

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CASE NO. 37 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

S K B.....1ST ACCUSED

JUMA MADUKA MANYALA.....2ND ACCUSED

JUDGMENT

S K B, the 1st accused herein, and one **Juma Maduka Manyala** the 2nd accused were jointly tried on a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 13th October 2009 at around 1.00am at Litein Township in Bureti District of the Rift Valley Province, jointly with others not before court, the duo are alleged to have murdered **M J B**. At the close of the prosecution's case, Juma Maduka Manyala was acquitted while the accused was placed on his defence.

The prosecution tendered the evidence of six witnesses in support of its case. The only eye witness is **S M B** (P.W.1), a girl aged seven years. It is her evidence that she heard the accused threaten to cut the deceased's legs. The deceased and the accused are P.W.1's mother and father respectively. She claimed that on the material date she was asleep and that when she woke up, she witnessed the accused use a panga to cut the deceased's leg and hand. P.W.1 also alleged that the accused fled the house after cutting the deceased. **P.C.Mutinda** (P.W.2), a police officer attached to Litein Police Station, said, he together with other colleagues were on patrol in Litein Township during the fateful night i.e on 12/10/2009. While on patrol, P.W.2 met with two girls. He knew one of them by the name Winnie (P.W.4). It is the evidence of P.W.2, that Winnie and her colleague told him that they were neighbours to the accused and that they left their house while the accused and the deceased were quarrelling. P.W.2 said, he together with colleagues requested P.W.4 and her colleague to take them to where the couple lived. On their way to the accused's house, P.W.2 said they met with Juma Maduka who told them that he was the accused's visitor. Juma Maduka further told them that the accused and the deceased were quarrelling at the time of his departure. Juma Maduka showed them the accused's house. P.W.2 averred that when the police knocked at the accused's door, a lady opened the door and that is when he discovered that the accused was someone well known to him. He stated that the accused was a well known herbalist in Litein Township and formerly referred to as 'Daktari' meaning doctor. It is the evidence of P.W.2 that he interrogated the lady who opened the door and in the end the lady told him that she has never had peace with the accused since they got married. P.W.2 claimed he saw a child inside that house who was aged about four (4) years. P.W.2 said they advised P.W.4 and her colleague to book a report of the incident at the police station. It would appear P.W.2 and his colleagues left to continue with their patrol duties but instructed Juma Maduka and Winnie to call them if anything happens. At 1.00am, P.W.2 stated that he received a phone call from the report office directing him to visit the accused's homestead because an incident had occurred. On the way, a police land cruiser arrived which they boarded to visit the scene. At the scene, the police found the lady who had previously opened the door for them writhing in great pain. She was lying in a pool of blood while blood was oozing from the open cut wounds on the hands and leg. P.W.2 said he entered the house and found that there was a commotion since things were strewn all over the place. The lady was alone in the house and shortly, P.W.2 said the accused arrived and started persuading the injured lady to persevere since he was making arrangements to take her to hospital. P.W.2 alleged that he heard the lady shout at the accused questioning him as to why he planned for people to attack her. The police took the injured to Kapkatet District hospital for treatment. She was accompanied by the accused. The lady died while undergoing treatment. **A.P.C Samuel Ogolla** (P.W.3) stated that he

together with other administration police officers were on night patrol in Litein Township on 12/10/2009 when at 1.00am the accused in company of two watchmen came to inform them that his wife had been cut by a gang of four thugs. P.W.3 said he accompanied the reportees to the accused's house and found the seriously injured lady lying on the floor and was unconscious. P.W.3 said the police later came in and took over investigations of the case. P.W.3 claimed there was a baby who was crying since she was not getting attention from the injured. **Winnie Chepkoech Ngetich** (P.W.4) stated that on the fateful night, one Juma Maduka visited her house to request for police telephone numbers because the accused and his wife (deceased) were quarrelling. This information prompted P.W.4 and her friend to head to the police station to report. P.W.4 met the police on the way and she passed the information she received from Juma Maduka. P.W.4 stated that she heard the accused ask Juma Maduka to tell him the person who spent the night in his house because his house had been raided by robbers. P.W.4 said she went to sleep when police arrived. Shortly, the deceased's children i.e S (P.W.1) and E were taken to P.W.4 with a request to take care of them since their mother was injured and had been taken to hospital. Those children were later taken away by the Child Welfare Society. P.W.4 stated in her evidence in cross-examination that she heard the accused tell Juma Maduka that his house had been raided by robbers who injured his wife. **Charles Yegon** (P.W.5) said, that on the material day he was approached by the accused to visit his house to see for himself how robbers attacked his family. P.W.5 said he went and actually saw the accused's wife. She was seriously injured. P.W.5 said he witnessed the accused cry while claiming his wife had been attacked by thugs. P.W.5 went to secure a motorcycle to take the deceased to hospital but police arrived before he could take her to hospital. **P.C Kinuthia** (P.W.6) stated that on the fateful night he was the duty officer when he received the report of robbery at the accused's house. P.W.6 together with other police officers visited the scene where they found the injured lady groaning in great pain. P.W.6 said he heard the deceased question the accused as to why he was pretending he did not know her killers. P.W.6 stated that it is this piece of information which made the police connect the accused with the deceased's death.

When placed on his defence, the accused gave unsworn testimony. The accused stated that on 11th October, 2009 he was not at home since he had gone to visit his patient at Nyagacho where he spent the night. The accused explained to this court that he leased three rooms in Litein Township. He claimed that in the night of 12/10/2009 he went to grind his herbal medicine in a separate room from where his wife (deceased) slept. He stated that at 1.00am thugs struck his homestead, tied his hands while demanding to be given money. When his wife heard of the commotion, she screamed thus attracting the attention of the robbers who went for her. She was assaulted with sharp objects. The accused said, he sought for help from Juma Maduka, P.W.3 and the police. He denied having a quarrel with his wife.

At the end of the evidence, Mr. Ong'any, learned counsel for the accused made oral submissions urging this court to find that the prosecution had failed to establish the case against the accused beyond reasonable doubt. Mr. Ongany pointed out that the evidence of P.W.1 could not be relied upon because the same needed corroboration and that the purported dying declaration by the deceased did not connect the accused with the offence. Miss. Kivali, learned prosecuting counsel was of the view that there was sufficient evidence to sustain a conviction. She was of the strong view that the accused's defence was displaced by the evidence tendered by the prosecution.

I have carefully considered the evidence presented by both sides together with the submissions. Two ingredients must exist in order for the offence murder to be proved. First, there must be proof of malice aforethought and secondly there must be proof *actus reus*.

Let me start with the question as to whether or not the element of malice aforethought was established! The prosecution presented the evidence of two key witnesses with the aim of establishing this ingredient. According to the evidence of S B (PW1), the accused is said to have threatened to cut the deceased's legs and hands with a panga one day. She also claimed she saw her father (accused) cut her mother (deceased) in the fateful morning. PW1 was unable to mention the name of the accused at the dock in court. She completely avoided any direct eye contact. It is clear from her evidence that this witness was aged between 3 and 3 ½ years at the time of the offence. It was therefore necessary for her evidence to be corroborated. PW1 contradicted herself when she said that the accused ran away after cutting the deceased. She later admitted that the accused was present when the deceased was lifted to

board the police motor vehicle to be taken to hospital. PW1 further stated that the accused committed the offence in the morning but the evidence of other witnesses suggest that the offence was committed at night. PW1 also alleged that she was asleep and that when she woke up, she saw her father cut the deceased. It is difficult to accept the veracity of her evidence since witness was too young and asleep to comprehend what was happening. There was need to corroborate her evidence. I am constrained to entertain some doubt. The other witness who was summoned to prove the ingredient of malice aforethought is Winnie Chepkoech Ngetich (P.W.4) who stated that she had been told by Juma Maduka that the accused had a quarrel with his wife. It is important to note that Juma Maduka was the accused's co-accused who was acquitted at the stage of no case to answer. His evidence as a co-accused needed corroboration. He did not, in any case testify, hence the evidence of PW4 in this respect, remains as hearsay. In my humble view, the police poorly investigated this case. There was no credible and cogent evidence to prove the element of malice aforethought. This case was meant to fail from the word go due to shoddy investigations.

The second element of *actus reus* is not difficult to discern. There is no doubt that the late M J B died as a result of severe haemorrhage with resultant cardio respiratory failure due to multiple cut wounds. Whoever inflicted the wounds must have intended to cause grievous harm or death. Under **Section 206** of the **Penal Code** the court is permitted to infer that malice aforethought on the basis of the injuries. The question is! who inflicted these injuries? There was an attempt by P.W.2 and P.W.6 to introduce a death declaration by the deceased. In the first place, P.W.2 admitted that he did not record this very crucial piece of evidence in his initial police statement. That creates doubt as to veracity of his evidence. The evidence of P.W.2 appears to be discounted by the evidence of P.W.3 who stated that when he arrived at the scene, the deceased was unconscious hence she could not talk. P.W.6 stated that he heard the deceased tell the accused that he knew her killers. The wording of the alleged death declaration is to the effect that the accused knew the deceased's killers. The deceased did not tell anyone that declaration. It was a mere conversation between the deceased and the accused which was allegedly overheard by P.W.2 and P.W.6. Even assuming for a moment that the deceased had made the alleged death declaration to an independent witness, I do not think that would have salvaged the prosecution's case because the alleged death declaration did not connect the accused with the offence. The deceased merely stated that the accused had knowledge of her killers. The accused gave un-sworn statement in his defence. He stated that a gang of robbers attacked his homestead and in the process they fatally injured his wife. In fact, there was evidence that he sought for the assistance of his neighbour (PW4) and the police (PW3). The police did not bother to investigate the accused's allegation that his homestead was raided by robbers. I do not understand why the police ignored the accused's complaint. I will give the accused the benefit of doubt.

In the end, I am convinced that the prosecution failed to establish the case against the accused beyond reasonable doubt. Consequently, I find **S K B**, not guilty. He is hereby acquitted, hence he should set free forthwith unless lawfully held.

Dated, signed and delivered in open court this 13th day of May, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Miss. Kivali for Director of Public Prosecutions

Mr. Mutai holding brief for Mr. Ong'any for Accused