



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MURANG'A

CRIMINAL CASE NO. 43 OF 2012

[FORMERLY NYERI HCCR 12 OF 2010]

REPUBLIC.....PROSECUTOR

VERSUS

PETER WAINAINA MUNGAI.....ACCUSED

JUDGMENT

1. Mburu Mungai Micara (hereafter *the deceased*) was killed and the body dumped into a pit latrine. When it was finally exhumed, it had decomposed so much that it was difficult to identify. According to one witness, the head had multiple injuries from some blunt force.
2. The accused, a brother of the deceased, was the principal suspect. The Republic brought *Information* to the High Court charging him with murder contrary to section 203 as read with section 204 of the **Penal Code**.
3. The particulars are that on the night of 25th and 26th December 2009 at Kariti village, Kariti Sub-Location, Muran'ga South District of the former Central Province, jointly with others not before the court, he murdered the deceased.
4. The prosecution lined up four witnesses. The first was Damaris Wanjiru (PW1). She is a sister of the deceased and the accused. She was away at her matrimonial home when she learnt of the murder. The information was from a woman whose name she could not remember. PW1 was however present when the police exhumed the remains from the pit latrine nine days later. The pit was under construction in the deceased's compound.
5. Stanley Ng'ang'a (PW2) was the area chief. On 2nd January 2010, an informer told him that the deceased was murdered and thrown into the pit. He shared the intelligence with the police. On 3rd January 2010, the same informer told him that the perpetrators of the murder were planning to exhume the remains to hide the evidence. The police, secured the area and obtained an order to exhume the body.
6. The witness said that the following morning, members of the public assisted the police to excavate the site. According to the witness, "*the state of the body was such that it was not easy to identify it. The face appeared to have been hit by a blunt object many times*".
7. PW2 testified that the accused was not present during the exhumation exercise. He however admitted in cross examination that the accused and his brothers had escaped for their own safety. Irate members of the public torched all the houses in the compound after the police left.
8. The witness also attended the postmortem examination on 20th February 2010 at the City Mortuary, Nairobi. Benson Mungai (PW3), a relative of the deceased, also attended the autopsy. The pathologist did not take to the stand and the post mortem report was not produced.
9. The last witness was Corporal Mwirigi (PW4). On 11th April 2010, he and Police Constable Malori got a tip from the public that the accused was in Makuyu. They arrested him and detained him at Makuyu Police Station before handing him over to Kabati Police Station. He said that at first the accused resisted arrest but later co-operated with them.
10. When the accused was placed on his defence, he made an unsworn statement denying that he killed the deceased. He claimed that he was away at work at Kagundu-ini Tea Factory on the night of 25th and 26th December 2009. He stated-

I went to celebrate Christmas and returned at 17:00 hours and went to work. I returned home at 06:00 hours on 26/12/2009 and went to bed and woke up at 13:00 hours. I went to see my friend and returned at 17:00 hours. Again I left for work at 17:00 hours until the following morning at 06:00.

11. Learned counsel for the accused, *Mr. Kinuthia*, filed written submissions on 1st February 2022 with authorities annexed.

12. 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.*

13. 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*.

14. PW2 could not identify the body due to the level of decomposition. PW3, who was a brother in law of the deceased identified the body to the pathologist. He said he was able to do so from the face of the deceased. The body had injuries on the head. I am thus not in doubt about the death of the deceased.

15. There is however a serious gap of the absence of the pathologist or production of the post mortem form. From the circumstances of the death, I find that the death was unlawful, but I *cannot* state with certainty the cause of the death.

16. As the record will show, the prosecution sought numerous adjournments for want of witnesses. On 20th November 2017, *Waweru J*, ruled as follows:

This is an old Nyeri case (2010!). I will very reluctantly grant adjournment. The Accused has not been tried within a reasonable time as required by the Constitution. This will be the last adjournment upon the basis of non-attendance of prosecution witnesses.

17. I took over the proceedings on 31st July 2018 and explained the rights to the accused. He opted to proceed from where my predecessor left the matter. I fixed the hearing for 20th December 2018. The prosecution was still not ready. I granted “*the very last adjournment*” with witness summons to the four remaining witnesses. But the prosecution was again not ready on 12th February 2021. Noting the age of the case and preceding orders, I declined to adjourn the matter any further.

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

19. In the absence of an eye witness, this case is entirely built atop *circumstantial* evidence. In order to convict on such evidence, the entire chain must be complete and point to the guilt of the accused “*incapable of explanation upon any other reasonable hypothesis than that of his guilt*”. *R v Kipkering arap Koske & another* 16 EACA 135 (1949). See also *Sawe v Republic* [2003] KLR 364, *Mutua v Republic*, High Court, Machakos, Criminal Appeal 198 of 2013 [2015] eKLR, *Republic v Richard Itweka Wahiti*, High Court, Kiambu, Criminal Case 9 of 2016 [2020] eKLR.

20. I must state that I did not find the defence by the accused believable. His demeanour betrayed him as untruthful and one who was concealing vital information. But 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.

21. Unfortunately, the combined evidence of the *four* witnesses does not reach the threshold of proof *beyond reasonable doubt*. The evidence of PW2 for instance, raises serious *suspicions* against the accused. But his informer remained hidden and never testified. PW2’s evidence thus largely bordered on *hearsay*. PW1 on the other hand was present the day the body was exhumed, but she was away at her matrimonial home when she first learnt of the murder. PW3 identified the remains for the autopsy while PW4 was only the arresting officer.

22. There is thus no *concrete* evidence from their testimonies that the accused or his accomplices killed the deceased and threw him into the pit latrine. I cannot then say with confidence that all the elements of the charge have been laid out; or, at any rate that the accused, *of malice aforethought* killed the deceased.

23. I accordingly enter a finding of *not guilty*. The accused person is hereby acquitted.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 22ND DAY OF FEBRUARY, 2022

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mr. Kinuthia for the accused.

Ms. Muriu for the Republic.

Ms. Susan Waiganjo, Court Assistant.