



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.16 OF 2017**

**(FORMERLY NANYUKI HCCR.29/2016)**

**REPUBLIC.....PROSECUTOR**

**- V E R S U S -**

**PHILIP WANGOMBE GUTU.....APPLICANT/ACCUSED**

**R U L I N G**

**Philip Wangombe Gutu** faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on diverse dates between 24/9/2016 and 1/10/2016 at Kanyagia village in Nyahururu Sub-County, Laikipia County, murdered **Grace Wamaitha Maina**.

The accused denied the offence and the prosecution called a total of seven (7) witnesses to prove their case.

**PW1, James Maina Waititu**, a resident of Pesi recalled that on 1/10/2016 when at his home, a person who had come to buy cabbage from Gutu's farm called him to go where he was with other people in the cabbage farm. The person whom he knew as pastor informed him that they had found a dead body. The body was in the adjacent maize plantation. PW1 observed the body, which was only the lower part of the body from the burst. He called other neighbours including PW2. He could not tell whose body it was.

PW1 admitted that he knew the accused who lives with his father, a sister and the sister's child. He was not aware whether the accused was married.

**PW2 Zipporah Wecera Nderitu** recalled 1/10/2016. He was called by the people who had come to buy cabbage from the neighbouring farm of Gutu. He found PW1 at the scene. She was informed that they had found a dead body. She did not view the body. She denied knowing whether accused was married and that he lived with the father and 2 sisters.

**PW3 John Njama Mwangi** told the court that on 1/10/2016, he was at Ndibai when he received a call from Kanyaria of Pesi who informed him that the body of a girl who had been murdered had been found by people harvesting cabbage in accused's farm. He went to the scene on the same day about 7.00 p.m. but people had left. PW3 said that he is a neighbor of the accused and knew Grace Wamaitha who had been married to him but left him for accused; that the said Wamaitha had lived with accused for about a month; that Wamaitha would be taken away by her relatives but she would return to the accused. He said that when he noticed the relationship between Grace Wamaitha and accused, he returned her to her parents after reporting to the police station that she was no longer and he handed her over to her parents in the presence of accused and police.

PW3 said that before the body was found, he had not seen accused or Wamaitha for some days. PW3 never saw the body and so did not know if it was Grace Wamaitha's body or not.

**PW4 David Murage Muthoni** a resident of Pesi said that on 1/10/2016, they were looking for the body of Wamaitha because a dog had been seen with a human hand PW4 said they found a skeleton of a hand and the next day they found a head near his gate; that the body was found in their farm. On finding the head, they called police from Pesi. PW4 told the court that Wamaitha had been married to PW3 Njama but they separated and that there is a time the same Wamaitha lived with accused after she left PW3's home. He had seen Grace with the accused three times but did not know their relationship.

**PW5 Sgt. Joel Koskei**, a Scenes of Crime Officer was stepped down when the defence counsel insisted that the officer who took photographs be called. In the end, the scene of crime officer was never called.

**PW6 Dr. Boniface Miringu** of Nyahururu County Referral Hospital performed a postmortem on the body that was identified to him as that

of Grace Wamaitha. It had decomposed, was infested with maggots; the head was decapitated, the thoracic cage and abdomen were open and the internal organs were exposed; upper limbs were amputated; the head had skull fractures one on temporal region, left parietal bone, and the middle of the head. He took samples of muscular tissue from the thigh and a tooth (2<sup>nd</sup> molar) for purposes of DNA to establish who the body belonged to; that Elijah Maina identified the petticoat and under wear of the deceased as that of Grace Wamaitha. The Doctor however said that it was difficult to identify the body due to decapitation and decomposition which prompted him to take samples for purposes of DNA.

**PW7 CIP Francis Waikwa**, received a call from another officer who reported that a decomposed body had been found. He sent the officer to the scene where he later proceeded, found a decomposed body 50 metres from the suspect's house; that the body was from the breasts downwards, had no hands but had legs and was infested with maggots; that photographs were taken of the body; they recovered a blood stained mattress cover, a basin and bed sheet, from a one roomed grass thatched house which had no door. They found that the suspect had been moved from the post to the police station. PW7 said that the next day, the head was recovered; that the recovered exhibits and specimens were taken to the Government Chemist to assist in identification of the body. They however did not take the blood for DNA. He further said that the parents of Grace Wamaitha confirmed that the deceased was living with the accused.

The prosecution having closed its case, the question to be considered by this court is whether the prosecution has made out a prima facie case against the accused to warrant the accused to enter his defence.

What constitutes a prima facie was defined in the case of *Ramanlal T Bhatt v Republic (1957) EA 332* where the court defined it in the following terms:

***“It may not be easy to define what is meant by a prima facie case but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”***

In the instant case, the cause of the deceased's death is not in doubt. The body was found in parts. First the lower trunk from the breasts downwards, without the hands, was recovered in a maize farm. The missing head was recovered the next day in a person's home, nearby. The Doctor (PW6) was of the view that the cause of death was decapitation of the head and fractures to the head. Somebody must have caused the death.

The next question is who committed this heinous act. The evidence against the accused is circumstantial because nobody witnessed the murder.

Circumstantial evidence is said to be the best evidence in criminal cases. In *Neema Mwandoro Ndurya v. R CRA.446/2007*, the Court of Appeal cited with approval the case of *R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20* where the court stated that:

***“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”***

**However, though it is the best evidence, the court must take precaution when relying entirely on circumstantial evidence. That caution was expressed in *Teper v. R [1952] AC at p. 489* where the court had this to say:**

***“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”***

Although PW1 and 2 denied having known that accused and one Grace Wamaitha were cohabiting as husband and wife, PW3 a former husband of Grace Wamaitha said that Grace had left him for the accused. PW4 also confirmed that he was aware that Grace Wamaitha was first married to PW3 but later she went to live with the accused. The accused was arrested on account of having been cohabiting with Grace Wamaitha but none of her relatives were called as witnesses to confirm or deny the relationship. It seems that accused and the said Grace were either married or had some romantic relationship.

The accused is alleged to have murdered Grace Wamaitha, but so far, there is no evidence that Grace Wamaitha had gone missing. None of Grace Wamaitha's family members were called to testify to confirm whether or not they were aware that Grace Wamaitha had gone missing.

So far, there is no evidence to prove that the body parts that were recovered in accused's farm and neighbouring farms were those of Grace Wamaitha. According to PW1, 2 4 and 6, they were not able to identify the body parts as belonging to Grace Wamaitha. PW7, the investigations Officer said that the parents identified the body as belonging to Grace. However Grace's parents or relatives including Elijah who went to the mortuary, were never called as witnesses to confirm whether they were able to identify the body parts that were recovered as those of Grace Wamaitha up to now it is unknown.

PW7 told the court that they recovered a blood stained bed sheet, mattress cover and basin from the accused's house which they took possession of and forwarded to Government chemist for analysis. However, the said exhibits and the government analyst report were never produced in evidence. In fact, apart from PW7, the other witnesses who testified never alluded to the recovery of the said items. PW7 could not tell whether the items were received back from the Government Analyst or not.

PW6, the doctor also took specimens from the recovered body, the thigh and a molar tooth, for purposes of DNA sampling. Although this case has taken so long to conclude, the prosecution did not demonstrate whether the said specimens were ever taken to Government Chemist for DNA sampling. The relatives of Grace Wamaitha having not come up to demonstrate how they identified the body, there is so far no medical evidence to confirm that the body remains that were recovered were the body of Grace Wamaitha. It was the duty of the prosecution

to prove that Grace Wamaitha actually died. So far, there is no evidence laid before this court to confirm the identity of the body parts that were recovered.

None of the witnesses that testified stated how the accused was arrested. PW7 found him already under arrest. PW7 said that on visiting the scene, he found a lone grass thatched house which had no door and inside it they found a bed sheet, mattress cover and a basin which were blood stained PW7 said there was only one house in the home which exhibits were found. PW3 however said there are three houses in accused's home. PW4 said that there are two (2) houses in the said compound, the accused's and that of his grandparents. The question then is, who pointed out the house where the blood stained exhibits were found to PW7, as belonging to accused?

In conclusion, I find that the identity of the body that was recovered has not been established. The police failed to follow up with DNA sampling with the Government Analyst. It is not clear what the police did with the recovered exhibits and the specimens taken by PW6 from the body of the deceased. There are so many gaps in the prosecution evidence as to what led to accused's arrest.

Although the accused is a prime suspect, suspicion alone is not sufficient to found a conviction. The police totally bungled the investigation for reasons known only to themselves. The evidence on record does not meet the threshold of a prima facie case. If the accused were placed on his defence and he opted to remain silent, the court cannot convict on the evidence on record.

Consequently, I acquit the accused of the charge of murder under Section 306(1) of the Criminal Procedure Code.

**Dated, Signed and Delivered at NYAHURURU this 25<sup>th</sup> day of July, 2019.**

.....

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Ms. Rugut for State

Ms. Mureithi for accused

Soi – Court Assistant

Accused - present