



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 33 OF 2010

REPUBLIC

VERSUS

DANIEL KARONJI WAHOME.....1ST ACCUSED

DAVID GITUKU KIRUHI.....2ND ACCUSED

DANIEL WACHIRA KIRUHI.....3RD ACCUSED

JUDGMENT

On the night of 3rd September, 2010, Lucy Wangui Gitau (the deceased), was attacked by armed thugs at her home at Gatuiga village in Nyeri South District. She suffered multiple cut wounds and burns on different parts of her body; these injuries turned out to be fatal as she succumbed and died four days later, on 7th September, 2010, to be precise.

The accused who happened to be her neighbours were suspected to have been behind the deceased's attack and subsequent death and it is for this reason that they were charged with her murder in accordance with section 203 as read with section 204 of the Penal Code, cap. 63.

As I understood the state's case, the accused were on a revenge mission; they attacked the deceased because the latter had previously complained and testified against the 1st and 2nd accused in Nyeri Chief Magistrates' Court Criminal Case No. 5461 of 2003. In that case, the accused were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code; they were alleged to have robbed the deceased and injured her in the process. They were convicted and sentenced to death; however, they lodged a successful appeal against both the conviction and sentence. They were retried and subsequently acquitted on 5th August, 2010, just about four weeks before the deceased was attacked.

On the fateful night the deceased had just had supper with her employee David Mwangi Maina (PW14) in a detached kitchen. As Maina retired to his house, approximately ten metres away from the kitchen, he heard the deceased scream, struggling to call out his name. He responded and rushed outside the house to rescue her. He found the deceased set ablaze and being attacked by three men. With the help of his torch and the light from the fire he was able to recognise the accused persons as the assailants. The first two accused lived in the neighbourhood and he had known them from the time they were released from prison. As for the third accused, he had known him for the past four years he had been in the deceased's employment since, like the rest of the accused, the third accused lived in the same neighbourhood as the deceased. He named and pointed each of the accused persons in court. He described the first two accused persons as having been in jumpers while the third accused wore a black jacket. The deceased, according to Maina, was in a seated position, with her back held against the wall as the thugs struck her. They repelled Mwangi and ran after him; he escaped and hid himself in his house from where he shouted for help. After about 20 minutes he went back to the kitchen and found the deceased still burning but the thugs had left. He put out the fire using water.

Amongst the people who responded when Maina (PW14) raised alarm was the deceased's son, John Macharia (PW2), her son-in-law, Robert Maina (PW3), and Jecinta Wairimu (PW4). They all lived in the same neighbourhood as the deceased and the accused. Macharia (PW2) ran towards his mother's gate. It was his evidence that he saw the three accused running from the deceased's home towards the river. He was able to see them with the help of his torch; he testified that there was some moonlight too. He found Maina (PW14) in his house, crying. He retreated to seek help when he noticed that his mother was naked. By the time he returned several members of the public had gathered at the scene; with the help of some of them, they drove the deceased to the hospital in Paul Gitonga Wanjau's (PW1's) vehicle.

Maina (PW3) asked Wanjau (PW1) to bring his vehicle when he arrived at the scene and realised that the deceased was still breathing, though faintly. His wife Wairimu (PW4) followed him to the scene. She accompanied the deceased to hospital.

The police officers testified as to their role in the investigations that led to the arrest and subsequent prosecution of the accused

They were informed of the attack by the area chief, Mathenge Nderitu (PW7) as soon as he received the information from a village elder. Inspector H. Mwasombo (PW5), the then deputy officer in charge of Othaya police station together with his colleagues, Sgt. Francis Wambua (PW9), police constable Benjamin Mumo (PW10) and other police officers proceeded to the scene but found when the deceased had already been taken to hospital. They followed her to the hospital but Inspector Mwasombo couldn't interrogate her because she had already been admitted at the theatre. He went back to scene and, acting on reports from police informers, he together with his colleague, arrested the second and third accused. The first accused, according to Sgt. Joseph Kingori (PW8) was brought to the police station by the assistant chief of Munyaki sublocation as a suspect in the murder on 4th September, 2010. According to his testimony, the first accused had surrendered himself to the assistant chief so that he could be escorted to the station. As at this time, the police were looking for him. According to constable Mumo, the accused were initially charged with the offence of attempted murder; this charge was substituted with that of murder upon the death of the deceased.

Four experts testified for the prosecution; they were Corporal Benjamin Wechuli (PW12), a scenes of crime officer who produced photographs of the deceased's burnt body taken at Outspan hospital mortuary on 7th September, 2010 and a certificate in that regard; Dr Sheila Mwangi (PW6) who produced a psychiatrist report certifying the accused to be fit to stand trial; Eunice Wamuyu Njogu (PW11) a Government chemist who examined the deceased body parts for any chemical substances. She produced a report which was inconclusive because the deceased's liver and stomach had not been submitted for analysis. Dr. Esther Dindi (PW16), on her part, conducted the postmortem on the deceased's body and certified her death to have been caused by 'complications of severe burns in an extreme of age'.

When the accused were put on their defence they opted to give sworn testimonies. The first accused stated that he was at his home on the night of the deceased's attack. It was his defence that none of the prosecution witnesses ever implicated him. He produced statements of PW2 and PW3 as exhibits in support of his case that their statements to the police were inconsistent with their testimony in court. He also testified that his sister whom he named as M had been married to the PW3 but they divorced. According to him, PW3 testified against him because of the divorce.

Like the first accused, the second accused also testified that he was at his home on the night of the attack and only learned of it from the police officers who arrested him on 4th September, 2009. He denied that he had anything to do with it.

As for the third accused, he said that he only learnt of the deceased's death when he was charged in court and denied that he murdered her. He admitted, however, that he was arrested with the second accused on the morning of 4th September, 2010.

A careful consideration of the evidence in its entirety leaves little doubt that the deceased was murdered in a manner that amounts to an offence contemplated in section 203 of the Penal Code. That section reads:

203. Murder

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

There is sufficient evidence that she was attacked and fatally injured. This is apparent from the testimonies of **Paul Gitonga (PW1), John Macharia Irungu (PW2), Robert Maina (PW3) and (PW4)**; their testimonies were corroborated by the police officers and more importantly the pathologist (PW16) who was categorical the deceased did not only sustain cut wounds but that she also suffered burns from which she probably died. Her lifeless body was identified at the mortuary by her sons John Wachira (PW2) and Peter Gichohi (PW13).

It is therefore safe to conclude that the deceased not only died but also that her death was not natural; it was as a result of an unlawful act caused by somebody else. The manner and the circumstances in which she was attacked, the injuries she sustained and from which she eventually succumbed suggest that the assailants' actions were premeditated; in other words, there was malice aforethought.

The question that still lingers and whose answer this honourable court must find from the material before it is whether the accused are the people who murdered the deceased. As it is common in many other cases of this nature, the issue of identification or recognition, as the case may be, emerges as the focal point in unravelling the appropriate answer to this question.

As far as I can evaluate the evidence on record, **David Maina (PW14)** turned out to be the only eye witness to the murder. (PW2) said that he saw the accused running away from the locus in quo but, in my humble view, his evidence would be more of corroborative or circumstantial than an eye witness' account of the fact in issue.

It is not in doubt that **David Maina (PW14)** had been the deceased's domestic employee for at least four years and the evidence that he lived with the deceased in the same compound though in different houses was not controverted. The house in which he lived and in which he had retired to sleep after sharing dinner with the deceased was barely 10 metres away from the point at which the deceased was accosted and attacked by the thugs. Except for the first accused whom Maina had known all along, it is appreciated that his other co-accused had been in prison for the better part of Maina's employment with the deceased; however, it is worth noting that prior to her death, he had known them for about a month. It was not contested that the accused, the deceased and his employee were neighbours or rather they lived in the same neighbourhood and therefore it is logical that if any of them saw the other he or she would recognise them.

With this kind of background, I am bound to believe Maina (PW14) when he says that he could recognise the accused persons when he rushed to the scene in response to the deceased's person cry for help. According to his evidence, they confronted him and perhaps to save his life, he had to take refuge in his house from where he called for help. He saw the attackers long enough as to be able to describe their attire.

It is appreciated the attack took place in the night and therefore one is bound to ask, and legitimately so, whether in those circumstances the conditions were favourable for a positive identification. As noted, the accused's was a case for recognition and not just identification; but even in recognition, the same standard for a positive identification would apply; in other words, the question on the favourability or lack thereof of conditions for a positive identification is a common question which will always emerge irrespective of whether an accused is

alleged to have been identified or recognised. As always, the burden is on the prosecution to demonstrate that the conditions were favourable.

Maina (PW14) testified that despite the fact that the attack took place in the dark, there was sufficient light not only from his torch but also from the blaze that the accused had set on the deceased. As a matter of fact, the light could be seen from as far as Wairimu's (PW4's) house, further away from the deceased's home.

I am cautious that, for all intents and purposes, Maina (PW14) was a single identification witness because he is the only one who saw what transpired. Where an accused is identified in such circumstances the trial court must be alive to the fact that though the identification witness may be honest, he can make a mistake particularly where the conditions for a positive identification are less favourable. But I am also aware that nothing stops the trial court from convicting based on the evidence of a single identification witness if circumstances are such that it would be safe to convict on such evidence.

The Court of Appeal in **Ogeto versus Republic (2004) KLR 19** was emphatic that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows:-

It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.

As much as the deceased was attacked at night, I am satisfied the conditions in which the accused were identified were favourable and there was little room for mistaken identity.

The defence took issue with the fact that the main identification witness wrote his statement with the police long after the accused had been arrested; I understood the accused to argue that it is possible that the only eye witness implicated them because they were already in police custody at the time his statement was recorded. In my humble view, the recording of the accused's statement after arrests had been made was neither deliberate nor a calculated move by the prosecution to frame them; I find it to have only been coincidental. I say so because the attack took place on the night of 3rd September, 2010 and on the following day Maina, oblivious of the intricacies of police investigations and, perhaps, because of the trauma he had to undergo the previous night, he left for his home in Kirinyaga. Since the arrests were made soon after the incident, it was not possible for Maina's statement to be taken earlier, just like the statements of the rest of prosecution witnesses which were taken after the arrests. I gather that as at 11th September, 2010, investigations were still under way considering that the deceased had died only three days earlier; in any event the accused were charged 16th of September, 2010 almost a week after the statement had been recorded. In these circumstances, I do not consider the recording of Maina's statement as having been delayed or to be prejudicial to the accused.

The other angle to the accused's defence is their argument that they were charged and prosecuted on mere suspicion that they murdered the deceased because of a previous case in which they had been convicted and sentenced to death as a result of a complaint against them by the deceased. As noted, they were acquitted after a retrial. I would agree with the accused if all the prosecution presented before court was a mere suspicion based on the past relationship between the deceased and the accused. However, the prosecution went a step further, in my humble view, to prove beyond doubt that the accused were behind the deceased's macabre death.

Why the accused chose to terminate the deceased's life and in the manner they did it may not be obvious to anybody else other than the accused themselves. It may as well be that they were on a revenge mission as they themselves have suggested that this is what the state may have suspected; they could have harboured some other ulterior motives that are not that apparent. Whatever the case, it is clear that from the manner in which the deceased was attacked and injured that the accused set out to kill the deceased or they had an intention to unlawfully cause the deceased grievous bodily harm. See the decisions in (**see Beckford v R [1988] AC 130 and DPP v Smith [1961] AC 290**). I am therefore satisfied beyond peradventure that the prosecution proved that not only the accused murdered the deceased but also that their actions were premeditated or, to be precise, they had malice aforethought.

In the ultimate I find the accused guilty of the offence of murder as defined under section 203 of the Penal Code and convict them accordingly.

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

Ngaah Jairus

JUDGE