



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 105 OF 2013

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

JECINTA WAIRIMU NUNGARI.....ACCUSED

JUDGMENT

1. The accused person **JECINTA WAIRIMU NUNGARI** is charged with two counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the first count are;

“That on the night of 15th day of October, 2013 at around 8.00 p.m. at Ndumberi location, within the Kiambu County, murdered PETER KAMAU MUIRURI”

2. The accused person was arraigned in court on 28th October 2013 for this offence. The prosecution called seven witnesses. In brief, the prosecution case is that on the material day at about 7.30 p.m. the accused who is the wife of the deceased, and he were at home with their four children. According to PW3 and 4 the daughter and son respectively of the couple, the deceased armed himself with a panga and an empty beer bottle and chased his wife around the compound. He also chased the children out of the home compound and locked the gate behind them.
3. Soon thereafter, PW1 a brother of the deceased had calls for help and on proceeding to his brother’s home the deceased, he found him lying near the gate bleeding from the head, ears and the nose. He also saw the accused standing about a metre from the deceased with a panga and an axe in her hand. PW1 also saw PW3 armed with a panga and an iron bar standing nearby. It was the testimony of PW1 that both the accused and her daughter told him to leave the deceased and that in particular PW3 asked him to let the father die because he was a drunkard.
4. There was also the evidence of PW2 who said he was visiting PW1’s home when the incident occurred. It was her testimony that she had a conversation between two women one of who was the accused and the other one she did not disclose who it was. She said that she heard the accused saying to the other woman **“this person had chased us with a panga and knife”**. The other woman then asked **“are you the one who did this to him?”**. That the accused said **“yes”**. PW3 testified that she then heard the accused telling his daughter to give her an iron bar so that she can hit the man and that she was ready to go to jail if she is to go there.
5. The post-mortem on the deceased body was conducted by Dr. Midia. He found two cut wounds on the head and an injury on the right arm with bleeding. Internally, the deceased had an injury to the spleen with 500 ml haemoperitonium, injuries to the intestines, a fractured skull, and acute subdural haemorrhage with brain laceration. The cause of death according to the doctor was head injury due to blunt and sharp trauma. The report was P.Exh.2.

6. The accused gave a sworn statement. In her defence she stated that on the material day at about 8 p.m. the husband arrived home and found her in the kitchen with their four children, PW3, PW4, one Stephen Ikonya and one Paul Kiarie. The accused said that after she prepared the food, she served the husband the deceased and their three sons at table. She said that instead of eating the food, and being very drunk, the deceased started beating her. As a result, their children out of fear ran away to their neighbours. She said that at the time the deceased was holding a panga and a bottle of beer.
7. The accused stated that she ran out of the compound through the main gate which was about 5 metres from the main house. She said that she waited outside the gate for about fifteen (15) minutes until all was quiet and it was safe for her to return home. The accused said that she pushed the gate with force and found her husband fallen on the ground. That when she questioned him and asked him for how long he intended for her to suffer, she realized that he was not responding. Shortly later her brother-in-law one Stephen Ikonya appeared. Together with others, he took the deceased to the hospital. She followed him to the hospital where the sister-in-law's children tried to strangle her. She was later arrested for this offence.
8. Mr. Gichuki defended the accused person in this case. In his final submissions learned defence counsel urged that PW1 who was the first to arrive at the scene of the incident did not witness the accused hitting the deceased. Counsel urged that he also did not see the children of the deceased.
9. Mr. Gichuki submitted that the prosecution failed to prove *mens rea* and *actus reus*. Counsel submitted that the evidence on record shows that the deceased was under the influence of alcohol and that it was well known that such a person may not be in control of themselves. Counsel urged that the fact that the deceased had a panga and two beer bottles was proof that his intention was to attack the accused and his children. Counsel also submitted that there was a possibility that the deceased tripped on something and he urged the court to accept the accused defence that she did not attack the deceased.
10. Ms. Maari learned Prosecution Counsel in her submission urged that the prosecution had proved through the evidence of PW1 and 2 that the accused killed the deceased and that she had both the motive and intention to commit the offence. Counsel submitted that PW1 and 2 found the deceased lying in a pool of blood with the accused person standing beside him holding a panga. Counsel urged that the accused told PW1 and 2 to leave the deceased to die. Counsel urged further that the accused went into hiding when PW1 and 2 went to the scene and that the said conduct was that of a guilty mind.
11. Ms. Maari submitted that given the fact that the deceased was lying far from the gate there were no chances that the deceased had been hit by the gate. Ms. Maari submitted that had the deceased been hit by the gate, blood stains could have been traced to the gate. Counsel also submitted that the investigating officer PW7 visited the home and found some blood in the grass inside the compound of the deceased, a distance from the gate which rules out any possibility of the accused having been injured by the gate.
12. Ms. Maari submitted that PW1 and 2 heard the accused telling her daughter that she was going to do something very bad to her husband and that she did not fear the court. Just to correct that submission it is only PW2 who claimed that she had the accused talking with another woman but the words she had were not those ascribed to the witness in the submission of Ms. Maari.
13. I have considered the evidence adduced in this case by the prosecution and the defence, together with the submissions by both counsel. In regard to the submissions not all the facts alluded to by the counsels were correct. For instance, it is not correct to say that PW1 did not see any of the deceased children in the home when he went in answer to the calls for help. In his evidence PW1 said that he saw PW3 the daughter of the deceased and that she even spoke with him urging him to let her father die because he was a drunk.
14. The charge facing the accused is that of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The section creating the offence stipulates as follows:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

15. The circumstances which constitute malice aforethought are set out under section 206 of the Penal Code as follows:

“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.”

16. The burden lies with the prosecution to prove its case against the accused person on the standard of proof beyond any reasonable doubt. The prosecution must adduce evidence to prove that it was the accused that inflicted those injuries the deceased suffered, and further that it was as a result of those injuries that the deceased died.
17. There was no eye witness of the incident. All who were at the scene were there either shortly before or shortly after the incident. There are issues which are not in dispute. There is no dispute that the accused was the wife of the deceased. There is no dispute that the accused and the deceased had an issue on the night in question which led to deceased chasing the accused and all his children from the compound, while armed with a panga and beer bottle or bottles. There is no dispute that the deceased was injured the same night. On the other hand the accused defence is that the deceased may have been hit by the gate when the accused pushed it with force before she entered to find the deceased injured and unconscious.
18. Having considered the evidence adduced by both sides, and the submissions of counsel, the issue in this case is:
- Whether the deceased was injured by the accused person?; or,**
 - Whether the deceased tripped and fell or was injured due to misadventure?**
19. The evidence against the accused is from the brother of the deceased who also lived next to him, PW1, and PW2 who was visiting PW1. PW1 testified that he heard screams for help from his brother's place. PW1 did not disclose who was screaming. He said that he immediately proceeded to his brother's place only to find him lying in a pool of blood with his wife, accused and his daughter PW3 standing nearby each armed with crude weapons.
20. PW2 testified that she first heard a conversation between two women only one of whom she identified in her evidence as the accused. The gist of that conversation was an admission by the accused to the undisclosed woman that she, accused, had done something to the “man” and that she was ready to go to jail. From that conversation PW2 claimed that the accused asked her daughter for an iron bar so that she could hit the “man”. It appears like there were three women at the deceased place according to PW2.
21. The evidence of PW2 was not truthful. PW1 was at the same place as PW2 yet he did not hear that conversation. Secondly, PW1's testimony demonstrated clearly that he proceeded to his brother's place immediately he heard the calls for help. PW1 did not find any other woman except the accused and her daughter. I do not believe there was ever a third woman in that home as there was no reason why she could have left the scene after the attack on the deceased, being innocent and also an eye witness of the attack. I find PW2 was dishonest. Her evidence was geared towards implicating the accused. However the evidence lacked in substance as she did not say who the missing woman was. Furthermore, there is no disclosure of what the accused was admitting he did or could have done. There is therefore a possibility that whatever it was it had nothing to do with injuring the deceased. PW2's was not a trustworthy witness and her evidence is not credible.
22. The evidence of PW1 appeared biased in my view. His testimony was that he heard screams and that when he went to the scene he found both the accused and her daughter, PW3 armed and

- demanding that he leaves the deceased to die for the reason that he was a habitual drunkard. PW1 insinuated that PW3 was involved in the assault of the deceased. However the two children were witnesses and their evidence is to the effect that they were chased away from home and that they left before the deceased suffered the injuries. From the evidence of PW3 and 4, the first to leave the compound was PW3. She went to her friend Rebecca's place, not far from her home. PW4 and the other children followed her there later. Both children testified that they did not witness what happened to their father, however PW4 returned home later to find people carrying his father to a waiting vehicle.
23. There is no attempt to have the children declared hostile witnesses and therefore it can be safely assumed that whatever evidence they gave in court was in line with their statements to the police. PW1's evidence that he found PW3 next to the deceased while armed with an iron bar and panga does not add up. It is contradicted by the evidence of PW2, 3 and 4. I do not believe that part of PW1's evidence.
24. The question is who inflicted the injuries on the deceased? The prosecution is relying on circumstantial evidence, the evidence of opportunity to commit the offence and the fact that the accused was found standing next to the deceased armed with an axe and panga. The prosecution is also relying on the fact that the nature of the injuries the deceased suffered could have been caused by the weapons the accused had in her possession soon after the attack on the deceased.
25. The accused gave an explanation in her sworn defence which I have considered. Her defence was that when the deceased chased her from their compound, she waited outside the gate for fifteen minutes and then pushed the gate with force thinking all was well, only to find the deceased lying down near the gate. He did not respond to her. The accused therefore denied hitting or touching the deceased and suggested he could have been hit by the gate, or could have tripped and fallen.
26. In the case of **SAWE –V- REP[2003] KLR 354**, 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.”**
27. The deceased suffered two cut wounds on the scalp, 6cm and 2cm deep. He also had a subcutaneous haemorrhage on the dorsum of the right forearm. Internally he had laceration of the spleen with haemoperitoneum; extensive scalp haemorrhage with comminuted skull fracture and with acute subdural haemorrhage and injury into the brain cerebral laceration. The doctor concluded that the injuries were caused by blunt and sharp force trauma. I find that the multiplicity of the injuries suffered by the deceased were incapable to have been caused as a result of tripping, falling or hitting against an object, or misadventure. I find that these injuries were inflicted on the deceased by a third party.
28. I find that the evidence of PW1 that the accused was found standing over the deceased while armed with an axe and panga moments after the attack on the deceased, taken together with the post mortem findings that the deceased suffered injuries caused by a blunt and sharp force, and the multiplicity of the injuries being incapable to have been as a result of tripping, falling or hitting against an object are strong pieces of circumstantial evidence against the accused.
29. The accused defence was a blatant lie. There were screams at her home that night and that was

what caused PW1 to rush to their home. In those circumstances there is no possibility that the accused could have remained outside for fifteen minutes before re-entering her home as she claims. The evidence of PW3 and 4 also rules out a lapse of fifteen minutes between the time their father chased them away and the time they saw him being carried into a vehicle to be taken to hospital.

30. I find that from the evidence, the accused was in close proximity to the deceased and was armed with weapons capable of causing sharp and blunt trauma. Those facts justify the drawing of an inference, which I hereby make that the facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of her guilt. I find that it is the accused that inflicted the fatal injuries on the deceased as a result of which he died.
31. Regarding malice aforethought, the evidence of PW3 and 4 both children of the deceased and accused was that their parents constantly quarrelled and further that their father was a habitual drunkard. On the material day, their evidence was that their father first chased their mother around the compound while armed with a panga and empty beer bottles. The deceased then chased away the children from the compound and locked the gate behind them.
32. From this evidence it is clear that the deceased was the aggressor. He was also armed with a panga. From these circumstances I find that the prosecution was unable to establish that the accused had formed the necessary malice aforethought to commit murder. The offence proved by the evidence adduced was manslaughter contrary to **section 202** of the **Penal Code**.
33. The accused did not raise any defence of self defence or provocation. I will therefore not consider them as it was not the accused defence. Her defence was that she did not touch the deceased, which defence I have rejected for being a blatant lie.
34. **Having come to the conclusions I have of this case. I substitute the charge against the accused under section 179 of the Criminal Procedure Code, from murder contrary to section 203 of the Penal Code to manslaughter contrary to section 202 of the same Act. I find the accused guilty of the substituted offence of manslaughter and convict her accordingly.**

DATED AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2015

LESIIT, J.

JUDGE.