



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL CASE NO. 23 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VS.**

**EVANS KARARI MWANGI.....RESPONDENT**

**JUDGMENT**

1. **EVANS KARARI MWANGI**, the accused is charged with the offence of murder of **CAROLINE WANJIRU MAINA** deceased. The accused was described by some prosecution witnesses as a boyfriend of deceased and by others as deceased's husband. All witnesses however confirmed that accused and deceased lived together for about 7 years.

2. The prosecution portrayed this was a turbulent relationship characterised by fights with the accused being the more violent party. **Esther Njeri Maina** younger sister of deceased said accused used to assault deceased "savagely". **Lucy Wanjiku Kungu** was the mother of the deceased. She knew the deceased as a friend of her daughter the deceased. She however confirmed that they had lived together for 7 years. She described their relationship at the beginning as being good but later it deteriorated. To show the deterioration of the relationship. She stated in her evidence:-

***"My daughter would call ... at 2.00 am to report that accused wanted to kill him (sic). I would often take a boda boda to go rescue her. She called me to go rescue her at least 5 times..."***

***Once I had to move her from where she was living to come living (sic) with me because of how she had been beaten... within 2 months Karis (accused) came back to live with her. But they fought again.***

***One day accused broke her teeth and also damaged the house until they were evicted. On that day accused came and attacked us with a knife in deceased's house. The landlord had a gun and it's what saved us."***

3. The deceased's mother narrated how on 24<sup>th</sup> January, 2016 she was informed by another lady that her daughter had died. She accompanied that lady to the place where the deceased's body had been found but on arriving there she was informed by those that were there that the body of the deceased had been taken up by police. They therefore went to Juja police station. this witness then stated:-

***"We found the body there. We found accused at the O.B. trying to report that they had been attacked by robbers... The deceased had cash Kshs.2,200/= on her and a phone."***

4. **Lydia Nabwire**, in 2016 was employed by the deceased as a bar tender. The bar was called Kaska Inn at Kenyatta Road. She also lived on Kenyatta Road. She knew the accused and the deceased as husband and wife. On 23<sup>rd</sup> January, 2016 she had reported at work at 2.00 pm. The deceased arrived at the bar at 7.30 pm in the company of accused. The deceased began taking alcohol with her aunt up to 10.00 pm. when the aunt left. At 11.00 pm this witness after being paid by deceased Kshs.2,000/- wanted to close the bar. Then this witness stated:-

***"But a customer came in at this point. He wanted alcohol, Carol (deceased) told me not to sell to him but Karis (accused) argued that since the man was in crutches I should sell to him. I didn't sell to him.***

***Carol and Karis started arguing with each other about this issue. They used to argue all the time. They would also often fight in front of customers.***

***We left together. We got to the foot bridge and I left for my house. This is about 100 metres from the pub. We lived in opposite sides."***

5. This witness stated that at 5.00 a.m. on 24<sup>th</sup> January, 2016 she was informed of the death of deceased. She said the scene where the body

was found was about 500 metres from where she had parted with the deceased and accused.

6. *Fredrick Kamira Mugendi* was a neighbour of the accused and deceased. He knew them as husband and wife. They lived 10 meters away from his house. On 23<sup>rd</sup> January, 2016 at 3.30 a.m. while he slept this witness heard someone calling him at his window. It was the accused. On opening the window he said he saw accused whose T shirt was soaked in blood. They talked through the window. He said:-

***“he (accused) told me that they had been attacked by thugs. I asked him where carol (Deceased) was and he said that carol had run away.”***

7. The witness on opening his door for the accused offered him water and food. He noted the accused was injured on his ribs but the injury was not serious. He woke up his two neighbours and they all together with the accused went to the accused's and the deceased's residence. There was no one there. This witness said that accused, at that house was calling out “babe babe”. This witness suggested they report the matter to the police but on getting to the highway they did not find public service vehicle. They therefore decided to report it the next morning. The accused slept on that witnesses' couch.

8. In the morning the witness said he went to take tea at a local restaurant. On his way back to the house, at 8.00 am, he noticed people were going in one direction. On following them and at a place called Tafrijah he saw deceased lying down dead. On his way back to his house he met the accused who asked him:-

***“Has Carol been killed?”***

The witness did not answer.

9. On 29<sup>th</sup> January, 2016 the police visited the home of this witness. He said:-

***“They knocked and came in. They started searching the house. They didn't find anything but one found something on the slab at the front of my house – above the house. He climbed on top of the toilet and then he dropped a knife from above there. It was clean knife.”***

10. *Chief Inspector Police Jacinta Kalundu* was the Investigating Officer (I.O.) of this case. She was present when on 29<sup>th</sup> January, 2016 *Police Constable Nguyo* retrieved the knife on top of the roof of the house of Fredrick. The I.O. noted that the knife was blood stained. That knife was taken to government chemist and the report presented by the government chemist revealed it had human blood and the DNA profile generated from that blood stain, matched the DNA profile generated from the deceased's blood sample.

## ANALYSIS

11. As I begin to consider the evidence adduced by prosecution, I am left with no doubt that this case was very poorly investigated and even more poorly prosecution. That notwithstanding the witnesses who testified portrayed the accused as a person who physically abused the deceased. Deceased sister described that abuse as savage. Deceased's mother said at one time following physical abuse by the accused the deceased suffered broken teeth. Both the deceased sister and mother also testified that accused often times threatened to kill deceased. This was even when the deceased mother had found a house near her for deceased and when the accused moved into that house, joining the deceased, an assault by accused broke out when he beat the deceased and then threatened to kill her, the deceased, and her mother. That assault was eventually stopped by the landlord who had a gun.

12. On the night in question an argument began between deceased and accused when a customer arrived at the bar, when it was closing time requesting to be served with alcohol. It would seem from the evidence of the lady bar-tender that the accused was displeased with the deceased countermanded his instruction to the bar tender for that late customer to be served with alcohol.

13. When the bar tender parted ways with accused and deceased as she went into the opposite side then to her house, the next witness, Fredrick saw the accused with a blood soaked T-shirt. It needs to be noted that accused went to that house at 3.30 am yet they last parted with bar-tender at 11.00 pm. It is clear from the evidence of Fredrick that the blood on that T-shirt did not come from accused's superficial injuries. This is because when asked about accused injuries that he saw on the night in question, Fredrick retorted: *“It wasn't serious”*. It certainly could not have been serious because Fredrick together with the accused and other two neighbours mounted a search, that night for deceased to no avail. Accused was not said to have been in pain during that search. Further, Fredrick gave accused water and food while they were in his house and they both went to sleep until morning. When they woke up, there is no evidence that accused went on to get medical attention.

14. Police officers who went to Fredrick's house on 29<sup>th</sup> January, 2016 and carried out a search found a knife hidden in the slab of the house which knife was found by government chemist to have traces of deceased's blood. This was the house the accused who arrived there with a blood soaked T-shirt, spent the night.

15. The accused gave a sworn defence. He stated that prior to him being arraigned in court he operated a club. He did not give details of that club.

16. On the night of 23<sup>rd</sup> January, 2016, at 3.30 am he was walking home with his wife, deceased, when they were attacked by thugs. The thugs injured him on the chest and waist. He produced P3 to prove those injuries. He bled following that attack. The deceased screamed and the accused ran to the home of a neighbour called Kennedy Muthengi. Together with Muthengi and other neighbours they went to the scene of attack and to the club to look for deceased. They did not find deceased. They also went to the deceased's aunt and mother but even

there they did not find anyone.

17. Accused said that Mugendi advised him at 6.30 am to go and report to the police. At 7.30 am a police officer informed him that a female's body had been found at Kenyatta road. He saw the body in police vehicle and he was able to confirm that it was deceased's body. This defence does not marry with the evidence of Fredrick. Fredrick in his evidence said accused was still at his home on 24<sup>th</sup> January 2016 as at 8.00 am as he went to take tea at a restaurant.

18. On their relationship the accused stated:-

***“Previously, I and deceased had moments of difficulties but we always resolved them peaceful. I never assaulted the deceased during our cohabitation...”***

***Both of us were drunk on the material night.”***

19. The ingredients of the offence of murder were stated in the case REPUBLIC VS. ISAAC MATHENGE MAINA as follows:-

***“The ingredients of the offence of murder were discussed in the case REPUBLIC VS MOHAMMED DADI KOKANE & 7 OTHERS [2014] eKLR as follows:-***

***“The offence of murder is defined as follows by section 203 of the penal code:***

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

***This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:-***

***1. The fact of the death of the deceased.***

***2. The cause of such death.***

***3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly***

***4. Proof that said unlawful act or omission was committed with malice aforethought.”***

20. The fact that deceased died was confirmed by the post-mortem report produced by *Dr. Dorothy Njeru*. The report confirmed that death of deceased was due to chest injuries due to penetrating sharp force trauma (stab). The doctor noted that the deceased did not have defence marks. The fact that the deceased died and the cause of death was proved by the prosecution.

21. The third ingredient to consider is whether there is proof that the deceased met her death as a result of unlawful act or omission on the part of the accused.

22. There is no direct evidence pointing to the accused causing the death of the deceased. Is there any circumstantial evidence proving the same? It is important to note that for a conviction to be made on circumstantial evidence the inculpatory facts must be incompatible with innocence of the accused. Further this Court needs to be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. What the court should bear in mind when confronted with circumstantial evidence was considered by the Court of Appeal in the case PON VS. REPUBLIC (2019) eKLR thus:-

***“Though not direct, circumstantial evidence, as this Court stated in MUSILI TULO V. REPUBLIC Criminal Appeal No. 30 of 2013:-***

***“... is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”***

***To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are REX V KIPKERRING ARAP KOSKE & 2 OTHERS [1949] EACA 135 and SIMONI MUSOKE V R [1958] EA 71. In REX V KIPKERRING (supra) the court explained that:-***

***“In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”***

***SIMONI MUSOKE V R* (supra) introduced an additional factor to the foregoing, to the effect that before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. Over the years these strictures have been developed further by way of explanation. For example, in the case of *OMAR MZUNGU CHIMERA V. R* Criminal Appeal No. 56 of 1998, the Court stated that;**

***It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:-***

- (i) the circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established;***
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***
- (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”***

23. What is the circumstantial evidence here? It is that the accused was the last known person who was in the company of deceased prior to her meeting her death. The accused said that he ran to their neighbour when he and deceased were attacked by thugs. The neighbour he ran to is Fredrick. As stated before Fredrick even before he opened his door to let in accused not his house noted accused had blood soaked T-shirt. Accused did not deny that fact but explained that he was injured by the thugs who attacked them. The accused did not explain his whereabouts from 11.0 pm to 3.30 am when he showed up at the house of Fredrick. The accused monumentally failed to give details of that alleged attack by thugs, which he alludes was what led to the death of deceased. He had an obligation as recognised under Section 111 and 119 of Evidence Act to do so. The sections provides:-

***“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:***

***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the accused person shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.***

***119. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”***

24. Those provisions were considered by the Court of Appeal case ***PETER MUGAMBI VS. REPUBLIC*** (2017) eKLR thus:-

***“In *DOUGLAS THIONGO KIBOCHA VERSUS REPUBLIC* [2009] eKLR the Court while construing section 111 (1) of the Evidence Act had this to say:-***

***“When parliament enacted section 111 (1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge. Otherwise, the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111(1), above, places an evidential burden on an accused to explain those matters which are especially within his own knowledge. It may happen that the explanation may be in the nature of an admission of a material fact.”***

25. Accused informed Fredrick, the I.O. and stated in his defence that he and deceased were attacked by the thugs. No more details are given by accused about that alleged attack. One would expect details of how they, the thugs, approached them. What they said to accused and deceased, if any, to give an impression they would attack and most importantly how the accused got his injuries. Other than saying they were attacked by thugs the other happenings which led accused to run to the neighbour's place is shrouded in mystery. It needs to be noted that deceased was found to have her money and phone when her body was discovered. That mystery must be regarded in the backdrop of what was described as an abusive relationship, which accused being the perpetrator. Accused himself acknowledge the difficulties in their relationship when he said, in his defence:-

***“I and deceased had moments always resolved them peacefully. I never assaulted the deceased during our cohabitation.”***

26. That defence must also be considered in with the mind that the mother of deceased, who testified in details how accused used to assault deceased, was not cross examined on that testimony. It must therefore be assumed to be correct. Similarly the testimony of the differences that occurred between accused and deceased on the material night as stated by the bar-tender was not subjected to cross examination.

27. However the most incriminating was the knife found at Fredrick's house, the house accused went to find shelter on the material night. Although Fredrick who was present during the police finding that knife said the knife was clean, the fact remains that the knife was found to have traces of deceased's blood. Although learned counsel for accused submitted that the trace of deceased blood was planted on the knife that allegation was not put to the police officers and having not given the police opportunity to respond to such a serious allegation the accused cannot raise the same in the final written submissions of this case.

28. I am led to make a similar conclusion, as did the justices of Court of Appeal in the case of ***PETER MUGAMBI VS. REPUBLIC*** (supra) that applying the principles of section 111 and 119 of the Evidence Act the evidence adduced at the trial taken cumulatively shifted the

evidential burden to the accused to explain how the deceased met her death, he also had a burden to prove why he had a blood soaked T-shirt when he only had superficial injuries.

29. I also find that the evidence before court is incapable of any other conclusion except that the accused's unlawful act or omission was the result of the death of deceased.

30. The doctor who carried out the post-mortem examination noted that the deceased did not have defensive marks. That finding is contrary to the defence offered by accused that they were attacked by thugs. If that was so, and since he stated accused screamed, which would mean she was apprehensive of imminent attack, one would have expected deceased attempted to defend herself, for example by fending off the sharp object which stabbed her and led to her death. There was no such defensive mark noted in the post-mortem report. This can only mean that the deceased was unaware of the imminent attack or that she was attacked by someone she knew from whom she least expected such an attack. Circumstantial evidence has been stated to often be the best evidence. This is what the court in the case of **REPUBLIC VS. RICHARD ITWEKA WAHITI (2020) eKLR** thus:-

***“26. In NEEMA MWANDORO NDUZYA V R [2008] eKLR the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court, stated that:***

***“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R V TAYLOR WEAVER AND DONOVAN (19280 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.”***

***27. In its earlier decision in MWANGI AND ANOTHER V REPUBLIC (2004) 2 KLR 32, the Court of Appeal exhorted that:***

***“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge”.***

31. Did accused have malice aforethought. It is trite law that to prove an offence of murder the element of malice aforethought as detailed in **section 206** of the Penal Code must be present. **Section 206** of the Penal Code provides:-

***“It is trite that to prove an offence of murder the elements of malice afore thought set out in section 206 of the Penal Code must be present. This section provides: -***

***“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 persona actually killed or not.***

***(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some persons whether that person is the persona actually killed or not, although such knowledge is accompanied by indifference whether of death or grievous bodily harm is cause 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 persons who had committed or attempted to commit a felony.”***

32. The provisions of that section were considered in the case **PETER KIAMBI MURIUKI VS. REPUBLIC (2013) eKLR**.

33. The prosecution's evidence, which is not contradicted by the accused is that accused and deceased, after 11.00 pm left the bar in the company of the bar tender. When the bar tender parted way with them there is no evidence that accused and deceased reached their residence. Yet deceased was attacked by a kitchen knife, which knife was traced in the residence of Fredrick where accused went and spent the night. It would therefore seem that the accused was armed with a knife as he went from the bar to their home with the deceased. The accused in using that knife undoubtedly intended to cause death or intended to cause grievous harm and knew there was risk of death to the deceased. In view of that finding it is clear to this Court that accused who, prior to their walking home was armed with a knife, had malice aforethought. He intended to cause grievous harm and even death to the deceased.

34. In examining the evidence of this case I have come to a conclusion that the circumstances prove the case points unerringly to the accused as the perpetrator of the offence of murder. There does not exist a room for co-existence of circumstances weakening that inference. The prosecution has proved its cases on the required standard, beyond reasonable doubt. I therefore convict ***Evan Karari Mwangi*** of the offence of murder.

**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 22ND DAY OF APRIL 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

C/A

Accused: .....

For the Accused.....

For the prosecution.....

**COURT**

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**