



**REPUBLIC OF KENYA**

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

**HCCR NO. 4B OF 2018**

**FORMERLY MACHAKOS HCCR 39 OF 2014**

**REPUBLIC ..... PROSECUTION**

**VERSUS**

**NZUKI KYALO WAMBUA ..... ACCUSED**

**JUDGMENT**

1. **Nzuki Kyalo Wambua** the accused herein is facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that the accused on 29<sup>th</sup> day of June, 2014 at Kwakyai Village, Nganduni Sub-location in Kibwezi District within Makueni County murdered **Kimilili Mwangangi**.

2. He denied the charge and the case proceeded to full hearing with the prosecution calling seven (7) witnesses. **PW1 Mary Kambua Kasungi** testified of having been in an intimate relationship with the accused and they lived together in her house at Kwachani Kibwezi. They separated after staying together for a month and she went back home in Makindu.

3. She later met the deceased (**Kimilili Mwangangi**) with whom a relationship developed. They got close to the extent that he came to live at her home. One day in March 2014 he invited her to his home.

She got delayed and the deceased came for her as it was getting late. As they walked towards his home the accused appeared and took hold of her hand. The two men then started fighting and she ran away. Later the deceased came home and told her he had been injured on the knee. He was never well again.

4. One Sunday night as she slept she saw the deceased's number calling on her phone. He was supposed to have been at his work place. She picked the call and the voice she heard was that of the accused who said, "*wacha hiyo, nenda mchukue mzee wako nimemua.*" Meaning ("Stop that. Go and take your husband. I have killed him").

5. She went out and called her brother whom she asked to call the deceased's mother to find out what was happening. He called and there was no response. Later Muthama came and he called the deceased's number and the accused received the call and told them where to get the deceased at Rose Mwakwas room 5 who is a neighbour. They walked there and found the deceased lying on the ground facing upwards. They had a hurricane lamp, which they used to light the place. On seeing the body she fainted and later learnt he had been taken to Kibwezi. The deceased later died and the accused was arrested. She identified the ITEL phone (EXB 1a) as belonging to the deceased.

6. In cross examination she said she parted with the accused because of his cruelty. She confirmed that the accused had no phone during the time they lived together.

She further confirmed that on the fateful night the deceased had called her at 6.00 p.m. and told her he was on the way coming home.

7. **PW2 Joseph Mwalimu Musili** a village elder was in his house on 29<sup>th</sup> June 2014 at 10.00 p.m. when Mutua came knocking at his door. He opened and Mutua told him of a person lying on a trench. He called another elder (**David**) who came and they went to the scene. **PW1** was there crying and she told them who the deceased was. She also told them how she had received a call from the accused telling her that the deceased was at the trench. This witness called the OCS who immediately came in a motor vehicle and left with the deceased for Makindu hospital and he later died.

8. **PW3 Kyalo Mumo** is a nyumba kumi security chairman. He testified that on the date in issue he received a call informing him of a problem nearby. He went to the scene with another where they found somebody he identified as the accused being beaten. He used his phone light to see. The accused was holding a mobile phone (blue in colour). The accused told him the phone belonged to the deceased (**Kimilili Mwangangi**). He identified EXB1a as the phone. He got a boda boda rider and took the accused to the police station to save his life. He left

the phone at the station. He learnt that the deceased died.

9. **PW4 Katitui Kyema** a relative of the deceased was on 2<sup>nd</sup> July 2014 at the mortuary to identify his body.

He saw wounds at the back of the deceased's head and both hands were swollen and bandaged.

10. **PW5 PC Jonathan Kavoi** was at the station on 29<sup>th</sup> June 2014, when he received a report of an assault. Together with the duty officer and driver they went to the scene at Matinga. Guided by the village elder they found the victim Kimilili who had injuries on the head, blood oozing from his mouth, broken left hand and he was unconscious. They rushed him to hospital at Kibwezi then Makindu upon referral.

11. Back at the station they found the suspect apprehended by the villagers. He re-arrested him and placed him in cells. A mobile phone make ETell was handed over to him. It was blue and black in colour and said to have been recovered from the accused. He identified it as (EXB 1a). Some sticks were recovered at the scene and were believed to have been used in the attack on the deceased.

12. **PW6 Dr. Lynn Kiema** conducted the post mortem on the deceased's body. Her findings were as follows;

- Depression on left side of head.
- Elbow was swollen and blood stained.
- Head had multiple fractures.
- Cause of death was severe head injury.

The post mortem report dated 2<sup>nd</sup> July 2014 was produced as EXB 2.

13. **PW7 Cpl. Peter Mwangi** testified that upon receipt of a report on the deceased's death and accompanied by the OCS and PC Kavoi they visited the scene since the accused had already been arrested by members of the public. The scene was at a road reserve in kwa choi village. There appeared to have been a struggle at the scene. He was given a mobile phone, safaricom poach and a national Identification card No. 320xxxxx all belonging to the deceased (EXB 1a-c). They had all been recovered from the suspect. According to him PW1 was with the deceased when the accused attacked him.

14. The accused elected to give a sworn statement of defence and did not call any witness. He said he knew the deceased who was his neighbour. Further that PW1 was his former girlfriend of four months from July 2013. They lived together and parted ways when she got a job in Nairobi, and he released her. On 28<sup>th</sup> and 29<sup>th</sup> June 2014 he was at Mulani working. On 29<sup>th</sup> June 2014 at 10.00 p.m. he found six people at their gate, he knew three of them who were from the deceased's family. They arrested him and beat him saying he had killed their brother.

15. He said they threatened to kill him, as Katilu and Mosia Wambua assaulted him. Mosia stabbed him on the head, searched him and took away his Shs. 600/=. They took him to the nyumba kumi leader. While there Musembi and Zakayo appeared and stabbed him on the left hand.

16. The nyumba kumi chair advised that he be taken to the police station from where he was taken to hospital. He denied ever calling PW1. It was his testimony that the investigations revealed that the deceased had been killed at the gate of Mutua Mwakuya. He talked to the said Mutua who came to the station but he never testified. He had told him he had seen an injured person at his gate. He recorded a statement admitting the offence after being forced to. He said that him and the deceased were general friends.

He denied any knowledge of the deceased relating with PW1. He confirmed that he had no phone when he lived with PW1.

17. In cross examination he said he had never collided with PW1 and wondered why she lied to the court. He denied knowing the relationship between PW1 and deceased. He admitted knowing PW2 and PW5, and said he never complained against the latter for forcing him to record a statement.

18. Counsel for both parties filed written submissions. Learned counsel for the state Mrs. Monica Owenga submitted that the prosecution had proved the death and its cause. That the evidence of PW1 linked the accused to the death of the deceased. The evidence was that the accused called her and told her to go and see the deceased whom he had killed. Further the accused had earlier on attacked the deceased, after the breakup of the relationship between PW1 and accused. That the accused had told PW1 that he would kill the deceased.

19. She further submitted that the accused had called PW1 using the deceased's phone the night of the killing. He had been arrested while in possession of the deceased's phone. This confirmed his being the assailant. She argued that the accused's defence confirms that he knew the deceased and PW1. He never said anything about the recovered phone in his defence.

20. M/s Ongonga for the accused submitted that the prosecution had not proved the charge against the accused to the required standard. She contended that the sticks recovered from the scene were never produced. Secondly the sticks were never taken for analysis to ascertain whose blood was on them.

21. Counsel further submitted that the evidence before court was circumstantial and can never form the basis of a conviction if there is no other evidence to support it. She referred to the case of **Republic -Vs- Albert Tirimba Ogata [2014] eKLR** to support her argument. Further she states that there is no evidence that the deceased shared a girl with the accused. No mobile providers call data was presented in the court to confirm the alleged phone call made to PW1.

22. It is her submission that *Mens rea* which is a key element in a murder case was not proved. She argues that the evidence tendered is circumstantial as there was no eye witness to this incident. She also referred to the cases of;

(i) **Hanumant Govind Nargundkar and Anor –Vs- State of Madhya Pradesh, (AIR 1952 SC 343) Par. 10;**

(ii) **Kariuki Karanja –Vs- Republic (1986) KLR 190;**

(iii) **Abanga alias Onyango –Vs- Republic Cr. Appeal No. 32 of 1990(UR)** to buttress her argument.

23. She finally submitted that suspicion however strong cannot provide the basis of inferring guilt which must be proved beyond reasonable doubt. See **Sawe –Vs- Republic (2003) KLR 354**. That the alleged admission of the offence which was not taken in form of a confession should not be admitted. She therefore asked for the accused's acquittal.

24. In a rejoinder, counsel for the state submitted that the accused was not injured to subject his blood to an analysis. There was sufficient evidence to connect him to the murder she stated. She added that circumstantial evidence is the best evidence to prove an offence.

### **Analysis and Determination**

25. The offence of murder is defined under Section 203 of the Penal Code as follows;

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

26. The ingredients to be proved are therefore as follows;

(i) *The fact and cause of death.*

(ii) *Actus reus – that the deceased's death was caused by the accused's commission or omission.*

(iii) *Mens rea/Malice aforethought accompanied the commission or omission by the accused.*

### **Issue No. (i) - The fact and cause of death.**

27. The evidence of the prosecution witnesses attests to the fact of the death of the deceased. PW4 a relative of the deceased testified on witnessing the post mortem, and named all the injuries that he was able to identify.

28. **PW6 Dr. Lynn Kiema** who conducted the post mortem also outlined her findings of the injuries on the deceased body.

She found the cause of death to be the severe head injury. It was therefore not a natural death.

### **Issue No. (ii) – Whether the deceased's death was caused by the accused's commission or omission.**

29. There is no dispute that none of the witnesses who testified witnessed the assault on the deceased which led to his death. There is therefore no direct evidence to this. What has been presented is circumstantial evidence which if properly covered is one of the best pieces of evidence to prove an offence.

30. What constitutes circumstantial evidence has been considered in several cases in our country. In the case of **Abanga alias Onyango – Vs- Republic Cr. Appeal No. 32 of 1990 (UR)** the Court of Appeal stated this;

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. These are;***

***a. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***

***b. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

***c. 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.***

31. In **Sawe –Vs- Republic [2003] KLR 364**, the Court of Appeal held thus;

1. In order to justify 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 hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ....

5. ....

6. ....

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

32. Being guided by the above findings I wish to examine the evidence in the instant case. **PW1 Mary Kambua Kasungi** is a former girlfriend of the accused, and this was admitted by the accused in his defence. He said they parted very well since PW1 had got a job in Nairobi. There would therefore be no reason why PW1 would lie against him, if that is the position.

33. PW1 testified that about one and a half months after parting ways with the accused she got into a relationship with the deceased. They were even planning to go and meet his parents.

34. On the 29<sup>th</sup> June 2014 at 6.00 p.m., she received a call from the deceased who had gone to work. He was notifying her that he was on his way home. Apparently the deceased was living at PW1's home. That same night she again received another call from the deceased's number. When she responded she found the person talking to be the accused (whose voice she knew very well) and not the deceased.

35. The words the accused told her shocked her. He was advising her to go and take her husband whom he had killed. The deceased's number was called by one Muthama in the presence of PW1 and the person who received the call told them the deceased was at Rose Mwakwa's. PW1, her mother, brother and sister went to Rose Mwakwa's place which is not far from their home. They found the deceased lying on a road near Rose Mwakwa's home, just as they had been directed, by the accused.

36. **PW3 Kyalo Mumo** is the chairman of nyumba kumi. On the material night at 11.00 p.m., he received a report of a problem not far from where his place is. He got a fellow member with whom he went to the place. He found a person he identified as the accused being beaten. He was holding the phone (EXB 1a) in his left hand. He told PW3 that the phone belonged to the deceased. He arrested the accused together with the phone and handed them over to the police.

37. The phone (EXB1a) was identified by PW1 as belonging to the deceased. She explained to the court the marks on the phone and also showed them to the court. PW3 also identified (EXB 1a) as the phone the accused was holding as he was being beaten and which he told him belonged to the deceased. The said phone (EXB1a) was identified by **PW5 PC Jonathan Kavoi** as the one he received from the villagers who brought the accused to the police station and said it belongs to the deceased. PW5 handed the phone to Cpl Mwangi the investigating officer (PW7). PW7 too confirmed receiving the phone (EXB1a) which belonged to the deceased. This evidence of the recovery of the phone is so consistent.

38. In his evidence the accused elected to say nothing on this issue of the deceased's phone having been found with him. What was he doing with the deceased's phone especially after his serious injury? PW3 also testified that as he rescued the accused, he asked him about the phone he was holding. That the accused told him the phone belonged to the deceased – Kimilili Mwangangi.

39. The communication from the deceased's phone with Muthama could not have been from the deceased as he was already injured. PW1 was able to differentiate the accused's voice from that of the deceased. She had been a former lover of the accused and so knew his voice well. The things they heard being said to Muthama by whoever was speaking to Muthama through the deceased's phone came to pass. And these were as follows:-

*(i) The deceased was found lying on a road near Rose Mwakwa's home.*

*(ii) He had been badly injured to the point of death.*

*(iii) The phone that was being used to relay all these messages was the deceased's phone and it was found with the accused.*

PW1 had explained how the accused had called her using the deceased's phone and told her to go and pick the deceased whom he had killed. Accused merely denied calling her.

40. It follows that the accused is the one who was relaying this information using the deceased's phone. Having failed to explain his possession of the phone leads to no other conclusion but that he is the one who was with the deceased that night and he seriously assaulted him and took away his phone (EXB1a) from him. The injuries he caused him led to his death.

41. In his defence he said he was attacked on the material night at his gate after arriving from home. PW3 who rescued him told the court that the place where he found the accused being beaten is so far from the accused's home. It therefore confirms that the accused was not being truthful on this. Upon considering all this evidence, I am convinced beyond doubt that this circumstantial evidence points to none other than the accused as the person who killed the deceased person. There is no reason why any of these witnesses could lie against him.

**Issue No. (iii) – Whether Mens rea/Malice aforethought accompanied the commission or omission by the accused.**

42. Malice aforethought is defined under Section 206 Penal Code as follows;

- (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.*

43. For malice aforethought to be proved there must be evidence that the killing was premeditated. In the classic case of **Republic –Vs- Tubere s/o Ochen [1945] 12EACA 63**, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

44. In the case of **Daniel Muthee –Vs- Republic Cr. Appeal No. 218 of 2005 (UR)** cited in the case of **Republic –Vs- Lawrence Mukaria & Anor [2014] eKLR**, Bosire, O’kubasu & Onyango Otieno JJA while considering what constitutes malice aforethought observed as follows;

***“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code.”***

45. I will now apply the findings in the above cases to the following facts in the instant case.

- (i) The accused and PW1 had lived together as man and wife between June 2013 - December 2013 before they split. PW1 says she left because of the accused’s cruelty. The accused says the parting was because PW1 had got a job in Nairobi. There is no evidence of PW1 working in Nairobi.
- (ii) PW1 got into an intimate relationship with the deceased 1½ months after breaking from the accused. The deceased was even living at PW1’s home. There was therefore an impending marriage between PW1 and the deceased.
- (iii) On one night in March 2014 when PW1 and the deceased were walking together to the deceased’s home, they were attacked by the accused who fought with the deceased and injured his knee. He never recovered from it.
- (iv) On the night of incident the accused called PW1 on phone telling her he had killed her husband and they should go for him. He later gave direction on where the deceased would be found. That’s how the deceased was found.

46. All these incidents point to the fact that the accused had a grudge against the deceased because of PW1. He had earlier in March 2014 attacked the deceased in the presence of PW1. After the 2<sup>nd</sup> attack he called PW1 to inform her he had killed her husband. The accused was taking revenge over his relationship with PW1 which had gone sour. The sequence of the events confirms that the execution of the killing was planned.

47. The nature of the injuries also speaks to the intention of the accused. **PW6 Dr. Lynn Kiema** testified that the deceased had a depression on the left side of the head while the elbow was swollen and blood stained. The head had multiple fractures. The cause of death was severe head injury. Considering that the part of the body that was severely hit was the head, it leaves no doubt in my mind that the accused was bent on killing the deceased or causing him grievous harm.

48. I therefore find that malice aforethought has been satisfactorily proved by the prosecution. The upshot is that the charge of murder against the accused has been satisfactorily proved beyond reasonable doubt.

49. For my part, I find the accused **guilty and convict him under Section 322(2) Criminal Procedure Code of the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code.**

Orders accordingly.

**Delivered, signed & dated this 28<sup>th</sup> day of January 2020, in open court at Makueni.**

.....

**H. I. Ong’udi**

**Judge**