REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 11 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

TITUS MUSYOKA MUTINDA.....ACCUSED

JUDGEMENT

TITUS MUSYOKA MUTINDA hereinafter referred as the accused person was indicted on 3/10/2011 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63 of the Laws of Kenya).

The brief particulars of the indictment are that accused on 12th day of September 2011 at around 12.30 am at Illasit township in Loitokitok District within Kajiado County murdered one Shoilla Ngina Kaniki hereinafter referred as the deceased.

The accused was arraigned before the High Court at Machakos where he denied the allegations that he killed the deceased. The prosecution case was conducted before Kajiado High Court my Mr. Akula Senior Prosecution Counsel and the accused was represented by learned counsel Mr. Onchiri.

The prosecution called nine (9) witnesses in support of the charge. According to the prosecution witnesses PW1 Benson Kooi and PW2 Samat Kooi who introduced themselves as a brother and sister to the deceased stated to have received a telephone call with a message that their sister had been murdered. On the basis of the report they stated in court that they travelled on 15/9/2011 to Loitokitok Hospital Mortuary where they confirmed the death and did observe that she had sustained therein stab wounds apparently from a sharp object. It was PW1 and PW2 testimony that they identified the body and participated in the postmortem examination conducted by PW8 Dr. Stephen Mutiso. The findings of the postmortem report as deposed by PW8 were that the deceased was a female adult aged about 18 years in good nutrition. The deceased according to PW8 suffered multiple stab wounds to the head, neck, back, right arm probable cause of death was opined as massive hemorrhage resulting from a total of 13 stab wounds passing through the neck anteriorly and posteriorly.

PW1 JOSEPHINE MWELU used to be a neighbour to the deceased told this court that on 12/9/2011 about midnight she heard screams of a child. In company of another neighbour by the name of Mama Chiro they rushed to the scene and found a house door wide open with a lone child having blood stained body inside the house. It was the testimony of PW3 that she took care of the child as the police drove

into the compound to preserve the scene and other necessary action to investigate the crime. PW3 further testified that the deceased used to stay with the accused whom she positively identified before court.

PW4 HUMPHREY ELMOKOSI is the child to the deceased. He gave unsworn testimony that on a day he could not recall at night time the accused and deceased were together in the house. According to PW4 accused had visited them and as the deceased was preparing a meal for super accused armed with a knife stabbed the deceased and thereafter ran away. This witness further stated that accused used to stay in their house. In his testimony when he saw what happened to the mother (herein the deceased) he raised an alarm and people who heard managed to respond to the home immediately. On being cross examined by the defence counsel Mr. Onchiri, on the events of that night PW4 informed the court as follows:

“My mother was cooking. She did not finish cooking to enable us eat the food. She was beaten. I do not know why she was beaten. The people in the house left. I woke up in the morning and found my mother dead.”

PW5 DAMARIS AKECH a nurse at Isineti dispensary stated that on 13/9/2011 at about 2.30 pm accused person in company of some people sought medical treatment at the facility. According to PW5 she examined the accused and confirmed that he had sustained cut wound on the neck. It is her testimony that she treated the accused who gave an history that the injuries were as a result of a fight with some men over a bag of sugar. PW5 further testified that later the police visited her at the medical centre and demanded that she records a statement on the incident and encounter with the accused on 13/9/2011.

PW6 IP JACKLINE ATIENO who at the time was attached to Illasit Police Station testified that instructions issued from IP Ongute they visited the murder scene on 12/9/2011 at about 1.30 am. In the presence of other members of the public they identified the body of a female adult who had sustained multiple injuries. She further stated that they made arrangements and carried away the deceased body to Loitokitok District Mortuary to arrange for a postmortem. According to the testimony of PW6 the investigations carried out revealed that deceased and accused were together that fateful night. PW6 further stated that after committing the offence the accused left the house but investigations revealed that he was treated at Isinet dispensary on 13/9/2011.

In the course of the investigations PW6 told this court that she recovered a small torch, a knife and white T-shirt all were blood stained. The three exhibits according to PW6 evidence were found inside the house where the deceased was killed. The exhibits were presented and admitted in evidence as torch – exhibit 2, T-shirt exhibit 3, knife – exhibit 4. On the basis of the investigations PW6 further testified that the accused was pursued and arrested at Mwamila Forest with blood on his body.

PW7 PC DANIEL MWAURA gave additional evidence to that of PW1 and PW2 that he had identified the deceased to the doctor PW8 who conducted the postmortem. **PW9 APC KANYUA** testified to effect on how he rearrested the accused from members of the public and escorted him to the police station for further interrogation to establish his connection with the commission of the offence.

In his defence the accused on the other hand gave a sworn statement and alleged that on the material day 12/9/2011 he spent the whole day and part of the early hours of the night at his workshop located at Kimana. The accused further denied that he ever visited the house of the deceased as fronted by the prosecution witnesses. According to the accused he knew the deceased prior to her death and they used to visit each other as friends. In his testimony he did not kill the deceased nor does he know how she

met her death.

At the close of the prosecution and defence testimony both counsels filed final written submissions on the case. Mr. Onchiri, the defence counsel submitted that star witness to the murder of the deceased is PW4. Learned counsel submitted that the court should exercise caution in relying on the unsworn testimony of the witness. Learned counsel contended that probative value of such evidence is wanting and in the circumstances of this case, the accused ought to be acquitted.

Learned counsel placed reliance in the case of **May v Republic Cr. Appeal No. 24 of 1979** for the proposition that unsworn statement is not strictly speaking evidence and the rules of evidence cannot be applied to unsworn statements, it has no probative value but it should be considered in relation to the whole of the evidence, its potential value is persuasive rather than evidence. Mr. Onchiri submitted and referred me to the prosecution evidence where some witnesses crucial to the case were not called to testify to corroborate the testimony of PW6. Mr. Onchiri further argued that the case for the prosecution is not sustainable in absence of PW6 forwarding the blood sample, knife, blood stained T-shirt to the government analyst to confirm the nexus of the blood stains to that of the deceased. In summary Mr. Onchiri contended that the prosecution failed to make out a case against the accused beyond reasonable doubt.

Mr. Akula, learned counsel for the state submitted that there is both direct and circumstantial evidence to prove the case against the accused beyond reasonable doubt. Learned counsel contended that the alibi defence cannot be availed to the accused given the circumstances and events deduced from the prosecution witnesses that placed him at the scene of the crime. Learned counsel referred me to the case of **Charles O. Maitanyi v Republic [1986] KLR 198** for the proposition of law on the statement of a single witness and the need for testing with greatest care the evidence of a single witness respecting identification. It was the learned prosecution counsel submissions that there is ample evidence establishing the offence of murder and accused participation beyond reasonable doubt.

I have considered the evidence by the prosecution, the accused defence and submissions by Mr. Onchiri for the accused and a reply by Mr. Akula for the state. In the charge of murder the prosecution is mandated by law to prove the following elements of the offence beyond reasonable doubt in order for a finding of guilty to be recorded against the accused:

1. ***Death of the deceased person named in the charge sheet.***

2. ***That the death of the deceased was due to unlawful commission/omission on the part of the accused.***

3. ***That in causing the death of the deceased accused person action was motivated with malice aforethought.***

4. ***That the accused who has been indicted with the offence participated in causing the death of the deceased person.***

It is trite that the prosecution bears the burden under criminal law to prove each element of the offence beyond reasonable doubt where the accused is being tried for an offence like the one facing accused person. The supreme law of the Republic under Article 50 (2) there is a presumption of innocence until the contrary is proved by way of evidence. The standard proof required is that of beyond reasonable doubt as elucidated by **Lord Denning** in the case of **Miller v Minister of Pensions [1947] 2 ALL ER 372** as follows:

“That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

How does the evidence tendered by the prosecution stand in relation to the ingredients of the offence under Section 203 as read with Section 204 of the Penal Code.

1. **Death of the deceased:**

There is no dispute that prior to 12/9/2011 the deceased was alive and good nutrition as per PW8. The prosecution witness PW1 and PW2 being a brother and sister identified positively the deceased person at Loitokitok District Mortuary. This was corroborated by PW7 PC Daniel Owuor who accompanied them during the time when Dr. Mutiso (PW8) conducted a postmortem on 15/9/2011. The postmortem report confirmed the death of the deceased and opined the cause of death as arising from the thirteen stab wounds inflicted against the deceased. The postmortem report was admitted in evidence as exhibit (1). The accused in his defence does not dispute the fact that the deceased died.

This ingredient on the death of the deceased has been proved beyond reasonable doubt.

2. **On the ingredient of unlawful commission/and omission that led to the death of the deceased:**

The evidence by PW3 clearly demonstrates that deceased was killed in her house on or before midnight on the 12/9/2011. PW3 had been attracted by screams of a child. That child was identified before this court as witness No. 4. The deceased body was recovered from her house by police officers under the command of IP Jackline Atieno (PW6). A postmortem was conducted by (PW8) Dr. Mutiso where he prepared the postmortem report. According to PW8 deceased sustained extensive thirteen cut spread all over the neck, head, back and right arm. The multiple penetrating stab wounds described by the doctor occasioned massive hemorrhage with two critical wounds extending through the neck anteriorly and posteriorly being fatal. PW4 body who was rescued by PW3 after the murder was at the time blood stained which apparently was from the injuries of the deceased.

In this case, PW4 testimony points to the accused as the assailant which happened while the deceased was preparing a meal for them. According to PW4 the attack and beatings against the deceased was done by the accused. The nature of the injuries identified by the medical evidence of PW8 is a clear proof that deceased was not supposed to survive. The attack focusing on the sensitive parts of the body like the head, back and neck taken together is enough evidence to show deceased death was unlawful. There was no evidence that whoever inflicted the injuries did so in self defence under any act of provocation, in defence of property or was under the influence of extreme intoxication impairing judgement.

PW6 the investigation officer recovered a knife from the deceased house. As at the time of recovery the knife was blood stained. There was no other person injured in that scene except the deceased person. The medical evidence tendered by PW8 point to the nature of the injuries as stab wounds. The recovery of the blood stained knife corroborates the testimony of PW8 on what might have been used to inflict the stab wounds. The absence of the forensic analysis by the government chemist as to the source of the blood in the knife, T-shirt and torch is not fatal to the prosecution case.

The basis why it was not possible to extract the sample for analysis has been explained by PW6. This was due to the distance and absence of the doctors at the medical facility to extract and preserve the samples before being transported to Nairobi Government Chemist. The evidence of the pathologist PW8 who did the postmortem examination is consistent with the nature of injuries suffered by the deceased. This corroborates the testimony of PW4 who while testifying stated that accused beat the deceased resulting in not being served with the food she was cooking. The multiple injuries found on the deceased could have also been caused by the knife recovered from the room of the deceased house. The deceased may have succumbed to her injuries within the period when PW3 heard screams from PW4.

I therefore find that the ingredient of unlawful causation of death has been proved beyond reasonable doubt.

3. **The third ingredient deals with malice aforethought**

The offence of murder has been defined under Section 203 of the Penal Code Cap 63 of the Laws of Kenya as follows:

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

Malice afterthought has been defined in Section 206 of the Penal Code – malice aforethought shall be deemed to be established by evidence providing any one or more of the following circumstances:

a. An intention to cause the death of or to do grievious 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 death or grievious harm to some person, whether that person is the person killed or not, accompanied by indiffence whether death or grievious injury occurs or not or by a wish that it may not be caused.

c. An intention to commit a felony. The prosecution must lead evidence to prove malice aforethought beyond reasonable doubt. The court must draw what constitutes malice aforethought from the set of facts and evidence placed before it for consideration by the prosecution. The requisite intention as conceived by the accused to commit the offence has to be gathered from the case presented by witnesses lined to prove the case against the accused.

As held in the case of **Karani & 3 Others v Republic [1991] KLR 622** the Court of Appeal held interalia where malice aforethought is not proved but there is proof of death linked to the accused, the accused may be convicted of the lesser offence of manslaughter. The Penal Code Section 207 as read together with Section 208 also provides that despite existence of malice aforethought and the existence of the rest of the elements which constitute the offence of murder an accused person acting under provocation or diminished responsibility at the time of committing the murder shall be convicted for the offence of manslaughter.

Section 206 (a) (b) of the Penal Code specifically provides where an accused person causes murder by unlawful act or omission. This is in accordance with the principle laid down by the Court of Appeal in **Ogeto v Republic [2004] 2KLR 14** (the appellant in this case chased the deceased and another person, caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wound). The Court of Appeal found that by dint of Section 206 (a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or grievious

harm.

In **Republic v Mzabia Bin Mkoni [1941] 8 EACA 85** where the appellant killed his friend by shooting him with an arrow at close range in the rear, and there was no evidence of motive, provocation or insanity the court held that it was murder and dismissed the appeal. In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63:** The East African Court of Appeal set out the circumstances in law under which malice aforethought can be inferred:

a. The nature of the weapon used (whether lethal or not).

b. The part of the body targeted (whether vulnerable or not).

c. The manner in which the weapon is used (whether repeatedly or not).

d. The conduct of the accused before, during and after the attack.

Malice aforethought can also be inferred from the manner of the killing as held in the case of Abanga alias Onyango v Republic Court of Appeal Cr. Case No. 32 of 1990:

"The deceased in this case was tabbed severally with a sharp object apparently the knife recovered by PW6. The knife once used for a commission of the offence like grievious harm or murder is a lethal weapon. It is clear from the postmortem report that the accused targeted the head, neck anteriorly and posteriorly. The medical doctor described the interior stab wounds in the following manner:

3 stab wounds anteriorly on the face, right chest, 2 stab wounds measuring 5cm and 4cm in length, a through and through stab wound though the next anteriorly measuring 15 cm running from left to right. Four stab wounds to the head and neck, the largest being a 10 cm through and through wound to the nape of the neck being left to right on the neck. A 6 cm stab wound between the shoulder blades. A 4 cm stab wound over the left scapula and 5 cm stab wound over right scapula.

On the right shoulder a 5 cm and 7 cm deep stab would on the dorsten of the right hand and 3 cm long stab wound.

There is no dispute that the assailant herein had an opportunity and time to inflict the extensive injuries. He was not a person in a hurry. The vulnerable parts of the body were targeted."

This was the legal principle in the case of **Karani & 3 Others (Supra**) where malice aforethought can be inferred from the nature of the injuries and weapon used to inflict them.

Relying on the evidence of PW1, PW2, PW3 and PW4 the accused was a close friend to the deceased. They lived together in the house where the murder was committed. The accused in his defence did not adduce evidence that they had parted ways with the deceased as at the time of the murder on 12/9/2011. This court has anxiously weighed the requirements of the unsworn evidence of PW4 as tested under cross examination together with other materials placed before me by the prosecution. There is no difficulty in reaching a conclusion that the evidence is truthful and reliable as to whereabouts of the accused on the night of 12/9/2011.

In this respect it may be acknowledged that during the inquiry this court should have focused more on

non-leading questions to explore whether the child truly understands the abstract notion of dishonesty as opposed to the distinction between true and false statement. However for me in this case the testimony of PW4 in overall as permitted and received unsworn was supported with other evidence of PW1, PW2 and PW3 to the effect accused lived with the deceased. I am therefore satisfied that the elements of malice aforethought have been met by the prosecution beyond reasonable doubt. There are no mitigating circumstances from the record to reduce the blameworthiness of the accused.

The other element relates to positively placing the accused at the scene. The prosecution presented evidence of PW1 and PW2 that accused lived together with the deceased. PW3 a neighbour to the deceased confirmed that accused stayed with the deceased in the house where the incident took place. On the night of 12/9/2011 PW3 heard screams from the same house where the deceased was murdered. According to PW3 the deceased stayed with the accused and her children. The fateful night according to PW3 was a normal evening when their mother the deceased was cooking an evening meal for the family.

According to PW4 the accused joined them and started to beat the deceased while still in the course of preparing the meal. When the accused was done he left the house and never returned back. PW4 further testified that on waking up he realized the mother was dead and immediately screamed for help. The screams were heard by PW3 who responded by visiting the home. The accused was never seen the morning of 13/9/2011 save that he visited Isinet Medical Centre seeking treatment for an injury. PW5 a nurse at the facility confirmed treating the accused. There is no dispute the sad news of the death of the deceased was no secret to the people of Kimana. It is not disputed from the prosecution and the accused at no time ever responded to the alarm or death of the deceased. PW3 and PW6 visited the house in the early hours of 13/9/2011. They observed that it was full of blood arising from the attack of the deceased. There was no evidence of any disturbance of the scene or any other offence committed like theft in the course of executing the murder.

The police investigator mounted a search for the accused. The accused was arrested at Mwailua Forest. The alibi defence adduced by the accused does not dislodge the prosecution evidence that he was not at the scene of the murder in the night of 12/9/2011. The accused defence was not substantiated weighing alongside other evidence that the deceased was like a wife to the accused. The accused did not even make an attempt to explain whether he learnt at any one time that the deceased had been killed.

In my view the evidence before me taken in totality falls under the category of circumstantial evidence. The best exposition of which constitutes circumstantial evidence can be found in Sankar on Evidence 15th Edition Reprint 2004 at pg 66 – 68:

1. That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.

2. That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given a benefit of doubt.

3. That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred thereof.

4. Where the circumstances are susceptible of two equally possible inferences the inference favouring the accused rather that the prosecution should be accepted.

5. There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the claim must be such human probability the act must have been done by the accused.

6. Where a series of circumstances are dependent on one another. They should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.

7. Circumstances of strong suspicion with more conclusive evidence are not sufficient to justify a conviction even though the party offers no explanation of them if combined effects of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive.

Applying these principles to the case before me I find the testimony of PW1, PW2 and PW3 to be circumstantial in respect of accused relationship with the deceased. Secondly that prior to the 12/9/2011 accused stayed together in the house where deceased was murdered. That fact was admitted by the accused. PW4 knew the accused as uncle to the family. He appeared to know the accused as uncle hence the reason he did not know his actual name properly. The accused was part of the deceased family by virtue of the relationship they kept during the lifetime of the deceased. This 12/9/2011 nothing has been shown to controvert the piece evidence that accused was not with the deceased prior to her death.

From the evidence I am satisfied that the prosecution has discharged the burden of proof beyond reasonable doubt against the accused person. In my view the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code facing the accused with all the ingredients have been established. As a result there is ample evidence to support a verdict of guilty and conviction of the accused in respect of the offence of murder as charged.

Dated, delivered in open court at Kajiado this 21st day of December, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Onchiri for accused present

Mr. Akula for Director of Public Prosecution - present

Mr. Mateli Court Assistant

Accused present