



IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 9 OF 2011

REPUBLICPROSECUTOR

VERSUS

BENJAMIN NGARI NJERUACCUSED

J U D G M E N T

1. **BENJAMIN NGARI NJERU** the accused herein stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the 22nd day of March 2011 at Gitiburi Village in Mbeere District within Embu County murdered Eunice Ruguru Gachoki.
2. The case of the prosecution is premised on the evidence of six (6) witnesses. The fact of death was proved by PW1, PW2, PW3, PW5 and PW6. PW5 – Dr. Godfrey Njuki Njiru produced the post mortem report on behalf of Dr. Ngari. The Cause of death was established as severe head injury secondary to cut wounds. She had observed that the deceased had suffered several cut wounds on the skull, scapula region, fractures on the head and others.
3. PW1 – Lydia Ikanga Njeru who is the mother of the accused stated that on 22nd March 2011 evening she went to the accused’s home to get fodder. She found no one there. At the same time she said she found the accused and his wife (the deceased) outside the accused’s house. The accused appeared from nowhere, joined them and pulled a panga from a banana. He held it saying he was going to kill somebody. He then held the deceased’s hand. The deceased held her dress and they started running away. The accused chased them while holding the panga. PW1 was meanwhile screaming. The accused caught up with them and grabbed the deceased whom he cut on the shoulder and head. By the time people came the deceased had already died. The accused ran away but was arrested immediately.
4. PW2 – Albert Nthiga and PW3 – John Munyi M. Jamiu did not witness anything besides confirming the death. PW4 – Dr. Joseph Thuo examined the accused for mental assessment. He found him fit to plead. PW2 the chief of Gitiburi in cross-examination said the accused and deceased were husband and wife but they had several marital issues. They had appeared before him severally over the said issues.
5. In his unsworn defence the accused explained that on 20th March 2011 him and his wife spent most of the day in the shamba weeding and drinking an local brew they had made. In the evening they went home and continued drinking as the deceased prepared food. A disagreement ensued when the deceased asked him to sell part of the land in order to take money to her parents. When he refused to buy the idea, she slapped him. A fight broke out and he fatally injured the deceased. Their noises had attracted several people who came and beat him. His mother was forced by the people to record a statement. The accused did not call any witness.
6. Mr. Kinyanjui submitted that the *mens rea* for a charge of murder had not been proved as the accused was operating under the influence of alcohol. He referred the Court to the cases of

ANTHONY NDEGWA NGARI –V- REPUBLIC NYERI CRIMINAL APPEAL NO.352/12.
He further submitted that the deceased had provoked the accused that evening according to his defence. On this he referred the court to the cases of;

- i. **PAUL KOKWONY –V- REPUBLIC NAKURU CRIMINAL APPEAL NO.153/00**
- ii. **SAMUEL KIPNGENO –V- REPUBLIC NAKURU CRIMINAL APPEAL NO.13/09.**

He therefore asked the Court in the circumstances to reduce the charge to manslaughter.

7. The fact of death is not disputed and so is the cause of death. To establish Murder under section 203 of the Penal Code, two main ingredients must be established. They are;

- i) Actual killing – *actus reus*
- ii) the malice aforethought/intention *Mens rea*

8. The evidence of PW1 confirms that the accused severally cut the deceased with a panga. The accused himself has in his defence admitted to the killing. I also note that on 19th November 2013 the accused admitted to the killing but qualified it as having been unintentional. The issue for determination is whether the killing was intentional/pre-meditated. In other words has *mens rea* been established?

9. Malice aforethought according to section 206 Penal Code may be established in any of the following circumstances;

- a. ***An intention to cause 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.***

The provisions of section 206 Penal Code show that malice aforethought is established when it's shown that there was an intention to cause harm or death or knowledge that an act can cause death or injury on the part of the accused person.

10. The accused in his defence raised two issues which this Court must examine against the evidence adduced. The two are;

- i. Provocation
- ii. Intoxication

I will first deal with provocation. Section 208 Penal Code defines provocation as follows;

- i. ***The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.***
- ii. ***When such an act insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault”.***

11. The accused states that his wife wanted him to sell a portion of their land in order to take money to her parents. And when they disagreed she slapped him, and a fight ensued. It was just the two of them in the house. He does not make mention of any child or anybody else present in the house. It is not clear what the accused may have told the wife that could have made her slap him if indeed she slapped him. Given that the couple had had several marital misunderstandings it may just have been one of them. Without any tangible evidence to support that element of provocation, I find that defence to be neither here nor there. It could have been either of them who provoked the other.
12. I now move to the defence of intoxication. PW1 witnessed the killing of the deceased by the accused person. But she did not know how it had all started. In cross-examination by Mr. Githinji for the accused she said the following;

“I do not know if the accused was drunk. The accused is my son. We have been relating well. After saying somebody was going to die, he said nothing else. I never talked to him. He had not told me anytime that he would kill the deceased”.

13. It is also noted that PW1 is the accused's mother. Even her own evidence is a bit contradictory. It's not clear if she found the accused and the deceased at their home or if they found her there. This is because at one point she says she found them outside the accused's house. Later she says they were not there but the deceased came and found her there. Thereafter the accused came from nowhere and pulled out a panga from a banana and threatened to kill somebody. ***She did not know if he was drunk.*** She is the accused's mother but did not even talk to her son to find out what the problem was. Strangely she could not detect whether the son was drunk or not. Her evidence should be treated with a lot of caution.
14. PW2 – Albert Nthiga is the chief of Gitiburi where the accused comes from. Being an administrator he had dealt with marital issues between the accused plus the deceased. In his defence the accused stated that on the fateful day him and the deceased (his wife) had taken a lot of alcohol and they had one of those marital issues of theirs and he was slapped by the deceased and a fight ensued and finally he fatally injured her. And that this was not intentional. He said he was beaten unconscious by those who arrested him.
15. PW6 – Cpl. Samuel Kiptisha in cross-examination said the accused was not drunk upon re-arrest from members of the public. It's true that upon arrest the accused was beaten by members of the public. When the accused was examined on 29th March 2011 for mental assessment, the Doctor found him to have scars on face, bruises on the loins with red eyes. The accused told him he had been assaulted by a mob upon arrest. PW4's evidence confirms that indeed the accused was assaulted by a mob on 22nd March 2011.
16. It was therefore not possible for PW6 to tell with certainty whether the accused was sober or drunk after such a beating by the mob. In brief there is no evidence from the prosecution explaining to this Court whether the accused was sober or drunk on this day. His testimony on this issue is therefore unchallenged. I therefore find that the accused had partaken of quite an amount of alcohol and was drunk on this day.
17. Section 13(4) of the Penal Code provides;

“Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence”.

The issue is whether the accused was in a position to form any rational decision/decisions and/or any specific intention to kill. In his defence he says he had taken a bit too many for the day and in the course of the fight he fatally injured the deceased but he did not intend to kill her.

18. In the case of ***JULIUS OBAR ANGASA –V- REPUBLIC CRIMINAL APPEAL NO.271/08*** the Court of Appeal held observed thus;

“As this Court pointed out in DANIEL MUNGA MAINA –V- REPUBLIC [2007] eKLR a party who says he had taken some liquor is not necessarily raising the defence of

insanity. Such a person may only be asking the Court to take into account the fact of his having consumed liquor and whether that state had deprived him of the ability to form the specific intent to kill. The Court is under a duty to consider such a defence where it is raised”.

19. I have evaluated the evidence by the prosecution and the defences of Provocation and Intoxication by the accused. As stated earlier the prosecution has not given any tangible evidence to rule out the fact that the accused was drunk at the time of the commission of this offence. The evidence of PW1 and PW6 is lukewarm on this. The evidence on the couple's quarrels cannot also be isolated as it is on record. My finding therefore is that the prosecution has failed to prove that the accused had pre-mediated to kill the deceased. And that being the case I reduce the charge of Murder to Manslaughter contrary to section 202 as read with section 205 Penal Code and convict him of the same.

DATED, SIGNED AND DELIVERED AT EMBU IN OPEN COURT THIS 9TH DAY OF SEPTEMBER 2014.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Mr. Kinyanjui for Githinji for accused

Accused

Mutero/Kirong – C/c