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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 16 OF 2018

REPUBLIC

VERSUS

SAMUEL NGUNJIRI WAIHENYA alias NJIRI.....ACCUSED

JUDGMENT

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code; he was accused of having murdered Michael Githinji Wanjama on the night of 1st and 2nd January, 2015 at Kiahugu Trading Centre in Mukuruweini Sub-County of Nyeri County; the accused person had a mental assessment test conducted by Dr. K. Kamau (**PW1**) of Mathari Hospital and the accused was found to be mentally fit to plead and to stand trial; the Medical Report was produced and marked as '**PExh.1**'; upon taking plea the accused entered a plea of **NOT GUILTY** to the charge.

2. At the hearing hereof the accused was at all times represented by Learned Counsel Miss Maina whereas Ms. Gicheha was the Prosecuting Counsel for the State; the prosecution called a total of six (6) witnesses in support of its case; after the prosecution closed its case this court found the accused had a case to answer and placed him on his defence; his rights were explained to him and he elected to give a sworn statement of defence; hereunder is a summary of the respective parties cases.

THE PROSECUTION CASE

3. The prosecution submitted that for the offence of murder it had the burden of proving all the elements of the offence of murder; which are the fact of death, the cause of death, that the death was unlawful, that the accused person participated and caused the said unlawful act or omission that led to the unlawful death and lastly that the accused had malice aforethought;

4. Dr. K. Kamau (**PW1**) carried out the psychiatric examination of the accused and found him mentally fit to plead and stand trial. **PW1** produced the Mental Assessment Report which was marked as '**PExh.1**'.

5. Jonathan Mutisya Mwanzia (**PW2**) a boda boda rider testified and stated that on the fateful night a lady named Purity Wambui who was a regular customer called him and requested to be picked up and dropped off at her home; he proceeded to pick her up and she was in the company of a person whom he heard Purity referring to as '**Njiri**'; he was later called by the police on 5/01/2018 to record a statement on the persons he had ferried on the 1/01/2015.

6. **PW3** Simon Kibera Kibui who was the area Assistant Chief of the sub-location told the court that on 1/01/2015 he was called at 10pm and informed of a murder. There was no blood at the place where the body of the deceased was found but blood stains led him and the police to House Number 6. Upon summoning the caretaker to open the house they found blood stains on the sofa set, on a T-shirt and on the floor. The caretaker informed them that the house was rented to Purity Wambui who lived alone. Her ID was found in the house.

7. Wanjama Wanarua (**PW5**) the father of the deceased testified that on 2/01/2015 he was informed of his sons killing. He later attended the post mortem examination where he identified the body of the deceased. The Post Mortem Report was produced by Corporal Josphat Mbulu (No.65549) (**PW6**) who was the Investigating Officer. The report indicated that the deceased met his death as a result of two (2) stab wounds on his chest.

8. It was **PW6's** evidence that upon arresting and interrogating the accused, he told the officer that he had received a call on the

material date from Purity. Upon arrival at her house, he found the deceased lying in a pool of blood. Purity called a boda boda rider and they left the scene. **PW6** told the court that the accused fled the jurisdiction after the incident and was at large for nearly two years until his arrest on 6/11/2018. The investigations carried out pointed to the accused being at the scene when the deceased met his death and **PW6** proceeded to charge him with murder.

9. The items that were collected from House Number 6 which were the clothing, the kitchen knife and Purity's confession were not produced as evidence in court as they had been produced at the hearing of Purity's case; **PW6's** stated that the prosecution's case was founded on the confession of Purity.

DEFENCE CASE

10. The defendant opted to give a sworn statement of defence. In his submissions, the accused asserted that the prosecution had failed to prove its case to the desired threshold of beyond reasonable doubt.

11. **On actus reus**; from the evidence adduced the accused was not identified by any of the prosecution witnesses as having killed the deceased. **PW2** a boda boda rider only testified that Purity was in the company of a person going by the name 'Njiri. Purity had called him to pick her up and they met 100 metres from the scene. He had picked them up and ferried her together with the accused person to her home. However **PW2** was not able to identify the second passenger.

12. Counsel submitted that the only evidence that linked the accused person to the commission of the crime was an alleged confession by a co-accused whose statement ought to be scrutinized with great caution. It also needed corroboration. The statement was also not produced in court as evidence;

13. The evidence of CPL. Josephat Mbulu (**PW6**) was that upon entering room Number 6, he found blood stains all over and on the sofa sets and alluded to a commotion that night between the deceased and Purity, the co-accused. His evidence was that he found blood stained clothes in the room but confirmed under cross-examination that he never took the items of clothing to the Government Analyst to identify whose blood was on the clothes. There was also the knife that was allegedly used as the murder weapon. **PW6** stated that the knife was also not taken for forensic examination to identify whose finger prints were on it;

14. Counsel further stated that there was no evidence adduced that the items found in the room number 6 belonged to the accused; there was no nexus between the deceased and the bloodstains found on the kitchen knife and the clothes found in the room.

15. Additionally, Counsel submitted that the prosecution failed to prove beyond reasonable doubt that the accused did the unlawful act.

16. **On mens rea**; none of the prosecution witnesses gave any concrete evidence on whether the deceased and the accused had ever met; nor was there any evidence adduced that the deceased provoked the accused in a way that would have resulted in his death and the accused did not have malice aforethought to kill the deceased as he had no reason to.

17. Finally, Counsel urged the court to acquit the accused as there was no credible or compelling evidence that the court could use to convict the accused.

ISSUES FOR DETERMINATION

18. After hearing the oral submissions made by both counsel for accused and the state and having evaluated all the evidence on record this court has framed only one issue for determination which is as follows;

(i) Whether the prosecution has proved its case to the desired threshold of beyond reasonable doubt.

ANALYSIS

19. There are four (4) crucial ingredients which the prosecution must prove beyond reasonable doubt in order to prove the offence of murder; these ingredients are as follows;

(i) The fact of death

(ii) The cause of death

(iii) The death of the deceased was as a result of an unlawful act or omission by the accused person;

(iv) The unlawful act was committed with malice aforethought.

20. **On the fact and cause of death;** The parties agreed that the Post Mortem prepared by Dr. Kimathi be produced as an exhibit without calling the maker; the Post Mortem Report was tendered into court as an exhibit and it was marked as 'PEXh.2'; the report confirmed that an examination was conducted on the body of the deceased by Dr. Kimathi of Mukuruweini Hospital and it was confirmed that the deceased died and found that the cause of death was due to cardio-pulmonary arrest due to massive haemorrhage secondary to deep penetrating chest injury occasioned by stab wounds.

21. This court is satisfied that the fact of death and cause of death was proved to the desired threshold by the evidence of **PW3**, **PW4** and **PW6** and the medical expert evidence contained in 'PEXh.2';

22. **On whether the death of the deceased was as a result of an unlawful act or omission by the accused person;** the evidence adduced by Jonathan Mutisya Muasya (**PW2**) a boda-boda rider would have placed the accused at the scene of the crime on the material date had he been able to positively identify him; his evidence was that on the material night Purity had called him Purity to pick her up and they met 100 metres from the scene of crime; he had picked her up together with the accused person whom he heard Purity refer to as 'Njiri' and ferried both of them to Kabutu town; his testimony was that apart from hearing the co-passenger being called 'Njiri' and because it was dark he never got to see the face of this co-passenger and that he didn't even know whether this co-passenger was a man or a woman; he confirmed under cross-examination that he was not able to identify him even in the courtroom;

23. The evidence of CPL Josephat Mbulu (**PW6**) was that upon entering room Number 6 he found blood stains all over the room and also on the sofa sets. Due to the state of the room he concluded that there had been a commotion that night between the deceased and Purity the co-accused. His evidence was that he found blood stained clothes in the room and a kitchen knife. Under cross-examination, he confirmed that he never took the blood stained clothing to the Government Analyst to identify whose blood was on the clothes. The kitchen knife that was described as a murder weapon was not finger printed. No forensic report on the prints was ever prepared or produced. No blood analysis report was produced. The prosecution availed no phone call log records to confirm that Purity had indeed called the accused on that material night. The phone location details would have also demonstrated that the accused was within that vicinity and at the scene of crime on that fateful night.

24. The only evidence that would have linked the accused person to the commission of the crime was an alleged confession by a co-accused. The Investigating Officer never produced this confession before the trial court during the hearing. Nonetheless, had it been produced this court would have been enjoined to scrutinize it with great caution due to Purity being a co-accused and that there was also corroboration.

25. This court finds no direct or circumstantial evidence adduced by the prosecution that links the accused person to the unlawful act that caused the unlawful death of the deceased; and finds that the prosecution failed to prove this ingredient to the desired threshold.

26. **The last element is that in causing the death of the deceased the accused had malice aforethought;** the definition of malice aforethought is found at Section 206 of the Penal Code which reads as follows;

"206. Malice aforethought

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 above section malice aforethought is deemed to be established by evidence which proves an intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not.

28. None of the prosecution witnesses gave any concrete evidence on whether the deceased and the accused had ever met; nor was there any evidence adduced that the deceased provoked the accused in a way that would have resulted in his death. Purity confessed to cohabiting with the deceased but the prosecution presented no evidence on the existence of a love triangle nor was any evidence presented on the existence of a grudge between the accused and the deceased.

29. This court finds that the accused was arrested on mere suspicion and finds that the prosecution has failed to prove that the accused had a motive to kill the deceased.

FINDINGS AND DETERMINATION

30. For the above reasons this court makes the following findings and determination;

(i) The prosecution is found to have failed to prove its' case against the accused to the desired threshold;

(ii) The accused **SAMUEL NGUNJIRI WAIHENYA alias NJIRI** is hereby found **NOT GUILTY** of the charge of Murder c/s 203 as read with 204 of the Penal Code; and

(iii) The accused is hereby acquitted of the offence of murder under Section 306(2) of the Criminal Procedure Code and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 12TH DAY OF NOVEMBER, 2021.

HON. A. MSHILA

JUDGE



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