



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL CASE NO. 17 OF 2012

[FORMERLY NYERI HCCR NO. 31 OF 2012]

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN KANG'ETHE WAMBUI.....ACCUSED

RULING

1. The accused is charged with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.
2. The particulars are that on 19th August 2012 at Kamahuha village in Murang'a County, he murdered *Teresa Nyambura Muiruri*.
3. He pleaded *not guilty*. The prosecution managed to call *three* witnesses.
4. Jane Muiruri (PW1) is the mother of the accused and a sister to the deceased. The deceased was living on adjacent land. At 04:00 hours on the material morning, she heard some screams from the deceased. When she ventured there, she heard some voices from a number of people inside. The deceased was pleading with the intruders not to stab her.
5. She decided to get help from neighbours. They included Gabriel Kamau (PW2) and a village elder, Isaac Ngige. On their way back, they met the accused who appeared drunk. When they reached the house of the deceased, they found her lying dead in a pool of blood. The body had stab wounds, Blood was oozing from the chest, shoulders and back.
6. PW1 said that the accused returned to the scene and started to shake up the deceased asking her "*to wake up*". The witness said that in the process, the accused fell on the deceased and got blood on his clothing. He then left saying "*he was going to kill himself because his auntie had died*".
7. PW2's evidence largely tallied with that of the first witness save to add that when they approached the house of the deceased, he heard some stones hitting a corrugated iron roof and a voice saying, "*this is our home, and no-one knows where I have come from*". He said it was a male voice but he did not recognize it.
8. PW3 was Police Constable Sammy Saima. He was not the investigating officer. That was the role of Chief Inspector Ngeno, Police Constable Saina and ultimately Corporal Nyaga. The witness did not record a statement either. Nevertheless, and by consent, he produced the Post Mortem Report under section 77 of the **Evidence Act**. The report by Dr. Jalang'o is dated 24th August 2012. His opinion was that the cause of death was "*a penetrating chest injury causing cardiopulmonary arrest*".
9. That marked the close of the Prosecution's case.
10. Learned counsel for the accused filed submissions on 31st May 2021. The Republic opted *not* to file submissions.
11. The issue is whether the evidence discloses a *prima facie* case sufficient to place the accused on his defence.
12. The accused was first presented before the High Court at Nyeri over *nine years* ago; to be exact on 29th August 2012. The matter was transferred to Murang'a High Court on 13th November 2012. He has been in emand custody throughout. After a series of adjournments, PW1 finally testified before *Waweru J*, on 14th June 2016. PW2 did not take to the stand until 15th March 2017. I took over the proceedings on 4th

July 2018. The prosecution was unprepared. On 28th May 2018, the prosecution again sought adjournment due to non-availability of witnesses. I granted a new date for 16th July 2019.

13. On the latter date, learned Prosecution Counsel, Ms. Gichuru, sought yet another adjournment on similar grounds but claimed that that her colleague had communicated with the investigating officer on the *WhatsApp* platform. The application was contested. In the interests of justice I marked it as the *last adjournment*. PW3 then testified on 20th April 2021.

14. 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*.

15. The prosecution must first *prove beyond reasonable doubt* three elements. Firstly, the *death* of the deceased and its *cause*. Secondly, that the accused *committed* the unlawful act; and, thirdly, that the accused was *of malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

16. The death here is proved by the pathologist's report (exhibit 1). The cause of death was "*a penetrating chest injury causing cardiopulmonary arrest*". I readily find that the cause of death was unlawful.

17. However, none of the three witnesses saw the accused assault or stab the deceased or identify him as one of the persons that PW1 heard inside the deceased's house. True, PW1 and PW2 encountered the accused at the scene but none of them gave incriminating evidence to *link* him with the offence. As observed earlier, PW3 was *not* the investigating officer and his evidence was unhelpful on that score.

18. At the close of the prosecution's case, there is *no* direct or circumstantial evidence to prove that the accused killed the deceased. Paraphrased, there is no evidence to *convict* if the accused opts to *keep silent*. **Bhatt v Republic** [1957] E.A. 332 at 334.

19. I accordingly find that the Republic has *not* established a *prima facie* case against the accused *sufficient* to place him on his defence.

20. I enter a finding of *not guilty* under section 306 (1) of the **Criminal Procedure Code**. The accused person is hereby acquitted.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 28TH DAY OF SEPTEMBER 2021

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

The accused.

Mr. S. Kirubi holding brief for Mr. Mwangi Ben for the accused.

Ms. A. Gakubu for the Republic.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.