



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 13 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

EUNICE MUTHONI WANJIHIA.....ACCUSED

JUDGMENT

1. On 16th June 2019, at around 18:00 or 18:30 hours, the accused and Michael Gichaga Ngaruiya (hereafter *the deceased*) got into an altercation. One witness said that she saw the accused hit the deceased with a plank of wood on the head. The deceased succumbed to the injuries the following day.

2. The Republic thus brought *information* to the High Court charging her with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.

3. The particulars are that on 17th June 2019 at Huhoini village, Kandara Sub-County within Murang'a County, she murdered the deceased.

4. She pleaded *not guilty*. The prosecution lined up *seven* witnesses. The first was Jemimah Nyambura (PW1). On 16th June 2019, she saw the accused arguing with the deceased along the road. The witness asked the deceased to go home. It is at that point that the accused followed her, grabbed her firewood and started beating them. She said that the accused followed her, snatched a piece of the firewood and hit her and the deceased.

5. The deceased was injured on the forehead and fell down. The piece of wood was produced as exhibit 6. The accused and some men helped the deceased back on to his feet. The accused called her husband, Murage (who is also the deceased's brother) for assistance. He and the deceased's wife, Rose Gichaga (PW2), took deceased to hospital on a motorbike. The deceased died in hospital the following day.

6. Like I have stated PW2 is the widow. On the material day she received information that a person was being beaten on the road. As she headed there, she met with the deceased and two men who were helping him. The deceased had a big swelling on the forehead and told her that he was beaten by the accused. PW2 said the words were uttered in the presence of Mama Ngaruiya and her sister. She and Murage made arrangements to take the deceased to Gaichanjiru Hospital and later to Kiria-ini Hospital where he died.

7. The witness said that on the previous night (15th June 2019), there was a quarrel between the deceased and the accused's husband, Murage (PW3) over some meat that was not delivered to them by the deceased. The accused was not involved in that dispute.

8. PW3 was James Ngugi Gitau. He is the Assistant chief at Gaichanjiru. He was instructed by the chief to protect the accused who was holed up in her house. He said that the accused had an injury on her hand and did not resist arrest. Upon cross examination, he

clarified that the injury on the hand of the accused was fresh and was caused by persons who were trying to pull her out of the window.

9. PW4 was the deceased's brother, James Murage. He found the accused trying to lift the deceased from the side of the road. He had a big swelling on the forehead and the accused told him she is the one who hit him. PW4 was assisted by two men to take him home. The deceased was not talking but was groaning. They attempted to administer first aid using some warm water. He woke up but his condition deteriorated in the night and they took him to hospital. PW4 confirmed that he and the deceased had quarreled over meat the previous night but the accused was not involved.

10. On 20th June 2019, PW4 and PC Ndolo (PW6) attended the post mortem examination at Gaichanjiru Hospital. According to PW6, the deceased had injuries on the head and bruises on the hand and knees.

11. PW5 was Pauline Guchu. She was hawking vegetables near the scene. At about 18.30 hours, she saw the deceased pass by on the way home. She then saw a woman hit him with a small stick. The attacker then grabbed some wood from PW1 and hit the deceased. PW5 said she was about 50 metres from the scene.

12. The last witness was the pathologist, Dr. Eunice Kimani (PW7). She testified that the deceased died from "*massive intracranial hemorrhage secondary to trauma to the head*". The original post mortem form was produced as exhibit 2.

13. When the accused was placed on her defence she blamed the deceased for starting the fight. She said the deceased had always wanted to have a relationship with her and never accepted her as his brother's wife. She said that on the previous night, the deceased went away with their share of meat. That when her husband (PW4) went to collect the meat, the deceased refused with it and a brief quarrel ensued. The meat was only delivered the following day.

14. The accused said that on 16th June 2019, she was going to the shopping center when she met the deceased. She said that he followed her and hit her on her hand with a stick. When he attempted to hit her the second time, she grabbed the stick and let it go. That the deceased fell from the momentum, rolled down the edge and got injured by a rock.

15. The accused claimed that the stick that was produced in court was not the one they were struggling over. She also contested that she grabbed a piece of firewood from PW1 to hit the deceased.

16. Learned counsel for the accused, *Mr. Waweru Nyambura*, filed final submissions on 23rd February 2022.

17. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*.

18. There are three key ingredients that *must* be present: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*.

19. In our criminal justice system places the *burden of proof* entirely upon the shoulders of the prosecution. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.

20. I entertain no doubt about the *death*. PW2 confirmed that the deceased died on 17th June 2019 at Kiria-ini Mission Hospital. Doubt is erased by the post mortem report produced by Dr. Kimani (PW6). According to the pathologist, death resulted from "*massive intracranial hemorrhage secondary to trauma to the head*". I readily find that the death was *unlawful*.

21. The key question then is whether the available evidence proves beyond reasonable doubt that the accused, *of malice aforethought*, killed the deceased.

22. The accused is a sister in law to the deceased. The accused admitted that she met with the deceased though she claimed it is the deceased who attacked her with a stick. The incident took place between 18:00 and 18:30 hours. I find that the accused was *positively* identified by PW1, PW2 and PW4. *Wamunga v Republic* [1989] KLR 424, *Maitanyi v Republic* [1986] KLR 198 at 201.

23. PW1 heard her and the deceased abusing each other. She escalated it by hitting the deceased with a plank of wood that she grabbed from PW1. The accused was *not* forthright when she claimed that it is the deceased who followed her and hit her with a stick; or, that the deceased fell down the slope when she let go of the stick. I say so for *four* main reasons: Firstly, PW1 and PW5 saw the accused hit the deceased with a plank of wood on the head. The deceased then fell down. Death resulted from the blow to the head.

24. Secondly, the accused told her husband (PW4) at the scene that she was the one who hit the deceased. Thirdly, when the deceased came to at home, she told his wife (PW2) in the presence of two witnesses, that it is the accused who hit her with a piece of wood on the head.

25. Fourthly, I find that those words by the deceased amount to a *dying declaration*. Dying declarations should be treated with *caution*; and, there is need for *corroboration*. The statement by the deceased and his injuries was *corroborated* by PW1, PW4, PW5 and reinforced by the opinion of the pathologist.

26. I thus find that it is the deceased who caused the death of the deceased by an unlawful act. But I am anxious whether she *intended* to kill him. Paraphrased, was the accused of *malice aforethought*" Section 206 of the **Penal Code** defines it as follows:

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.

27. According to the accused she never intended to kill the deceased. She tried to assist him and called her husband (PW2) to help. I have already found that she was lying when she claimed that it is the deceased who attacked her; or, that the deceased fell down the slope from loss of momentum when she let go of the stick.

28. According to PW1, the accused and deceased abused each other before the attack. She called him *kihii*, a thoroughly degrading *kikuyu* insult. The accused claimed in her defence that the deceased had never accepted her as his brother's wife; and, that she had declined his advances.

29. But beyond the insults, there is no clear *motive* for the attack. Of course, the prosecution was *not* obliged to prove motive. But its absence casts some of doubt on the *intention* of the accused. The prosecution is obliged to *prove* the *intention*.

30. In *Nzuki v Republic*, Court of Appeal, Nairobi, Criminal Appeal 70 of 1991 [1993] eKLR, the accused walked straight into a bar, pulled out the deceased without uttering a *single* word, and stabbed him to death. The court found those facts to be *unnerving*. It held-

No doubt the prosecution is not obliged to prove motive, but just as its presence can greatly strengthen the case for the prosecution, so its absence can weaken it. See the case of R v Sharmpal Singh s/o Pritam Singh: Sharmpal Singh s/o Pritam Singh v R (PC), [1962] EA 13 at page 17 letter C. In the instant appeal, there was a complete absence of motive. The offence with which the appellant was charged, tried and convicted was committed in an environment of beer drinking and dancing to the music from a juke box. Except for the appellant's bare statement in his unsworn testimony that on the material date at 7.00 pm he was drinking beer at Beehive Bar, there is absolutely nothing on the record of the superior court from which it can be implied that the appellant had any one of the intentions outlined above when he unlawfully assaulted the deceased as is set out above with fatal consequence. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the superior court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and that the

same had been discharged to its satisfaction in view of the circumstances under which the offence in question was committed. Having not done so, and having regard to the environment in which the offence preferred against the appellant was committed as is mentioned above, we are uncertain whether or not malice aforethought, a necessary ingredient of the offence of murder, was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder was unsustainable. His killing of the deceased amounted only to manslaughter.

31. The circumstances in the present case point in the same direction. I find that the accused *killed* the deceased; but *lacked* the requisite *mens rea* for *murder*. See also ***Raphael Kimasi v Republic***, Court of Appeal, Nyeri, Criminal Appeal 61 of 2013 [2014] eKLR, ***Republic v Shadrack Kiprobon***, High Court, Eldoret, Criminal Case 37 OF 2010 [2017] eKLR.

32. It follows as a corollary that the charge of murder has not been proved beyond reasonable doubt. On the evidence, the law and the precedents, the accused is liable for *manslaughter*. I accordingly *substitute* the charge of murder with the *lesser* but *cognate* offence of *manslaughter*. The accused is hereby *convicted* of *manslaughter* under section 205 of the **Penal Code**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 24TH DAY OF MARCH 2022.

KANYI KIMONDO

JUDGE

JUDGMENT READ IN OPEN COURT IN THE PRESENCE OF:

ACCUSED PERSON.

MR. WAWERU FOR THE ACCUSED INSTRUCTED BY WAWERU NYAMBURA & COMPANY ADVOCATES.

MS. A. GAKUMU FOR THE REPUBLIC INSTRUCTED BY THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.

MS. SUSAN WAIGANJO, COURT ASSISTANT.



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