



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 18 OF 2009**

**REPUBLIC**

**VERSUS**

**DAVID WAWERU KARANI**

**JUDGMENT**

On the 17<sup>th</sup> day of February, 2009, Judy Wambui Muriithi's decomposing body was retrieved from a septic tank in her compound at Kimandi village in the then Kirinyaga District. Prior to her death, the deceased had been living with the accused who had recently been engaged as domestic servant in her home. He had, however, disappeared from the home at the time of recovery of the deceased's body. He was to be apprehended later, more particularly, on 23 February, 2009 when he was charged with the deceased's murder in accordance with section 203 as read with section 204 of the Penal Code, cap. 63.

The particulars of the offence were that on the nights of 14 and 15 February, 2009 at Kimandi village, in Kirinyaga district of the Central Province, jointly with others not before court, he murdered the deceased. He entered a plea of not guilty.

The deceased's son, John Muchiri Murimi (PW1), testified that he employed the accused to work for his mother towards the end of 2008. At that time, he was working as a supervisor at Kenya Co-operative Creameries at Nyahururu where he also resided. The accused had been introduced to him by Allan Waweru Kariuki (PW3). The latter confirmed in his testimony that indeed he and the accused hailed from the same village and that he introduced him to Murimi.

On 12 February, 2009, at a about 9.00 PM, he had a brief conversation with his mother over the phone. During this conversation, he could hear the accused shouting in the background telling the deceased to convey his (the accused's) regards to him.

Three days later, more specifically on 15 February, 2009, he tried to reach his mother in vain; her phone was apparently switched off. He attempted to reach her again on 16 February, 2009 but he could not get her. Similarly, he could not get the accused as his phone was off as well. He then sought the assistance of his mother's neighbour, Charles Nganga, whom he called and requested to go to his home and tell the deceased to switch on her phone so that he could speak to her. Nganga did not go to the home immediately but when he eventually went there in the evening, he did not find anybody. He also established that the doors to the houses of both the deceased and the accused were open. When he conveyed this information to Murimi, the latter told him to go to the home of Margaret Mwangi (PW7), who was a neighbour and one of the deceased's friends to check whether she was there. In the meantime, he also called and informed the area assistant chief, Jamleck Kabue Gatimu (PW6).

The latter confirmed in his testimony that he responded to Murimi's call and went to the deceased's home together with Margaret Mwangi and Charles Ngechu. It was his evidence that the gate leading to the home was open; so too were the doors to the houses in the compound. Everything looked intact though. The assistant chief switched on the security lights and locked the house. He went to the police together with Margaret and reported the matter.

On the following day, Murimi travelled home; he passed by the assistant chief's home and together they went to the deceased's home where they found members of the public gathered in the compound; they searched the entire home, looking for the deceased. It was while in the course of the search that Murimi and one Leah Wangui discovered the deceased's body floating in the septic tank.

The body was later retrieved by the police officers two of whom were Chief Inspector Charles Kibet (PW13) and corporal Benard Simiyu (P14); Inspector Kibet (PW13) who was then the Officer in Charge of Kerugoya police station testified further that the scene of crimes officers accompanied him; they took photographs of the body before it was eventually taken to the mortuary for post-mortem. Besides helping retrieve the body, Corporal Simiyu also witnessed the post-mortem exercise.

When Murimi checked the accused's house, he discovered that he had taken all his personal belongings. There was also interference with the deceased's documents. Her phone and radio were missing too.

In answer to questions during his cross-examination, Murimi admitted that he trusted the accused and that is why he recommended him to his mother. His mother had also told him that he was a good worker and that she had not complained about anything against him. As far as he was aware, the accused had a cordial relationship with the deceased and was surprised that he could be suspected of having murdered her.

Murimi also admitted that he knew one Kinyua Githaka whom he described as his cousin; he was also aware that the deceased kept the title to Githaka's land either because Githaka was mentally ill or he wanted to sell the land. The deceased, according to Murimi had a long-standing dispute with Githaka over the custody of this title and that at one point, Githaka had been arrested by the police for threatening the deceased with death. The assistant chief testified along the same lines that the deceased had a grudge with Githaka and in fact it was him who arrested Githaka after he threatened to kill the deceased in 2007.

Kariuki (PW3) testified that on or about 14 and 15 February, 2009 a Mrs Gacharia called him to say that the accused and his employer were missing; two days later, she told him that the deceased's body had been recovered in a septic tank. He immediately went to the accused's home and informed his mother. They then embarked on a frantic search of the accused in his relatives' homes but they could not find him. He later learned that the accused arrived at his home on 22 February, 2009 and on 23 February, 2009 his father took him to the police. He found the accused in custody when the police summoned him to record a statement.

There was evidence that as at 14 February, 2009, the deceased was alive and that the accused was at home on the material date. According to Cicily Nyawira (PW4) she was with the deceased while working on her farm on that day; she testified she left the deceased and the accused at their home at about 5 PM.

On her part, Nancy Wanjiku (PW5), testified that on 15 February, 2009 at about 4PM, she was with her uncle, Symon Mugo, when they saw a 'boy' at the deceased's gate. He was carrying a bag and walking ahead of them towards Kerugoya. She could not, however, tell whether the boy they saw was the accused.

Corporal Reuben Manyara (PW2) a scenes of crime officer took photographs of the deceased while inside the septic tank and after it had been retrieved. Dr Paul Mbalu (PW12) on the other hand, did a postmortem of the deceased's body identified to him by Charles Nyaga Mwaniki and Margaret Nyaguthi Mwangi. He observed that the body was at the early stages of decomposition; it had bruises on the front and both sides of the neck. There was also evidence of blood congestion at the base of the head. He opined that the deceased died from asphyxia due to strangulation.

The police officer who arrested the accused was inspector Benson Ndanya (PW10). He testified that the accused was brought to his office at Mairo Inya police station where he was the Officer in charge of the station; he was brought by his father, Karani Kiberenge who told him that Kerugoya police were looking for the accused for the offence of murder. He was later handed over to the police from that station.

Corporal Jospehat Chebon (PW8) was one of the investigation officers in the case against the accused; amongst his investigations, he took the accused's saliva and blood sample and the deceased's vaginal swab for analysis. The Government analyst, Stephen Matinda (PW9) testified that the vaginal swab had no traces spermatozoa or semen. The accused blood was found to be of group B while his saliva was group B secreta.

Another investigations officer Lawrence Kiprono (PW11) testified that he interrogated the accused and also took witnesses' statements. He established that the deceased and the accused lived in the same compound though the accused occupied the servant quarters. The accused, according to his testimony, told him that he and the deceased had been attacked by robbers who were armed with pistols. The accused, according to him, had been seen leaving the deceased's homestead on 15 February, 2009. When he interrogated the accused's parents, they told him that the accused had arrived home on 23 February, 2009. The investigations officer was also aware that one Githaka had threatened to kill the deceased and was even arrested; he, however, could not tell why he was released.

The accused testified on oath when he was put on his defence; while he admitted that he worked for the deceased at the material time, he denied that he murdered her. He testified that on the night of 14 and 15 February, 2009, he shared supper with the deceased in her house. As he made to leave at about 9.30 PM, he was confronted with thugs who ordered him to lie down. Meanwhile, he heard the deceased tell them not to harm her. They blindfolded him and took him to Gilgil where they abandoned him. He was only rescued by a good Samaritan the following day. It took him one week to travel to his home as he had to walk all the way. When he finally got home his parents told him that the police had been looking for him; as a matter of fact, they took him to the police station.

From the foregoing evidence, there is no doubt a known person died; the testimonies of Murimi (PW1), Margaret Nyaguthi Mwangi (PW7), Chief Inspector Charles Kibet (PW13), corporal Bernard Simiyu (PW14) and Corporal Reuben Manyara (PW2) were all consistent that the deceased's body was retrieved from a septic tank. Murimi discovered the body in the tank; Margaret and corporal Manyara, witnessed the retrieval of the body from the tank; on his part, corporal Manyara, took the photographs of the body before and after it had been retrieved from the tank. Inspector Kibet and corporal Simiyu were the officers who retrieved the body. To cap it all, Dr Paul Mbalu (PW12) testified that the body in question was of a deceased female African being positively identified by at least two witnesses as that of Judy Wambui Muriithi.

Turning to the law and in particular section 203 of the Penal Code under which the offence of murder is defined, it is apparent that the fact of death of a person is a necessary element that must be proved before one can be convicted of this offence. That section reads 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.***

The evidence of disappearance of the deceased, the subsequent recovery of her body, the positive identification of her body and the certification of her death constitute sufficient evidence of her death.

The next hurdle which the prosecution must surmount is to prove that the death must have been caused by an unlawful act or omission of another person. Here again, there is evidence, sufficient in my humble view, to prove that the deceased's death was not a natural occurrence but a deliberate act of another person. In this regard, one needs not look any further than the post-mortem report.

According to the doctor who conducted the post-mortem on the deceased's body, the deceased sustained bruises on the front and both sides of the neck; there was blood congestion at the back of the head. Based on these facts, the doctor concluded that the deceased had been strangled to death. Certainly, the deceased could not have strangled herself; and, assuming she had committed suicide, she could not have possibly dumped herself in the septic tank after the suicidal act. The doctor's opinion and surrounding circumstances only point to one conclusion; that the death was caused by an unlawful act of another person and to this end I am also satisfied that the prosecution has proved its case beyond all reasonable doubt.

But that is not all; the burden was also on the prosecution to prove that the accused was the person behind the deceased's death. On this question, it is apparent from the available evidence that there was no eyewitness to the deceased's murder. The prosecution evidence was all circumstantial and from what I gather, the primary link between the deceased's death and the accused was the latter's disappearance from the deceased's home on or about the same time that the deceased disappeared before her remains were recovered in a septic tank much later.

It is settled that an inference of guilt on the part of an accused person can always be drawn from circumstantial evidence if the trial court is satisfied that it is sufficient enough for a safe conviction except that such evidence must be narrowly considered. Citing "**Wills on Circumstantial Evidence**" in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** the Court of Appeal of East Africa had this to say about circumstantial evidence;

***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.***

The Privy Council in **Teper versus Republic (1952) AC 480** cautioned that the trial court must be wary of any circumstances that would weaken or destroy the inference of guilt whenever a conviction is based on circumstantial evidence. At page 489 of its decision the court held 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.***

It is tempting to agree with the prosecution that the disappearance of the accused at the same time that the deceased disappeared would raise suspicion on the accused's conduct with respect to the deceased's death. It is easier to conclude that it cannot have been coincidental that the accused's disappearance coincided with the deceased's disappearance and eventually, her death. The accused's explanation that he and the deceased were attacked by thugs and that he only managed to reach his home a week later would also be doubtful for one cannot understand why he did not make any report about the attack to the police or even his parents when he finally got home.

However, the weakness in an accused's defence will not necessarily lead to the accused's conviction and, at any rate, does not make up for the gaps in the prosecution case. The accused may as well choose to remain silent for that is a right to which he is entitled; the legal burden to prove the case against the accused always remains on the prosecution and never shifts to the accused.

Turning to the case against the accused here, the disappearance of the accused from her employer's home and the subsequent recovery of her body were facts proffered by the state as inculpatory; however, in my humble view, I find these facts insufficient and from which no inference of guilt on the part of the accused can be drawn particularly when I considered them alongside the co-existing circumstances which, no doubt, weaken or destroy altogether the inference of guilt.

What are these co-existing circumstances? First, it came from no other than the deceased's son that the accused was a man of good repute and it is for this reason that he engaged him as his mother's servant. He was categorical that to his knowledge, the accused could not have possibly done the macabre act. According to him, even for the short period the accused had lived with the deceased the two of them had enjoyed a cordial relationship; the deceased herself had attested to the accused's positive attitude and industry.

More importantly, Murimi testified that the deceased had been threatened with death before because of a dispute between herself and Murimi's cousin, one Githaka; the dispute is said to have been over a parcel of land or the land's title documents. This evidence was corroborated by the assistant chief (PW6) who confirmed that he had at some point arrested Githaka as a result of his threats to the deceased. The investigation officer (PW9) also established that such threats to the deceased's life existed and confirmed that Githaka had been booked in police custody for these threats but could not understand why he had been released without any charges.

This evidence opened the possibility that Githaka may have actualized his threats and finally killed the deceased. For purposes of evaluating the indirect evidence by the state, one can safely conclude that what, in the state's view, constituted inculpatory facts, were capable of explanation upon other reasonable hypothesis than the accused's guilt and secondly, the co-existing circumstances destroyed the inference of guilt on the part of the accused. The end result is that the state did not prove beyond all reasonable doubt that the accused was the person who murdered the deceased.

In the absence of prove that the accused murdered the deceased, it is not necessary to delve into the question whether malice aforethought, the final element in establishing the offence of murder, was proved.

For the reasons I have given, I am satisfied that the state has not proved its case against the accused beyond all reasonable doubt. The accused is thus acquitted under section 215 of the Penal Code. It is so ordered.

Signed, dated and delivered in open court this 26<sup>th</sup> day of April, 2019

Ngaah Jairus

JUDGE