



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 34 OF 2008

REPUBLIC

VERSUS

JOHN MWANIKI NJIRU

JUDGMENT

On 24th of June 2008 the accused was charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code, cap.63. In the first count, it was alleged that on the night of 8th and 9th of December, 2007 at Kiori village in Nyeri district within central province he, jointly with another not before court, murdered Teresa Wangechi Mwangi.

The particulars of the second count were that on the night of 8th and 9th day of December, 2007 at Kiori village in Nyeri district within the central province, the accused jointly with another not before court murdered Wilson Thuku Mwangi. These particulars were, however, not based on any statement of offence as far as I can gather from the information; its pertinent parts read as follows:

STATEMENT OF OFFENCE

MURDER CONTRARY TO SECTION 203 AS READ WITH SECTION 204 OF THE PENAL CODE

PARTICULARS OF OFFENCE

Count 1:

JOHN MWANIKI NJURU: on the night of 8th and 9th day of December, 2007 at Kiori village in Nyeri District within Central Province jointly with another not before court murdered TERESIA WANGECHI MWANGI.

Count 2:

JOHN MWANIKI NJURU: On the night of 8th and 9th day of December 2007 at Kiori village in Nyeri District within the Central Province, jointly with another not before court murdered WILSON THUKU MWANGI

Dated at Nyeri this 12th day of June, 2008

Signed

CHARLES O. ORINDA

PRINCIPAL STATE COUNSEL

FOR: ATTORNEY GENERAL

I will return to this issue later in this judgment; all I need to state at the moment is that the accused entered a plea of not guilty on both counts and so it fell upon the state to prove the case against him; accordingly, the state called a total of 17 witnesses who testified on its behalf in support of the charges against the accused.

Joseph Mwangi Thuku (PW1) testified that he was the husband of the late Teresa Wangechi Mwangi while Wilson Thuku Mwangi was his son. He knew the accused as his wife's cousin and was also his friend. On 8th of December, 2007, he was at his home with his wife, their two

children and a sister-in-law. At about 1 PM, his wife left for his parents' home together with their children and his sister-in-law. He left for Nanyuki himself. At about 6 PM he called his wife to inform her that he would not be able to make it home that night. When he called her again at about 8 PM she did not pick his call. After failing to get her on several attempts, he called his neighbour, one Peter, to go to his home to find out whether his wife had arrived. Peter couldn't make it that evening but he went to the home the following morning and established that Thuku's wife had not arrived. He informed him accordingly. It is then that Thuku called his father to enquire whether his wife was still at his (his father's) home. His father told him that his wife had left. He then asked his mother to visit his wife's parents' home to find out whether his wife might have gone there. She did not find them. When he finally returned from Nanyuki, he learned that the bodies of his wife and son had been found dumped at a river, near their home. He went to view the bodies and observed that his wife had a deep cut on the face and shoulder while his son had a cut on the neck. He then reported the matter to the police.

Thuku testified further that his wife used a black Motorola C1 13 phone. The phone's serial number had been recorded in the payment receipt. He himself had purchased the phone from Messrs Othaya Bill Communications on 5th of November, 2006. He recognised the phone when it was shown to him at Othaya police station. He also gave the police the receipt with which he was issued when he purchased it.

Cecilia Jane Gacha (PW2) stumbled on the bodies of the deceased at about 9 AM on 9th December, 2007. She initially saw something covered with a green jacket and a sheet. Fearing what it could be, she called one Mama Wambui to accompany her and check what it was. However, by the time they went back there was a crowd gathered at the scene and they some could get to see the bodies.

Eliud Wangai (PW3) testified that he accompanied the deceased's husband (PW1) from Nanyuki on 8th December, 2007 and that when they came back the following day, they found his wife's and his son's bodies in the river. Upon conducting a search, the accused's clothes were found hidden in a thicket nearby, about 30 m from where the bodies were. These clothes were a khaki trouser, a shirt, a cap and shoes. He knew the clothes belonged to the accused because the latter was his neighbour.

Peter Macharia Gichau (PW4) testified that he was a relative of the deceased persons and he identified the bodies for post-mortem purposes.

According to the accused's father, **Dominic Njuru (PW5)**, he lived in the same compound with the accused though the latter had his own house. On 9th of December 2007, he saw a crowd gathered towards the far end of his land. When he went there, he saw the deceased's bodies. It was his evidence that he had seen the accused the previous day wearing the same clothes that were found at the scene of the crime. The accused was, however, nowhere to be seen on 9th December, 2007 and the witness only saw him after he had been arrested by the police. He also testified that he never enjoyed a cordial relationship with the accused because there is a time the latter schemed with thugs to beat him. He described him as a 'troublesome child'.

Paul Chira Kanyi (PW6) testified that he was one of the people who discovered the accused's attire buried in the soil. He got curious when he noticed a shoe partly covered with the soil. Upon closer examination they found the accused's clothes and the shoes buried under the soil. In his estimation, these things were about one hundred metres from where the bodies were. He knew the accused because they used to work together and for that reason, he knew that the clothes and the shoes belonged to him.

Dr. Dindi Kithe (PW7) did a postmortem on the deceased's bodies; as far as Teresia Wangechi Mwangi's body is concerned, he established that there was a cut wound on the neck completely transecting the cervical spine. Other cut wounds he observed were on the right arm and exposure of the metacarpals; on the face and a fracture at the maxillary region. He formed the opinion that the cause of the deceased's death was severe head injury secondary to trauma.

His observation of the body of Wilson Thuku Mwangi revealed that there was a cut wound extending from the anterior neck region completely transecting the spinal column. He formed the opinion that the cause of death was as a result of complete transection of the neck secondary to cut wound.

Teresa's both parents Margaret Wambui Njoroge (PW8) and Joseph Ndore Mwaniki (PW16) were in agreement that their daughter left her children with Wambui as she attended a party at her husband's home on the material day. She came back to collect the children in the evening. One of the children opted to remain behind. A few minutes after she left, they heard screams; however, she ignored them. It is only the following morning that she discovered it was their daughter and grandson who had been murdered.

Daniel Ngure Thuku (PW9) testified that one of the items found at the scene was an identity card of one John Wambura. He admitted that John Wambura was not the accused person.

Eunice Chepkemo Chebon (PW10) testified that she purchased a phone from the accused; it turned out that the phone belonged to the deceased. The accused told her that his brother had given him the phone. She paid Kshs. 600/= for it and the transaction was at Karatina at the home of one Nicholas Githinji where they were both employed. Later, when the police enquired from her how she acquired the phone, she informed them that she purchased it from the accused.

Mr. John Mwangi Kimotho (PW11) testified that on 12th December, 2007, the villagers in the village where the deceased hailed together with the police, combed the scene of the murder. It is then that they recovered a black leather shoe, a white t-shirt with light blue strips, a muffin and a jacket with assorted colours. He identified the items as belonging to the accused. He had been with the accused on the 8th December, 2007 when he was wearing the clothes.

Corporal Fredrick Maina (PW12) testified that he accompanied Chief Inspector Jonah Nzau (deceased) to Kiaruhiu village at Karatina where he had been employed. They met the accused on the way; he informed them that he had sold the deceased's phone to one Eunice Walela at Kshs. 500/=. He then led them to the house of Eunice Walela. They found her at her house and she confirmed that indeed the accused had sold her the deceased's phone. They established the serial number of the phone to be 3591940059421939 but had the SIM card

registered in the name of Eunice Walela. Her cellphone number was 07112****. The name of the deceased was inscribed in the phone. The deceased's husband identified the phone at the police station. He produced a receipt which bore the same serial number as was on the phone.

Inspector Julius Mwachira (PW13) testified that on 9th December, 2007, he was informed by Police Constable Bosco Shallo of Kariko police base that there were two bodies at Rukira river. He then informed the Officer in charge of the station and other officers. Together they proceeded to the scene and noticed that there was a pool of blood 43 metres from the river. There was also a duplicate identity card at the same scene where there was the pool of blood. It bore the name of Joseph Wambora. The body of Teresa was 43 metres from the pool of blood while her son's body was 10 metres from her body. The bodies had severe cut wounds on their necks. The bodies were then removed to Nyeri Provincial general Hospital after the scenes of crime officer had taken their pictures and generally the picture of the scene.

Based on the information he gathered from the ground that the accused may have been involved in the murders, the officer mobilized his colleagues and went to the accused's house. The house was locked from outside and the accused himself was not there. They forced the door open and established that he had taken all his clothes except a t-shirt and a pair of jeans trouser. They recovered a panga which smelled blood. They also proceeded to the scene and collected a sample of the soil soaked blood.

Again, on 12th December, 2007, he mobilised officers and members of the public to comb the area where the bodies had been recovered after he got information that there were some clothing buried beside the river. They managed to recover an assortment of clothes buried in the ground. This was 253 metres from the accused's house. They were identified as clothes ordinarily worn by the accused.

Inspector John Mugo (PW14), a scene of crimes officer took pictures of the scene of crime and the bodies of the deceased; he presented the photographs to court.

The Government analyst **Stephen Matinde (PW15)** examined the items collected from the scene and the accused's house and presented to him for forensic analysis; these included the clothes recovered from the scene, the panga recovered from the accused's house, the soil sample and the deceased's blood-stained scarf and pants. He established in his analysis that there were no blood stains on the panga, the deceased's pants or on any of the clothes recovered from the scene of crime. It is only the deceased's scarf and soil sample that were established to have blood stains of the deceased's blood group.

The area assistant chief, **Paul Gachiri (PW17)**, was also at the scene of crime on the material date; he is the one who handed over the duplicate identity card in the name of Joseph Wambora to the police. **Josephine Wanjiku Mwangi (PW18)** testified that on 8th December, 2007, they had been in a wedding with the said Joseph Wambora the whole day and only returned at around 9PM. She knew Wambora as neighbour.

The accused opted to give a sworn statement when he was put on his defence. He admitted that he knew the deceased and were his relatives. They lived in the same neighbourhood. On the material day, the 8th December, 2007 he left for Karatina to look for work. He got employed by one Mwangi Wanjohi. Five and a half months after his employment some people came and asked him to take him to Mukurweini. When he went to Mukurweini, the strangers asked him to show him where Wachira was. He told them that he did not know who Wachira was. They then took him to Othaya police station from where he was taken to court and charged with the present offence. He said that his former employer had died but he had receipts in his (his employer's) name showing that he used to pay him. He denied that he owned the deceased's phone. He admitted that he knew his neighbours Paul Kanyi (PW6) and John Kimotho Mwangi (PW11). He testified that Eunice used to come to his work place. However, he denied knowing Eunice Walela. He also testified that on 7th December, 2007 he was working at Wachira's farm. Wachira was his neighbour.

That is as far as the evidence went.

As earlier noted, although the accused was apparently charged with two counts of murder, it is only in the first count that the statement of offence is given; only the particulars are given in respect of the second count. The charges as framed appear to offend section 134 of the Criminal Procedure Code, cap. 75 which states that a charge is only complete when it contains a statement of the specific offence for which the accused is charged and the particulars of the offence. It reads as follows:

134. Offence to be specified in charge or information with necessary particulars

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

For avoidance of doubt where there are several charges in the same information, each of these charges or counts must have a statement of the offence and the particulars of the offence. In other words, each count is independent from the other and, in my humble view, the logic behind this independence is partly because it is possible, as it happens from time to time, that one may be convicted of one count and yet is acquitted of the other. In that case it must be apparent which of the several offences he may be facing, he has either been acquitted or convicted; this will not be possible if two or more counts are intertwined, in one form or another, for example, where they share a statement of offence, as is the case here. At any rate, the accused is entitled to know which offence or offences he is facing if not for anything else, for him to prepare an appropriate defence.

Section 135 of the **Criminal Procedure Code** sheds more light on this issue; it is to the effect that while it is possible to have several counts in one information, each count must constitute a statement of the offence and the particulars. It states as follows:

135. Joinder of counts in a charge or information

(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

Subsection (2) is more apt that counts must be treated separately.

In light of these provisions of the law, it is obvious that as far as the prosecution of the accused is concerned, there was no charge or statement of offence for the second count; in these circumstances, I have no alternative but to acquit the accused of the purported charge.

As far as the first count is concerned, it was incumbent upon the prosecution to establish beyond doubt that an offence of murder had been committed. **Sections 203 and 204** under which the accused was charged respectively define and prescribe the punishment for the offence of murder. For better understanding, it is necessary to reproduce the two provisions here; they state as follows:

203. Murder

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

204. Punishment of murder

Any person convicted of murder shall be sentenced to death

Section 204 has since been held to be inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. (See **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017 eKLR)**).

The burden on the prosecution is to prove first, that there was murder, second, that the death was unlawful, third, that the death was caused by an act or omission of the accused and, finally, that the accused did that act or omitted to act with malice aforethought.

Malice aforethought is the mental element of the offence of murder; to a greater degree, it would ordinarily shed some light on the aspect of unlawfulness of the death. It may be either express or implied. (See **Woolmington v DPP [1935] AC 462**); it is express when it is proved that there was an intention to kill unlawfully (see **Beckford v R [1988] AC 130**), but it is implied whenever it is proved that there was an intention to unlawfully cause grievous bodily harm (see **DPP v Smith [1961] AC 290**).

Regardless of whether it is express or implied, the ‘intent’ of the accused must be brought to bear.

Malice aforethought is such a critical element in a charge of murder that courts do not have the freedom to speculate on what it entails whenever they have to consider whether it has been proved or not; it is for this reason that **Section 206** of the **Penal Code** prescribes in express terms circumstances in which malice aforethought may be inferred; that section states that:

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.

Turning back to the charge against the accused, there is no dispute that the deceased’s death was not natural and unlawful. The nature and the extent of injuries speak for themselves; she sustained a cut wound on the neck completely transecting the cervical spine. She also sustained such cut wounds on her right arm, on the face and the maxillary region. The pathologist who conducted the postmortem formed the opinion that the cause of the deceased’s death was severe head injury secondary to trauma.

On who could have perpetrated the injuries and ultimately caused the deceased’s death, it was apparent that there was no eyewitness’ account of how the deceased was murdered. All that the state presented to court with was indirect evidence or what is ordinarily referred to as circumstantial evidence. In this regard, the recovery of the deceased’s phone played a vital role and it is the sole evidence that links the accused to the deceased’s murder.

As I reconsider this evidence here, I proceed on the understanding that the phone in question was proved beyond doubt that it belonged to the deceased. There was uncontroverted evidence that the deceased's husband (PW1) bought it for his wife; he identified it as black Motorola C113. He purchased the phone on 5th November, 2006. The phone's serial number was written on the receipt with which he was issued when he purchased it. He handed over the payment receipt to the police. He was able to recognise the phone at the police station. Apart from recognising it, its serial number matched with that on the receipt.

According to **Eunice Chepkemo Chebon (PW10)**, she bought the phone from the accused and that she paid Kshs. 600/= for it. At the time of their transaction, they were both employed by one Nicholas Githinji at Karatina. She worked with the accused for three weeks and she identified the phone in court as the one that the accused sold to her. Later, a stranger called her and told her that he, and apparently another person or persons he was with were her visitors. The police officers finally turned up; she informed them of how she got the phone. By this time the accused had been arrested. She later came to learn that the phone belonged to the deceased.

Corporal Fredrick Maina (PW12) who was one of the investigating officers based at Kagunda at the material time testified that on 5th June, 2008 he was asked by Chief Inspector Nzau to accompany him to Kiaruhiu village in Karatina to find the accused; Inspector Nzau apparently had information that the accused was employed in that village as a shamba boy. While on their way, they encountered the accused and it is then that they arrested him. He told the officers that he had sold the deceased's phone to one Eunice Walela. He then led the officers to Eunice's house. They found Eunice in her house; she confirmed that the accused had sold her the deceased's phone. The officers confiscated the phone. This witness established the phone's serial number to be 359194005942139 which later turned out to be the same number appearing on the receipt for the phone's purchase. When he opened it, it had the deceased's name.

The accused said he was employed by one Mwangi Wanjohi; he did not however, deny that he ever worked with Eunice at Nicholas Githinji's home. He also admitted that he did not know all the people he used to work with. As far as the phone is concerned, the accused did not deny having been in possession of the phone; he however, denied that the phone was his.

He stated that he had a wife called Eunice Wago Mwaniki but who left him. He could not call her as his witness since she was in shock after his arrest. He alleged that his wife had initially been arrested but was later released. He denied that he ever had a friend called Eunice but at the same time admitted that Eunice used to come to where he used to work. When he was cross-examined further, he said that the Eunice he was talking about was his wife and not Eunice who is said to have purchased the deceased's phone from him. And with that, he closed his case.

The question that this honourable court has to grapple with is whether this evidence, though circumstantial, is sufficient enough to sustain a conviction. Section 164 of the Evidence Act, cap. 80 makes reference to this sort of evidence. It states as follows:

164. Circumstantial questions to confirm evidence

When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.

According to this provision of the law, where there is proof of circumstances that tend to confirm the evidence of a witness as to the existence of a particular fact, the court may rely on such evidence of circumstances that may have been observed at or near the time or place the fact in issue occurred. If the circumstances are proved beyond reasonable doubt, the court may convict in the absence of direct evidence.

The fact in issue here is no doubt the murder of the deceased; the loss and subsequent recovery of her phone are circumstances from which the fact in issue or any evidence tending to the fact in issue may be inferred, at least, as far as the prosecution case is concerned.

However, the trial court must be always cautious that circumstantial evidence must be narrowly examined if any inference of guilt on the part of the appellant has to be drawn. To be precise, the court must be satisfied that the circumstances are such that no inference, other than that of guilt on the part of the accused can be drawn from them.

In **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135**, the Court of Appeal for Eastern Africa, quoting Wills on Circumstantial Evidence, held as follows:

In order to justify 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. 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 on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.

And in **Simon Musoke versus Republic (1958) EA 715**, this principle was extended when the same court cited with approval a passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where it was held at page 489 that: -

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Prior to the recovery of the deceased's phone, the accused was suspected to have murdered the deceased. According to Inspector **Mwathi (PW13)**, when he and the lead investigator, the late Inspector Jonah Nzau, together with other police officers visited the scene on 9th December, 2007, they gathered information from members of the public to the effect that the accused was not only a member of Mungiki, an outlawed criminal gang, but he was also the person who might have been behind the two murders.

Inspector Nzau himself, according to Inspector Julius Mwathi (PW13), was murdered in 2009 by suspected members of Mungiki. Notwithstanding his death, it is sufficient that as early as 9th December, 2007, Inspector Nzau was aware that the accused was suspected to have murdered the deceased and her son and therefore it was no surprise that he subsequently arrested him. The information that the accused was living at Kairuhiu in Karatina was, according to Inspector Mwanthi (PW13), given by an informer; had Inspector Nzau lived to testify, he would probably have corroborated this evidence and how they eventually arrested the accused. It is worth noting, however, that the accused himself did not dispute the fact that he moved to Karatina on 8th December, 2007, incidentally on the same day that the deceased and her son were murdered and had not returned home as at the time he was arrested and charged, more than six months later.

My assessment of the evidence of the entire prosecution evidence and in particular, the circumstantial evidence, leads me to the conclusion that the accused handled the deceased's phone before he sold it to Eunice Chebon (PW10). I say so because there is nothing in her evidence to raise any reasonable doubt that she was sold the phone by the accused. Her evidence that she and the accused worked for one Nicholas Githinji at Karatina was not shaken. Although the accused himself said that he worked for one Mwangi Wanjohi, he did not deny that he could also have worked for Nicholas Githinji. In any event, he admitted that he worked for different people at Karatina and that he could not recall their names.

I also note that he admitted having interacted with a certain Eunice while in employment at Karatina; though that he denied that this particular Eunice was the same Eunice to whom he sold the phone, there was no evidence that the other Eunice he referred to ever existed. His explanation that the Eunice whom he interacted with was his wife who was too scared to testify on his behalf appears to me to be an afterthought.

I am therefore persuaded that the accused must have interacted with Eunice Chebon (PW10) and it is in the course of their interaction that the accused sold the deceased's phone to her. I also note that the accused himself never denied in categorical terms having been in possession of the deceased's phone; all he said in respect of this phone was that the phone was not his.

Having come to the conclusion that the accused was in possession of the deceased's phone before he sold it to Eunice (PW10), the next question that follows is how he came to be in its possession.

Were it not that the accused faced a capital offence, it is possible that he could have properly been charged with offence of handling stolen property contrary to section 322 (2) of the Penal Code. Whenever the question of handling stolen property arises, the burden is normally on the accused to give a reasonable explanation of how he came to be in possession of the stolen property. In the present case, though the accused was not charged under section 322(2) of the Penal Code, he was still bound to give a reasonable explanation of how he came to be in possession of the deceased's phone. In his defence, he did not discharge this burden but opted to simply say that the phone was not his.

In the absence of any explanation of how the accused came to be in possession of the deceased's phone, I am left with no alternative but to infer from the circumstances that he murdered the deceased and took her phone either immediately before, in the course of, or after the heinous act.

I must also observe that while the accused was entitled to leave his home to look for work elsewhere and stay there for as long as he wished, it cannot be a coincidence that he left on the same night that the deceased was murdered and chose not to go back home until such time that he was arrested. It cannot also be a coincidence that the deceased's phone disappeared contemporaneously with her death only to be traced to the accused person.

In my humble view, all these circumstances constitute the inculpatory facts incompatible with the innocence of the appellant or otherwise incapable of explanation upon any other reasonable hypothesis than that of the appellant's guilt. I am also satisfied that there are no other co-existing circumstances which would weaken or destroy that inference of guilt on the part of the accused.

As far as the motive of the murder is concerned, I am satisfied that considering the nature and extent of the injuries inflicted on the deceased, the accused had an intention to cause the death of or to do grievous harm the deceased or alternatively, he knew that the blows he inflicted on the deceased would cause her death or cause her grievous harm. I am therefore satisfied that malice aforethought was proved to the required standard.

Accordingly, I find that the accused person guilty of the offence of murder as charged in the first count and I hereby convict him accordingly.

Dated, signed and delivered this 25th day of January, 2019

Ngaah Jairus

JUDGE