



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 90 OF 2009

REPUBLIC.....REPUBLIC

VERSUS

EMELY KHAHECHIA SHIVACHI.....ACCUSED

JUDGEMENT

The accused herein, *Emely Khahechia Shivachi*, [hereinafter referred to as *Emely* and the *accused* interchangeably] is charged with the offence of murder.

The particulars of the charge are that on the 25th day of September, 2009 at Jalaram Apartments in Parklands within Nairobi area murdered *Mrudulaben Kirankumar Shah* (hereinafter referred to as the *deceased* and *Shah* interchangeably).

The prosecution called 13 witnesses in support of the state case.

Titus Toto Kisonge, PW1, testified that at all materials times he was a shamba boy at Jalaram Apartments in Westlands. That he had been so employed for 12 years prior to this incident.

On 25th September, 2009 he was on duty. The deceased invited him for tea in her house. The deceased was in the company of the accused. After taking tea he then left to clean the stair-case. As he was about to clean the last stair-case he heard Mama Naser and Mama Saddique, who were also tenants in the same apartment but occupying separate rooms, calling him. Mama Naser told him that she pressed the bell and also knocked the door of the apartment A5 but nobody was answering the bell.

He too two rang the bell also in vain. Consequently, he ran to seek help of the watchman at the gate. He enquired from the watchman if he saw the deceased or accused leaving apartment A5. The watchman informed him that he saw the accused leaving with a round big container carrying biscuits. Accused explained to him that she was taking the same to the daughter of the deceased, living with her husband, outside the compound but within Parklands. Accordingly, he went back and informed Mama Naser and Mama Saddique.

Mama Naser summoned the daughter and son – in – law of the deceased on a cell-phone. The son – in – law entered the house of the deceased through the window on the balcony and the opened the door from inside. The children of the deceased entered first. Immediately he heard the said children screaming and crying that “*mother is dead*”.

On entering the premises he observed blood from the door leading to the bedroom of the deceased. The body of the deceased was lying on the ground covered in blood. The daughter removed the turban from her neck. Near the entrance to the room where the body was found he saw a broken stool. He summoned the police who came promptly.

Last but not least, he crowned it all that the accused had worked for the deceased for about four (4) months before this unfortunate incident.

In cross-examination he testified in part thus:

“Mama Krishna was a very tough lady with maids. Yes. She had problems with her maids from time to time”

Re-examined she testified in part thus:-

“Mama Krishna was very harsh with her maids because when she employed someone, that person could not stay for long”.

Last but not least she identified the accused in the dock as the maid who was working at apartment A5 on that fateful day.

Patrick Oduori, PW2, recalled that on 25th day of September, 2009 he reported to work at 6.00 am and left at 6 pm. About 9.00 am two men and one women living in apartment A5 left for work. He knew them by face and sex. The accused person who had reported at 7.00 am left at 10.00 am. He asked the accused where she was going. She told him that she had been sent to the house of the daughter of the deceased to deliver some biscuits. He noticed that she was carrying a purple bucket. PW2 pressed her to open it. Inside was a black polythene and some biscuits. The accused said she would come back upon delivery. However, she never came back.

About 12.30 pm same day, the lady staying at apartment A5 who had gone to work was dropped by a car at the gate. About half an hour later the lady returned to the gate and confided in him that she knocked the door of apartment A5 severally but no one was responding. While still at the main gate he saw some people, including the daughter of the accused, arrive in a car. Among the group were also two men, staying in apartment A5, who had left for work that morning. Ten minutes later he heard some people wailing. On enquiry from Christine, a maid, staying at apartment A4, he learnt that the old lady staying at apartment A5 was found dead. He raised alarm and SAS Security personnel responded immediately. He identified the accused at the dock as the maid who was in the company of the deceased in the morning hours.

Dr. Zephenia Kamau, PW3, a surgeon based at the Police Surgery in Nairobi Area testified that on 1st October, 2009 the accused was brought to him for purposes of assessing her age, mental status and any injuries. The purpose was to, *inter-alia*, ascertain whether she was fit enough to stand her trial.

She assessed her age at 27 years. He observed superficial wounds on her right hand, on the back of the thumb and on the front part of the left finger. The injuries were six (6) days old. The accused had not been treated elsewhere before. He filled the P3, signed and dated it. He produced the same as exhibit No. 1.

Bansi Nipul Shah, PW4, the daughter of the deceased testified that the accused was employed by the deceased as a maid. Accused used to come in the morning and go back home every evening.

On 25th September, 2010, she got a call from her sister-in-law that something was amiss in her mother's house. That the door was locked. The maid had disappeared and her grandmother who stayed with the deceased could not access the house. His sister arrived almost the same time. Her brother – in – law – Kalpesh – entered the house through the balcony. On opening the door from inside both the sisters went inside the rooms. In the third room they found their mother covered in blood lying on her stomach. She

was unconscious or dead. The room was in a mess. Everything was upside down. A broken stool was lying on the floor. The body was badly bruised. In particular there was a deep cut on the thumb. A cloth covered with blood was hanging on her neck. Her grandmother told her that she had left the accused and the deceased in the house while going to the Mosque.

Nimu Pen M. Shah, PW5, a relative of the deceased testified that there were four (4) occupants of apartment A5. Among them was Kiran Shah, himself, the deceased and Rannal Pat. That the accused was an employee of the deceased. Accused used to come in the morning and leave in the evening. That accused had been in the employ of the deceased five (5) months before this incident. He left Apartment No. A5 at 8.30 am on 25th September, 2009. He returned home at 11.00 am and knocked the main door in vain. He enquired from the watchman who said that he saw the accused coming from the house carrying a box. The accused told him (watchman) that he had been sent to deliver a box of biscuits to the daughter of the deceased within Parkland area.

Since the house was locked the neighbours brought a ladder, which her brother-in-law used to climb the balcony to open the door from inside. They found the body of the deceased lying on the floor in a pool of blood with visible severe injuries.

Dr. Okemwa Niuda, PW6, a pathologist based at Kenyatta National Hospital was requested on the 25th day of September, 2009 to perform post-mortem on the body of the deceased. The body was identified by close relatives – Kalesh and Sagar.

He observed that the body had multiple slash wounds. In addition the body had swellings on the scalp, finger – nail marks compressing the neck thereby resulting in a protruding tongue. That aside there were multiple injuries on the neck with bleeding on the muscles of the neck, and multiple bruises on the scalp.

As a result of his examination he formed the opinion, *inter-alia*, that the course of death was due to asphyxia due to neck concussions. He signed the post-mortem report which he produced in evidence as exhibit 3.

In cross-examination he surmised that there was real possibility that there had been a fight or struggle between the deceased and the assailant. Slash marks were there before she died. Last but not least, he opined that she had been strangled. That the soft tissue injuries could have been caused possibly by a fist during the struggle. That the finger-nails came to be on the neck as a result of strangulation while the slash marks were caused by a sharp object.

Chief Inspector Henry Kiamati, PW7, based at CID Gigiri was requested by the investigating officer, CPL John Kalamu, to record a statement under enquiry from the accused, on the 2nd day of October, 2009, at 4.00 pm at CID Parklands. Accused signed the statement which was made in English and he also countersigned the same. He appended translation certificate to the statement in full compliance with the Judges Rules. He produced the statement as exhibit 4.

The accused defence was that the deceased poured water on her face and in addition said that even if she (deceased) killed her (accused), she (deceased) would be taken nowhere. At that time deceased was holding a knife threateningly. In self defence a serious fist fight ensued between them. Both of them were injured. Unfortunately the deceased succumbed to her injuries.

No. 78965 P. C Charles Omwandho, PW8, recalled that on the 25th day of September, 2009 at about 1.30 pm, in the company of Chief Inspector Kiambati, Deputy DCIO Gigiri, Sergeant Maobe of CID Gigiri, Inspector Ojwang and Inspector Moenga of Parklands Police, he visited the scene of crime at plot No. 361 Jalaram Road, apartment A5 situate on the second floor, within Parklands Area.

He observed severe injuries on the body of the deceased. He noted that the whole bedroom was in a mess. Clothes were strewn all over the place. There were broken pieces of wooden stools, a bent knife bearing blood – stains, a pool of blood on the floor, on the beddings and on the walls in addition to the

window. There were also marks of blood – stains from where the body lay leading to the bathroom and exiting at the corridor. There were other blood-stains leading to the kitchen, washing area and the near exit of the emergency door. At the washing area was a blood stained towel inside a plastic bucket with water.

He took photographs of the scene. He ensured that the film was processed and the prints were also processed and thereafter took custody of the same. He prepared a report dated 14th October, 2009. The report was marked as exhibit No. 2 (a), and the bundle of photograph as exhibit 2 (b) respectively.

In cross-examination he admitted that the bent knife was evidence that there had been a struggle. The broken stool was evidence that somebody smashed it. That all in all there had been a serious struggle inside the various rooms.

Kalpesh Parakey, PW9, is married to Krishna Shah since the year 2008. He is son-in-law to the deceased. On 25th September, 2009 he received a call from her sister-in-law [PW4] that the deceased's house was locked from inside. That the house girl, accused herein, was missing. On arrival at the deceased's house he found several people stranded at the door. They were trying to open the window to gain ingress in vain. He noticed a window in the stair-case over-looking the balcony which could provide the answer. He found his way to the balcony and discovered a rear door from the washing area which was open. When he finally opened the door from inside many people came inside. Of significance the deceased's bed-room was half open so he went inside with some people. They discovered the body with severe injuries and blood oozing therefrom. He summoned the deceased's relatives and friends. The body was half naked and bore severe injury marks. He summoned the police who came. and photographed the scene.

He confirmed that exhibit 2 – 9 clearly depicts the scene of crime. He attended the post-mortem at M . P Shah Hospital and identified the body for purposes of post-mortem.

No 83346 P.C Dennis Khisa, PW10, was at Kawangware Police Station in the company of P.C Sigar. While on patrol, members of the public informed them that a lady who had committed murder in Parklands Area, wanted to escape to her rural home. The informer took them to the house of the suspect but she was not in. The informer told them to check at the booking office of Joyland Bus Services. There at the informer identified the lady. She wore a lessa as a headscarf and had injuries on her hand. They both entered the booking office. He stood at the door while P.C Sigar approached the lady and asked her to identify herself and produce the bus ticket. The lady acknowledged that she was Emely Shivachi and reluctantly produced a bus ticket. They arrested her and took her to Kimathi Information Centre within outskirts of Kawangware. She identified the accused in the dock as the lady they arrested in connection with the death of the deceased.

Elizabeth Waithera, PW11, is a Government Chemist she holds a Bachelor of Science degree from Nairobi University, 1992. He job description is Analyst. She has been on the job for the last 18 years. Her evidence was that on the 28th day of September, 2009 she received, *inter-alia*:-

- (i) blood samples of the deceased marked as “A”;
- (ii) a knife marked “B”;
- (iii) a broken stool marked “C”;
- (iv) a torn head-kerchief marked “D”;
- (v) a white bed-sheet marked “E”;
- (vi) a blood sample marked “F” belonging to the accused.

The said items were brought by Corporal John Kalamu and were accompanied by a memo form dated

28th September, 2009. She produced the exhibit memo form as exhibit 14.

On 24th October, 2009 she received a memo form marked “F” accompanied by the blood sample. She produced the said blood sample as exhibit 11. Her mission was to analyze the said exhibits to establish whether the stains on the exhibits are blood-stains of human origin and the connection of the said blood-stains with the blood of the deceased and the accused. Upon analysis her findings were as follows:-

- (i) the red-sheet – MFI – 9 – had heavy stains of human blood of group “A”;
- (ii) the creamish head scarf MFI – 8 was heavily stained with blood of group “A”;
- (iii) the broken stool – MFI 7 was heavily stained with human blood of group “A”;
- (iv) the kitchen knife MFI – 5 was moderately stained with human blood of group “A”;
- (v) blood sample of the accused marked item “F” in the exhibit memo was established to be of human blood group “B”
- (vi) The blood stains in the bed sheet, headscarf, broken stool and the knife matched in group with the blood sample of the deceased.

Her conclusion was that the blood-stains in the bed-sheet, headscarf and broken stool and the kitchen knife could have originated from the deceased after injury. She did a report which she produced as Exhibit 12. In cross-examination she confirmed that she did not do DNA profiling as requested.

No. 47324 Senior Sergeant Richard Maobe, PW12, currently stationed at Kilimani Police Station recalled the events of 25th day of September, 2009. While on duty he received information from the officer – in-charge of crime branch that murder had occurred at Jalaram Apartment A5 within Parklands Area.

He visited the scene of crime where he found duty officer and scenes of crimes personnel doing their job. He saw blood-stains on the floor of the bed-room. The body of the deceased was lying beside the bed on the floor. He noticed injuries to the left hand between the thumb and the index – finger. There were also visible injuries on the thighs.

The bedroom was in total mess. Several items were strewn all over the place. He observed foot – prints made of blood leading to the bathroom. The said foot-prints exited through the kitchen. Beside the body was a knife and pieces of broken stool stained with blood. There was also a blood-stained bed-sheet and a headscarf. The duty officer (Corporal Moenge) collected all the exhibits after the scene had been photographed by scenes of crime personnel. The body was later released to the relatives for burial. He produced the exhibits in the manner following:-

- (i) the kitchen knife as exhibit 5;
- (ii) broken stool leg – exhibit 6;
- (iii) stool top (blood-stained) – Exhibit 7;
- (iv) headscarf – Exhibit 8;
- (v) stained bed-sheet as – Exhibit 9;

No. 62149 Corporal John Kamau, PW13, was engaged in general duties at CID Parklands Police Station. He commenced investigations on 28th September, 2009. By then the suspect was already in the cells. The exhibits recovered from the scene were handed over to him. He visited the scene in the

company of P.C Bakeya and recorded statements from witnesses which included, but not limited to, the daughters of the deceased and a watchman who was at the premises at the material time.

As a result of his investigation he came to learn that the accused was employed by the deceased. That the deceased was left in the house with the accused on the fateful morning. About 10.00 am, which was unusually early, the accused left the premise. The body was later recovered inside the premises which was locked. Later on the accused was arrested while trying to flee to her rural home.

At the close of the prosecution's case, after carefully analyzing the evidence on record, I came to the conclusion that a *prima-facie* case had been established by the prosecution against the accused warranting the accused to be put on her defence. I then put the accused on her defence after duly complying with the provision of **Section 306 (2)** of the **Criminal Procedure Code**.

Accused (DW1) made unsworn statement and called no witnesses. She admitted having been employed as a cook for the deceased's family. She acknowledged having reported on duty, on the material day. In the morning she cleaned the car of the husband to the deceased. After the deceased's husband left the deceased picked a quarrel with her and poured water on her face. In addition the deceased assaulted her. In the process she tried to defend herself. A fierce struggle ensued and the deceased cut her on her hand and on the fingers. In sum, her evidence was that she was the victim of aggravated assault by the deceased which necessitated her to act in self-defence.

On the available evidence, it is clear to me that at all material times the accused was an employee of the deceased for a period of about five (5) months prior to this incident. On the 25th day of September, 2009 the accused was on duty performing the house chores in her capacity of a maid. By her admission she cleaned the car of the husband of the deceased, who then left for work. In total two men and one woman occupied apartment A5 – Kiran Shah, Nimu En M. Shah (PW5), the deceased and Renmarl Pal.

All the said occupants left the house early in the day leaving behind the accused and the deceased alone. About 10.00 am Patrick Oduor (PW2) saw the accused leaving apartment No. A5. Patrick enquired why she was leaving so early. Accused told him (Patrick) that she had been sent to the house of the married daughter of the deceased to deliver a tin of biscuits. At that time the accused was carrying a purple bucket. Out of curiosity Oduori (PW2) opened the bucket. Inside the bucket was a black polythene and some biscuits. Accused told Oduori (PW2) that she would return in the course of the day. However, she did not honour her promise. She went for good.

About 12.30 pm, on the fateful day, a lady staying in apartment No. 5 who had gone to work was dropped by a car at the gate. Oduor (PW2) opened the gate to let her in. She went to apartment No A5. About half an hour later the lady came back to the gate. She reported to Oduori (PW2) that she knocked the door to apartment No. A5 but received no response. While this lady was still conversing with Oduori (PW2) a group of people who included the daughter of the deceased arrived in a car. This group went to apartment A5. They pressed the bell but there was no response. Oduori (PW2) also joined them. He too pressed the bell but there was no response. Mama Naser summoned the daughter of the deceased who came promptly in company of her husband. The son-in-law of the deceased entered the house using a window on the balcony and in that way finally opened the door from inside. Inside apartment A5 the body of the deceased was discovered lying prostrate. The accused was nowhere to be seen.

On direct evidence, it is clear to me that the prosecution's case is supported by the defence sworn statement. The long and short of it is that after the occupants of apartment A5 left for various destinations, that fateful morning, active disagreement arose between the accused and the deceased. In the ensuing fierce struggle both the deceased and the accused suffered injuries. However, it was the deceased who was severely injured and eventually succumbed to her injuries.

By reason of the fact that only the accused and the deceased were alone in the apartment A5, it is difficult to know who was the aggressor and who was the victim. What is definite is that the deceased was seriously injured as embodied in the postmortem report. The accused too was injured as embodied in the P3 form admitted in evidence.

In my judgment the accused appears to have been younger and therefore much stronger than the deceased. This is what tilted the outcome of the fight in favour of the accused who escaped with minor injuries.

Against that backdrop of evidence, I find and hold that the prosecution has proved that the accused person killed the deceased. However *malice-aforethought*, a necessary ingredient of the offence of murder is not proved. Accordingly, the offence proved is manslaughter as opposed to murder.

Since the charge is that of murder, I invoke the provisions of **Section 179 (2)** of the **Criminal Procedure Code** and reduce the charge of murder to manslaughter. In the result I find and hold that the prosecution has proved its case against the accused, in the reduced charge of manslaughter, beyond any reasonable doubt. Accordingly, I convict the accused of the offence of manslaughter contrary to **Section 202** as read together with **Section 205** of the **Criminal Procedure Code**.

Having taken in to due consideration all the mitigating circumstances of this case, I sentence the accused to serve a sentence of 10 years imprisonment.

The accused has a right to appeal within 14 days.

Dated and delivered at Nairobi this 2nd day of October 2014.

N. R. O. OMBIJA

JUDGE