



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 8 OF 2009

REPUBLIC

VERSUS

FRANCIS WERU MBUGA.....ACCUSED

JUDGMENT

The accused was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**, cap 63; according to the information, on the 1st day of December, 2008 at Mt Kenya hospital in Nyeri South district within central province, jointly with others not before court, the accused murdered David Maina Wangeci (herein “the deceased”).

He pleaded not guilty to the charge and so his trial commenced in earnest on 12th February, 2009.

The background of the prosecution case was that the deceased had been admitted at Nyeri Provincial General Hospital for treatment after an attack which left him with gunshot wounds, amongst other injuries, on his body. He had been in the Intensive Care Unit (ICU) for two days when on 28th November, 2008, at about 8 to 8.30 PM thugs stormed that special ward and shot him; they also cut him. He succumbed to the injuries and died two or three days later.

Virginia Wanjugu Thuita (PW1) and Judy Wanjiku Karori (PW2) were nurses on duty in the ward in which the deceased had been admitted. According to Thuita, she was in the resting room next to the ICU together with her colleagues when a man, whom she described as “not tall” stormed in and asked her to get out. She made as if to approach him but the man whipped out a gun from his jacket and pointed it at them. He motioned them to keep quiet. Meanwhile, there was a commotion in the deceased’s ward; they heard him scream but suddenly he went silent. When they finally went to the ICU they found the deceased bleeding profusely apparently from cut and gunshots wounds. He was transferred to Mt Kenya hospital from where he subsequently died.

Karori’s (PW2’s) version of the testimony was similar to that of Thuita; she added that the intruder only left after the deceased went silent. The police arrived almost immediately because they had been alerted of the invasion by the maternity wing of the hospital. Unlike Thuita, she could not recall whether the man was tall or short.

Peter Mwangi Wangechi (PW3) testified that the deceased was his brother and that on 27th November, 2008, he received a call from his mother asking him to visit the deceased at the hospital. Apparently, his mother had been called on phone and informed by a stranger that the deceased had been attacked and admitted in hospital. They went to the hospital together and found the deceased admitted at the ICU. He managed to talk to him though; he informed his brother that he had been kidnapped from his home by people who letter cut and shot him. They abandoned him at Mweiga and had been taken to hospital by good Samaritans. On 28th November, 2008 they heard from the radio that the deceased had been attacked while in ICU. He later learned that he had been transferred to Mt. Kenya Hospital from where he died.

The witness testified that he not only knew the accused but that he was also his friend; he also testified that his late brother knew the accused ‘very well.’

The last prosecution witness to testify was Dr Gor Gudi who produced the post-mortem report on behalf of Dr Dindi; the latter examined the deceased’s body for post-mortem purposes and came to the conclusion that the deceased died of ‘cardiorespiratory arrest following complications secondary to gunshot wounds.’

In his defence, the accused testified on oath that he was a driver of a matatu plying Nyeri-Nyahururu route. On 28th November, 2008, he had been working as usual and returned home at about 8 PM. Some minutes later, at 8.30 PM, he heard people knocking at his door asking him to open it. He was alone in the house as his wife had travelled to her parent’s home. He peeped through the window and recognised some of the people outside; he identified them as Gichuku, Elijah and Mambo. He started shouting. One of his brothers whom he identified as Julius Waithaka Mbugu came out of his house. The intruders fired in the air. He escaped from his house but as he was running away he fell down. He was shot on the left shoulder and at the back. He was also cut on the head. After about one and half hours he struggled to reach

Waithaka's house. Waithaka called his other brother named as James Maina; the latter came with Criminal Investigation Department officers from Othaya police station. They took him to hospital.

He testified further that amongst the people who had invaded his house, Mambo was shot and killed by police, Githiri was lynched by members of the public while Gichuki and Elijah were sentenced to death after they were convicted of the offence of robbery with violence.

After the accused was discharged from hospital, the police came for him and informed him that his life was in danger. However, they later charged him with the offence of attempted murder which was later substituted with the charge of murder. He produced a discharge summary showing that he had been admitted in hospital on 29th November, 2008 and discharged on 1st December, 2008. He denied knowing the deceased.

As always, in a charge of murder the fact of death of a person must be proved. It must also be demonstrated that the death was unlawful and was caused by an act or omission of another person with a malicious intention. All these elements are encapsulated in **section 203** of the **Penal Code** which reads:

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

That a person identified as David Maina Wangechi died is not in dispute. According to the post-mortem report, his lifeless body was identified at the mortuary by his mother Lydia Wangeci Mwangi and brother Peter Mwangi. The death of the deceased was certified by Dr Guda Njenga who conducted the post-mortem on the body.

Going by the evidence of Thuita (PW1) and Karori (PW2) there is no doubt that the deceased's death was as a result of unlawful act of another person. And the manner of the murder would suggest that it was premeditated or intentional and therefore the murderer had malice aforethought.

Regrettably for the state, that is the farthest its case could go. No evidence was led linking the accused with the murder. The two nurses who were seated outside the Intensive Care Unit where the deceased was admitted when he was attacked did not have the opportunity to see the actual attacker. Neither could they remember whether the accused was the person who confronted them and restricted them in what I understood to be a lobby just outside the Intensive Care Unit. They never suggested in their evidence that they could possibly give his description at least to the extent that they would pick him out if they saw him again.

In any event, as the prosecution case stands, no efforts were made for an identification parade from which the two witnesses could pick out the deceased assailant's accomplice assuming that they were capable of identifying him in such a parade.

As a matter of fact, based on the material before me the case was never investigated.

According to the accused, he was 'arrested' and detained at Nyeri police station for his own security only for the police to turn around and charge him, initially with the offence of attempted murder but later with a charge of murder.

In the absence of any evidence to the contrary, particularly from the police officers who may have either investigated the case or arrested the accused, it is nearly impossible to tell what informed the decision to charge the accused. Suffice it to say that there is no evidence that the accused either by himself or jointly with others murdered David Maina Wangechi as alleged.

Before I conclude, I must mention that this case commenced way back on 12th February, 2009 when the accused took his plea. The hearing commenced on 25th May, 2010 when the first three prosecution witnesses testified. It was not heard again until 29th June, 2017, more than seven years later, when the pathologist was heard. In between 25th May, 2010 and 29th June, 2017, the hearing was adjourned on numerous occasions mainly for the reason that the state witnesses were not available. At some stage, the state attempted to enter a nolle prosequi but for reasons stated in my ruling which I delivered on 10th February, 2017 I rejected it. Among the reasons I gave for refusing to accept the nolle prosecution were that the witnesses whom the state intended to call were civil servants, two doctors and two police officers who have civic duty to testify. Even then despite several applications for adjournment by the state, it was not demonstrated that any efforts had been made to secure their attendance.

It is after my ruling that only one more prosecution witness testified and produced the post-mortem report. The state had to close its case at that point.

I need not speculate or interrogate why the state could not avail all its witnesses save to say that its case against the accused was not proved beyond reasonable doubt. Accordingly, I have no other alternative but to acquit the accused of the offence of murder. It is so ordered.

Dated, signed and delivered in open court this 22nd day of February, 2019

Ngaah Jairus

JUDGE