show that the deceased and the accused were the only two people at the scene where the deceased sustained chest stab wounds leading to his death. The prosecution advances the theory that the accused stabbed the deceased intending to cause him grievous harm or to kill him. The defence disagrees with that hypothesis and advances a theory that the deceased stabbed himself. It has been the accused's evidence that the deceased was suicidal and had attempted to jump over the balcony twice with the accused preventing him from doing so.

I have considered all the evidence surrounding the circumstances under which the deceased died. When PW4 arrived at the scene, he found the deceased still alive but weak. There is no evidence as to whether the deceased could talk. PW4 said the accused was wailing and kept on saying "my husband, I can't kill my husband". Other than the blood stained clothes belonging to the deceased, there was also the bed sheet and the accused person's shorts that had blood stains. The accused explained that the bed sheet got the stains after she used it to wipe the blood off the deceased. She said she pulled the deceased from the bedroom to the sitting room attempting to seek help. Although she did not explain how blood stains got onto her shorts, the defence presumption is that this happened as she was pulling the deceased.

There is also the issue of the broken beer bottle(s). PW4 told the court that there were pieces of broken beer bottle(s) in the bedroom. The accused explained that she had used the beer bottle to distract the deceased from stabbing himself. Her evidence is not clear whether she threw the bottle at him or hit him with it. What is clear however is that the bottle broke into pieces although this court has no evidence to know if it broke because it fell down or because of coming into contact with the deceased.

I have looked at the evidence on the chest injuries sustained. They were severe and penetrated deep into the lungs causing massive internal bleeding with haemothorax of 3 litres. The chest wound was located on the left upper chest measuring 3cm long. It was 11cm above the left nipple and 4cm below the left mid-clavicle. Internally the wound penetrated the upper lobe of the left lung and this wound extended to the hilum of the lung and measured 8cm long. The prosecution did not seek evidence to show whether such severe injuries can be self-inflicted. The defence sought to know from Dr. Shako if such a wound can be self-inflicted. She said it was possible. This court lacks the medical expertise on such an issue and even if it possessed such expertise, procedure would not allow it to offer its own opinion where evidence to support such a fact is lacking.

It is not lost to this court that the deceased had a laceration behind the left ear measuring 1cm long. There is no evidence to show how he sustained the same. In my considered view, however, this injury was minor and there is no evidence to show that it contributed to the death of the deceased.

It is clear from the evidence of Dr. Zephania Kamau who examined the accused that she had no injuries on any part of her body. This evidence is contrary to the view that the accused and the deceased fought.

The law does not require the accused to prove her innocence. The burden of proof never shifts from the prosecution at any time in a criminal trial. All the accused is required to do is to raise doubts in the mind of the court. I have read the authorities relied on by the defence. In **Abanga alias Onyango v. Republic Cr. Appeal No. 32 of 1990(UR)** referred to in the case of **Solomon Kirimi M'rukaria**, above, the court stated as follows in respect to circumstantial evidence:

**"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.”**

Although on the face of this case, the circumstances of this case may seem cogent and firm and may tend to point towards the guilt of the accused by virtue of the fact that she was the only person with the deceased in the house when he sustained the fatal injuries, it is my considered view that the third criteria set by the **Abanga case** has not been met. It cannot be said with conviction that the circumstances taken cumulatively 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 person and none else. With the doctor’s opinion that there was a possibility that the injuries could have been self-inflicted taken together with the defence of the accused, I find that I entertain some doubts that the accused with the intention of causing grievous harm or death of the deceased, stabbed him inflicting fatal wounds on him. This court had the chance to observe the accused as she testified. She was possessed a composed and confident demeanour and she seemed certain of what she was telling the court. Her evidence sounded cogent and consistent. This court lacks evidence to show that the accused who in the cause of the evening was hugging the deceased, turned against him when they were left together and harmed him.

### **Conclusion**

In conclusion therefore, it is the finding of this court that the prosecution has not reached the threshold required in this case. While I find that death of the deceased by unlawful act (stabbing) occurred, there is no evidence to prove beyond reasonable doubt that the same was caused by the accused with the intention of either causing the deceased grievous harm or killing him. The theory that he may have stabbed himself has not been dislodged. Consequently, I find that the accused is not guilty of murder as charged. I enter acquittal against her and order her immediate release from custody unless for any other reason she is held in custody. I make orders accordingly.

**Dated, signed and delivered in open court this 6<sup>th</sup> day of October 2015.**

**S. N. MUTUKU**

**JUDGE**

**In the presence of:**

Ms Magoma, Prosecution Counsel

Mr. Ochieng, Defence Counsel

Ms Phoebe Beldine Mitowo, the accused

Mr. Daniel Ngumbi, Court Clerk